Registered No. M—2.

GENERAL INDEX, TITLE, ETC.

TO THE

INDIAN LAW REPORTS,

MADRAS SERIES.

VOL. XXXIX—1916.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council.

BY THE BOOK DEPOT BRANCH OF THE LEGISLATIVE DEPARTMENT OF THE BENGAL SECRETARIAT, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;
AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD.

CORRIGENDA, VOLUME XXXIX.

Page 1, headnote, line 5, *after* moveable *insert* property.
„ 13, —, line 3, *delete* as being.
„ 70, footnote, reference (4) *for* 1911 *read* 1914.
„ 73, „ „ *for* 1914 *read* 1911.
„ „ „ „ *for* 37 *read* 34.
„ 112, for *D. E. Gruyther*, K. C., read *De Gruyther*, K. C.
„ 221, footnote, reference (2) *after* (1875) *insert* 8.
„ 317, shortnote, line 4, after *sale* insert *in*.
„ 328, footnote, reference (2), *after* I.L.R., *insert* 34.
„ 352, headnote, line 16, *for* doubted *read* referred to.
„ 412, line 5, for *Sir Erle Richard* read *Sir Erle Richards*.
„ 413 „ 8, for *Dr. Gruyther*, K. C., read *De Gruyther*, K. C.
„ 518 „ 10, for *De-gruyther* read *De Gruyther*.
„ 545 „ 2, *for* of a *read* from the.
„ „ „ „ or of „ or from.
for JUDGMENT *read* The judgment of the Court was delivered by SESHAGIRI AYYAR, J.
„ 546, line 23, *for* will *read* would.
„ „ „ 24, *for* may *read* might.
„ „ „ 28, *for* stated *read* arrived at.
„ „ „ 29, *for* of a *read* from the.
„ „ „ or of *read* or from.
„ „ line 30, *for* is *read* will be.
„ „ „ 31, *delete* given.
„ 621 „ 26, *for* statistics *read* statutes.
„ 703, footnote (1), *for* 11 *read* 1.
„ 711 „ „
„ 713, footnote, reference (7).—*For* the existing footnote, *substitute* (1900) I.L.R., 23 Mad., 28, and *delete* the remaining portion of the line.
„ 718, line 3, for *Mayandi Chetti* v. *Oliver* read *Tiruvengadath Ayyangar* v. *Srinivasa Thathachariar*.
„ „ footnote, reference (2) *for* 261 *read* 361.
„ 876, footnote, *for* * Civil Revision Petition No 711 of 1915. Subsequently converted into Civil Miscellaneous Appeal No. 213 of 1913 *read* * Civil Miscellaneous Appeal No. 213 of 1913, subsequently converted into Civil Revision Petition No 711 of 1915.
„ 879, headnote, line 4, *for* has *read* had.

Page 915, last but two lines of the body of the reports, *for* appellant *read* pet tioner.

" 916, line 15, *for* of *read* for.

" " " 27, *delete* in.

" 917 " 32, *after* to *insert* the above.

" 919 " 21, *for* toward. Consequently *read* toward, and that consequently.

" " " 31, *for* Rozario *read* Rosario.

" 921, line 11, before *generis* insert *ejusdem.*

" 922 " 22, *for* can *read* should.

" 931 " 19, *after* plaintiff *insert* may.

" 939, last but two lines of the report, *delete K. Srinivasa Ayyangar* and

" 940, line 1, at the beginning *insert S. Srinivasa Ayyangar* and

" 941 " 8, *for* will *read* would.

" 945, last but three lines from below, *for* and owner of *read* and as such owned.

" 963, footnote, referance (4), *for* 638 *read* 368.

" 983, line 1, *for* then *read* afterwards.

" 984 " 31, *delete* arrived.

" 1006, footnote, for *bailable offence* substitute *Criminal Procedure Code* (*Act V of* 1898), *sec.* 250.

" 1008, line 13, *for* bailable *read* non-bailable.

THE INDIAN LAW REPORTS,

MADRAS SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council — J. V. WOODMAN, *Middle Temple.*

High Court —
PERCY R. GRANT (*Inner Temple*), *Senior Law Reporter.*
C. MADHAVAN NAIR (*Middle Temple*), C. SIDNEY SMITH (*Gray's Inn*), — *Assistant Law Reporter.*
S, K, N — *Junior Law Reporters.*

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AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD.

JUDGES OF THE HIGH COURT.

1916,

1st January to 31st December.

— - -

CHIEF JUSTICES.

The Honourable Sir John Wallis, *Kt.*, M.A. (Barrister-at-Law). (*On leave from 10th July to 22nd October.*)

The Honourable Mr. Abdur Rahim, M.A., F.M.U. (Barrister-at-Law). (*Officiated from 10th July to 22nd October.*)

PUISNE JUDGES.

The Honourable Mr. Abdur Rahim, M.A., F.M.U. (Barrister-at-Law).

The Honourable Sir William Book Ayling, *Kt.*, I.C.S.

The Honourable Mr. Francis DuPre Oldfield, I.C.S , F.M.U. (*On leave till 27th March.*)

The Honourable Diwan Bahadur T. Sadasiva Ayyar, B.A., M.L. (*On leave for 1 month from 23rd November.*)

The Honourable Mr. Charles Gordon Spencer, I.C.S. (*On leave till 14th July*)

The Honourable Mr. Victor Murray Coutts Trotter (Barrister-at-Law.)

The Honourable Mr. T. V. Seshagiri Ayyar, B.A., B.L., F.M.U.

ADDITIONAL JUDGES.

The Honourable Mr. James Herbert Bakewell, LL.B. (Barrister-at-Law). (*On furlough from 10th July in continuation of the summer vacation up to 31st December.*)

The Honourable Mr. Charles Frederick Napier (Barrister-at-Law). (*On leave in continuation of the summer vacation till 14th August.*)

The Honourable Diwan Bahadur C. V. Kumaraswami Sastriyar, B A., B.L. (*Services placed at the disposal of the Government of India from the 18th September to 26th November.*)

The Honourable Mr. K. Srinivasa Ayyangar, B A., B.L.

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Velayutham v Subbaraya ... (1916) I.L.R., 39 Mad., 879

—— *Simple mortgage—Dispossession of mortgagor after mortgage, not adverse to the mortgagee*] The possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is not adverse to the simple mortgagee. *Parthasarathy Naicker v Lakshmana Naicker* (1912) I.L.R., 35 Mad., 221, followed. *Ramasami Chetti v. Ponna Padayachi* (1913) I.L.R., 36 Mad., 97, overruled.

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Manjappa Ajri v. *Marudevi Hengsu* .. ... (1916) I.L.R., 39 Mad., 12

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Rama Ayyar v. Govinda Pillai (1916) I L R., 39 Mad, 952

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Tetley v. Jai Shankar (1878) I.L.R., 1 All., 726, referred to 128

The British India Steam Navigation Company v. Hajee Mahomed Esack & Company (1891) I.L.R., 8 Mad., 107, referred to 2

The Secretary of State for India v. Kota Bapanamma Garu (1896) I.L.R., 19 Mad., 165, distinguished 304

Tincowry Dey v. Fakir Chand Dey (1903) I.L.R., 30 Calc., 218, referred to . 854

Trimback v. Ramchandra (1899) I.L.R., 23 Bom., 723, followed 429

Tuljaram Row v. Alagappa Chettiar (1912) I.L.R., 35 Mad., 1 (F.B.), followed 235

Umayan, Re (1903) 2 Weir's Cr. R., 43, approved 831

Unwin v. Clarke (1866) 1 Q.B., 417, followed . 889

Upendra Nath Nag Chowdhury v. Surya Kanta Ray Chowdhury (1910) 20 I.C., 205, followed 936

Usman Khan v. Daranna (1914) I.L.R., 37 Mad., 645, distinguished .. 1011

Vaidhianadasamy Ayyar v. Somasundaram Pillai (1905) I.L.R., 28 Mad., 473 (F.B.), followed .. 1026

Vasudeva v. Madhava (1893) I.L.R., 16 Mad., 326, followed 447

Vedala Lakshminarasimha Charyulu v. Vacha Lakshmiammal (1912) M.W.N., 750, distinguished 429

Vedapuratti v. Vallabha Valiya Raja (1902) I.L.R., 25 Mad., 300 (F.B.), referred to 897

Veeraraghava Iyer v. Muga Sait (1916) I.L.R., 39 Mad., 24, referred to . 662

Vellanki Venkata Krishna Rao v. Venkatarama Lakshmi (1876) I.L.R., 1 Mad., 174 (P.C.), referred to 773

Venkatachalla Reddi v. Rangiah Reddi (1911) 21 M.L.J., 900, referred to .. 854

Venkatachella Chettiar v. Sampathu Chettiar (1908) I.L.R., 32 Mad., 62, followed 504

Venkatakrishna Ayyar v. Thiagaraya Chetti (1900) I.L.R., 23 Mad., 521, followed 876

Venkatanarayana Pillai v. Subbammal (1915) I.L.R., 38 Mad., 406, s.c., L.R., 42 I.A., 125, distinguished 634

Venkatarama Ayyar v. Madalai Ammal (1900) I.L.R., 23 Mad., 169, overruled 236

Venkataratnammah v. Secretary of State (1914) I.L.R., 37 Mad., 368, followed 67

Venkata Sastrulu v. Sitaramudu (1914) 26 M.L.J., 585, referred to . 21

Vijaya Ragava v. Secretary of State for India (1884) I.L.R., 7 Mad., 466 (F.B.), doubted 352

Vijiaraghavalu Pillai v. Theagaraya Chetti (1915) I.L.R., 38 Mad., 591, applied. 1164

Virabhadrayya v. Sonti Venkanna (1912) 24 M.L.J., 659, followed 21

Viraj Lal v. Shameshwar (1905) I.L.R., 29 Bom., 219, followed 936

Vishnu Bhikaji Phadke v. Achut Jagannath Ghate (1891) I.L.R., 15 Bom., 438, followed 62

Voinet v. Barrett (1885) 55 L.J. (Q.B.D.), 39, followed 24

Webb v. Macpherson (1904) I.L.R., 31 Calc., 57 (P.C.), referred to .. 997

West Derby Union v. Metropolitan Life Assurance Society (1897) A.C., 647, referred to 23, 1156

Yogambal Boyee Ammani Ammal v. Naina Pillai Markayar (1910) I.L.R., 33 Mad., 65, referred to 796

CASTE, *superiority of, claim for certain exclusive rights in the church by one set of converts over another, unsustainability of*:—See CHURCH, ROMAN CATHOLIC.

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CAUSE OF ACTION :—*See* MADRAS LAND ENCROACHMENT ACT (III OF 1905), SS. 5, 6, 7 AND 14.

CERTIORARI, *writ of, when to be issued* :—*See* (INDIAN) PRESS ACT (I OF 1915), SEC. 3 (1), PROV

CHANGE OF VILLAGE, *from one district to another for revenue purposes* :—*See* RELIGIOUS ENDOWMENTS ACT (XX OF 1863).

CHARTER ACT (24 & 25 VICT., CAP. 104) (1861-62), SS. 13 AND 14 :—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS 421, 233 AND 537.

CHILD *entitled to maintenance from its mother's tavazhi but not from father* :—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 488.

CHURCH, *internal management of, absolute right of Church authorities over* :—*See* CHURCH, ROMAN CATHOLIC.

———, *Roman Catholic—Convert to Roman Catholic religion—Claim for certain exclusive rights in the church by one set of converts over another, on the ground of superiority of caste, unsustainability of—Internal management of church, absolute right of church authorities over*] According to Canon Law a Roman Catholic church becomes, as soon as it is consecrated, the property of the church authorities, irrespective of the fact that any particular worshipper or worshippers contributed to its construction. The Bishop and other church authorities have the exclusive right to the internal management of [illegible]

convert to Roman Catholicism can claim any special or exclusive rights or privileges in the church on account of any supposed superiority of his caste over that of others Where a certain section of Roman Catholic converts of a place claimed as against the local church authorities and as against another set of converts whom they considered to be of inferior caste, an exclusive right to sit in and worship from a particular portion of the church during the time of service and to take part in certain duties connected with the church service, *Held*, that such a claim was legally unsustainable, however long such privileges might have been enjoyed, whether by reason of any such custom or by reason of any agreement to that effect with any former Bishop of the locality. *Long* v. *The Bishop of Cape Town* (1863) 1 Moo. P C C. (N.S), 411 and *Merriman* v. *Williams* (1882) L.R., 7 A.C., 484, distinguished.

Michael Pillai v. *Rt. Rev Bartle* . ... (1916) I.L.R, 39 Mad , 1506

CHURCH AUTHORITIES, *absolute right, over internal management of* :—*See* CHURCH, ROMAN CATHOLIC.

CIVIL COURTS—*Jurisdiction, ouster of—Onus—Inam, grant of—Kudivaram—Right, ownership of*] A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so *Indety China Nagadu* v *Potu Konchi Venkatasubbayya* (1910) M W.N , 639 and *Virabhadrayya* v *Sonti Venkanna* (1913) 24 M L J , 659, followed There is no presumption that an inamdar to whom an inam was granted was not owner of the kudivaram right at the date of the grants. *Venkata Sastrulu* v *Divi Sitaramudu* (1914) 26 M L.J., 585 and *Ponnusamy Padayachi* v. *Karuppudayan* (1914) 26 M.L J., 285, referred to

Srimath Jagannatha Charyulu v. *Kutambarayudu* ... (1916) I L.R., 39 Mad., 21

————————*jurisdiction of* :—*See* MADRAS ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC (6) AND SEC. 8.

CIVIL COURTS ACT (MADRAS) (III OF 1873), SS 12 AND 13—*Court Fees Act (VII of 1870), sec 7 (ix)—Suits Valuation Act (VII of 1887)—Suit to redeem—Suit in a Subordinate Court—Valuation for purposes of jurisdiction and court fees, same—Court fees, rightly payable only on principal debt secured below Rs. 5,000—Erroneous order of Subordinate Court to pay court fees on total amount payable on redemption above Rs 5,000—Appeal—No jurisdiction*

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to the High Court but to the District Court.] In a suit for redemption of a mortgage instituted in the Subordinate Judge's Court, the amount of the principal of the debt was Rs 3,899 and odd; the plaintiffs paid court-fees on that amount; but the Subordinate Judge erroneously ordered the plaintiffs to pay court-fees on the total amount payable on redemption, *viz.*, Rs 7,218 and odd, and the plaintiffs paid the deficient court-fees. The Subordinate Judge passed a decree in the suit in favour of the plaintiffs. The defendants preferred an appeal to the High Court. The respondents objected that the appeal did not lie to the High Court but to the District Court. *Held*, that the amount of the principal debt must be taken as determining the jurisdiction under the Civil Courts Act, and consequently that the suit lay in the Subordinate Judge's Court and that the appeal lay to the District Court and not to the High Court. The authority of the Full Bench decision in *Zamorin of Calicut* v. *Narayana* (1882) I L R., 5 Mad., 284, is unaffected by the Suits Valuation Act (VII of 1887). The order of the Subordinate Judge, erroneously levying court-fees on the total amount payable on redemption, cannot deprive the District Court of jurisdiction to hear the appeal and confer it on the High Court. *Vasudeva* v. *Madhava* (1893) I L R., 16 Mad., 326, *followed*. *Ijjatulla Bhuyan* v. *Chandra Mohan Bannerjee* (1907) I L.R., 34 Calc., 954 (F B), distinguished.

Jallaldeen Marakayar v. *Vijayaswami* .. .. (1916) I.L.R., 39 Mad., 447

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC 244 —*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O XXI, R 5 641

———— **(ACT XIV OF 1882)**, SEC 258—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O XXI, R 2 . ... ..

————**(ACT V OF 1908)** —*See* PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC. 19, CL. (*i*) 64, 65

————, SEC 2, CL (11), O XXII, R. 1 —*Legal Representatives*—*Survival of right to sue*—*Daughter's suit for possession of father's estate*—*Death of daughter*—*Right of father's heirs to continue suit*] Pending a suit by a daughter brought after the death of her mother to recover possession of her father's property as his heir from strangers whom she alleged to be trespassers, the plaintiff (daughter) died In an application by the grandsons of the deceased plaintiff's father's brother as his heirs to continue the suit, *Held* (1) that the right to sue survived within the meaning of Order XXII, rule 1, Civil Procedure Code (Act V of 1908) and (2) that the applicants were her legal representatives within the meaning of section 2, clause (11) of Civil Procedure Code *Premmoyi Choudhrani* v *Preonath Dhur* (1896) I.L R, 23 Calc, 636 and *Bithai Rai* v. *Sheo Pujar Singh* (1911) I L.R, 33 All, 5, followed

Ramaswami v. *Pedamernayya* .. . (1916) I L.R, 39 Mad, 382

————, SEC 11—*Res judicata*—*Decision of a Boundary Settlement Officer*—*Grounds of decision of res judicata*—*Boundaries Act (XXVIII of 1860), ss 24 and 25*—*Estoppel*] Where a Boundary Settlement Officer decided under the Boundaries Act (XXVIII of 1860) that certain lands did not belong to a *mittadar* but to the Government on the ground that they never had formed part of the area of the *mitta*, and no suit was brought by the *mittadar* to contest the decision under section 25 of the Act, *Held*, that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the *mittadar* to recover the lands as having formed part of the *mitta* or in the alternative for a reduction of the *peshkash* of the *mitta* *Kamaraju* v. *The Secretary of State for India* (1888) I L R, 11 Mad, 309 (F B), followed. *Per* SESHAGIRI AYYAR, J —The decision of the Survey Officer is binding upon the parties whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not. *Krishna Behari Roy* v *Brojeswari Chowdranee* (1875) 2 I.A, 283 at p 284 and *In re Bank of Hindustan, China and Japan* (1873) L R, 9 Ch. App. 1, referred to

Muthammal v. *The Secretary of State for India* .. (1916) I L R., 39 Mad., 1202

————, SEC. 24, CL. (1) (*b*) —*See* CIVIL RULES OF PRACTICE, RULE 161 (*a*)

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———, SEC. 47; O. XXII, R. 10—*Decree in mortgage suit—Preliminary decree—Final decree, procedure to, not by way of execution—Application to continue the suit after preliminary decree, order disallowing, not appealable*] After the passing of the preliminary decree in a mortgage suit, the suit is continued until the stage of the final decree is reached. *Ashfaq Husain* v. *Gauri Sahai* (1911) I L.R., 33 All., 264 and *Munna Lal* v. *Sarat Chunder* (1915) 21 C L J., 118, explained. Where

Lakshmi Achi v. *Subbarama Ayyar* ... ... (1916) I L.R., 39 Mad., 488

———, SS. 47, 73 AND 104—*Rateable distribution, order for—Right of appeal—Mortgage-decree—Provision for execution personally against the mortgagor—Application for execution of sale of mortgaged property—Sale held—Application, not disposed of—Sale of other properties by other decree-holders—Proceeds paid into Court—Application for rateable distribution by holder of mortgage decree, if maintainable—Application for execution, not formally disposed of, if pending*] An order for rateable distribution under section 73 of the Code of Civil Procedure is appealable if it was passed between the parties to the suit in which the decree was passed and related to the execution of the decree and so fell under the provisions of section 47 of the Code. Section 73 of the Code does not say that no appeal shall lie against orders passed under it, nor does the omission to

order of disposal was passed by the Court on the application, it must be deemed to be a pending application for execution for purposes of section 73 of the Code.

Rajah of Karvetnagar v. *Venkata Reddi* . (1916) I L R., 39 Mad., 570

———, SEC 48 —*See* MORTGAGE-DECREE

———, SEC 92—*See* HINDU LAW 365

———, SEC 110—*Right of appeal to His Majesty in Council—Amount or value of the subject-matter of the suit, less than ten thousand rupees—Valuation for appeal, mode of—Mesne profits from date of suit to date of petition for certificate to appeal, if can be added—Value with mesne profits, more than ten thousand rupees—"Involve directly" in section 110, Civil Procedure Code, meaning of—Privy Council Appeals Act (VI of 1874)*] Where the amount or value of the subject matter of the suit in the Court of First Instance was less than ten thousand rupees, but the amount or value of the subject-matter in dispute in the appeal to His Majesty in Council exceeded that sum owing to the addition of the claim for mesne profits for the period between the institution of the suit and the filing of the petition for a certificate to appeal, *Held*, that the case did not satisfy the provisions of either the first or the second paragraph of section 110 of the Code of Civil Procedure and that leave to appeal to His Majesty in Council could not be granted. *Per* WALLIS, C J.—The words "involve directly," contained in the second paragraph of section 110 of the Code, cannot be read as including cases which involve nothing but the actual [illegible] *Moti Chand* v *Ganga Prasad Singh* [illegible], 29 I A, 40, followed. *Dalgleish* v [illegible], 33 Calc., 1286 and *Basanta Kumar* [illegible] *Council* (1910) 6 I C., 792, dissented [illegible]) A C, 193, explained. *Per* SRINIVASA AYYANGAR, J.—If the operation of the decision is confined only to the particular object matter, clause (2) of section 110 does not apply, and unless the case satisfies the conditions in clause (1), there is no right of appeal. If the decision, beyond awarding relief in respect of the particular object

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matter of the suit, affects rights in other properties, clause (3) would apply, also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause (2) may apply

Subramania Ayyar v. Sellammal .. .. .. (1916) I.L.R., 39 Mad., 843

——————, SEC. 115:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIV, RR. 3 AND 8

——————, SEC. 115—*Wrong decision of the lower Appellate Court that the first Court had or had not jurisdiction to entertain a suit—Revision—Power of High Court to interfere in.*] *Held*, by the FULL BENCH (SADASIVA AYYAR, J., dissenting) that the High Court has jurisdiction to interfere under section 115, Civil Procedure Code (Act V of 1908) where an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of First Instance had or had not jurisdiction to entertain a suit Case law on the subject reviewed. *Per* WALLIS, C.J —The power of the High Court to interfere in such matters is under the third part of section 115 *Per* SUNDARA AYYAR, J —The power of the High Court to interfere in such matters is under the first part of section 115 The function of an Appellate Court is to do that which the first Court ought to have done *Per* SADASIVA AYYAR, J —Under none of the three parts of section 115 has the High Court power to interfere in such matters. Clauses (a) and (b) of section 115 apply only to jurisdiction of the Court whose decree or order is sought to be revised, to pass such order or decree and not to its decision on the jurisdiction of some other Court. The words "acted illegally" in section 115, Civil Procedure Code, mean "giving a wilfully perverse but not a mere erroneous decision on a question of law"

Atchayya v. Sri Seetharamachandra Rao (1916) I.L.R., 39 Mad., 195

——————, SEC. 148, *no power to extend time under* —*See* CIVIL PROCEDURE CODE (ACT OF 1908), O XXIV, r 8, *prov*

——————, SEC 392.—*See* RIGHT OF SUIT.

——————, SEC. 462 —*See* TRUSTEE, *duties of.*

——————, SEC 462—*Compromise of suit on behalf of minor made without obtaining leave of the Court—Liability of other party to a joint bond so executed as part of the compromise*] A compromise made on behalf of a minor without having complied with the requirements of section 462 of the Civil Procedure Code, 1882, as to obtaining leave of the Court, is not enforceable against the minor The fact that a joint bond executed as a part of the compromise was not enforceable against the minor, did not absolve the other obligee from liability.

Jamna Bai v Vasanta Rao . . (1916) I L R., 39 Mad. (P.C.), 409

——————, O. XXI, R 2—*Mortgages (decree-holder) left in possession under decree—Liability under decree to account and to credit surplus income annually—Receipt by mortgagee, not certified to Court, effect of—Receipt, if payment under or adjustment of decree—Certificate within ninety days, if necessary*] Where under the terms of a decree, the decree holders (mortgagees) were to be in possession of the mortgaged property for six years, to render accounts every year and to give credit for any surplus income accruing from the lands, and at the end of eight years the judgment-debtor applied for the taking of accounts and delivery of possession of the lands, *Held*, that the receipts by the decree-holders of the income from the lands were not payments under or adjustments of the decree, under section 258 of the Civil Procedure Code (Act XIV of 1882) corresponding to Order XXI, rule 2 of the new Code, and did not require to be certified to the Court within ninety days from the dates when the incomes were received by the decree-holders. *Vaidhinadasamy Ayyar v. Somasundaram Pillai* (1905) I L R, 28 Mad, 473 at p. 478 (F.B.), followed, *Ramasami Naik v Ramasami Chetti* (1907) I.L R., 30 Mad, 255 at p. 265 and *Nistarini Dasi v Kasim Alini* (1910) 12 C L.J., 65, distinguished.

Yella Reddi v Syed Muhammadalli .. ... (1916, I.L.R., 39 Mad., 1026

——————, O. XXI, R. 5—*Agreement between one of the judgment-debtors and the decree-holder to enter up satisfaction of the decree—Agreement prior to decree—Application to enter up satisfaction, if maintainable—Civil Procedure Code (Act XIV of 1882), sec. 244.*] An application was made to the executing Court by one of the judgment-debtors to enter up satisfaction of the decree as against him, on the ground that there was an agreement to that effect entered into between himself and the decree-holder prior to the passing of the decree. The latter objected that such an application was not sustainable *Held*, that the application was maintainable under Order XXI, rule 5 of the Civil Procedure Code (Act V of 1908). *Rukmani Ammal* v *Krishnamachary* (1911) 9 M L T., 464, referred to. *Laldas* v. *Kishondas* (1898) I.L.R., 22 Bom., 463, followed. *Hassan Ali* v. *Gansi Alim* (1904 I L R., 31 Calc, 179 dissented from.

Subramania Pillai v. *Kumaravelu Ambalam* ... (1916) I.L R., 39 Mad, 541

——————, O. XXI, R 31:—*See* SPECIFIC MOVEABLE PROPERTY.

——————, O. XXI, RR. 46 AND 54—*Attachment of usufructuary mortgagee's right under Order XXI, rule 54 and not under rule 46, illegal—Sale, consequent, invalid.*] Attachment of the interest

mortgagee's right in the manner prescribed for attachment of immoveable

and does not prevent the mortgagor and mortgagee from paying and receiving the mortgage amount

Ramaswami Moopan v *Srinivasa Iyengar* ... (1916) I L.R, 39 Mad., 389

——————, O. XXI, R. 63, *suit under, after one year from date of original order but within one year from order on appeal*:—*See* LIMITATION ACT (IX OF 1908), ARTS. 11 AND 13.

——————, O. XXI, R. 89 (*b*) —*Payment into Court of portion of a judgment debt by persons other than the applicant, no right to take credit for—'Receipt,' meaning of.*] Order XXI, rule 89, Civil

credit for any amount paid by a co-judgment-debtor who has not joined

(1899) I L.R., 23 Bom, 723 and *Kripa Nath Pal* v. *Ram Lakshmi Dasya* (1897) 1 C.W N., 703, followed *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1913) 24 M L J, 205 and *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma* (1912) M W.N, 756, distinguished.

Karunakara v. *Krishna* . ... (1916) I L.R., 39 Mad., 429

——————, O. XXI, R 93:—*See* EXECUTION SALE.

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——— O XXIII, R. 1 (3)—*Suit by reversioners to declare an alienation invalid during widow's lifetime, withdrawal of—Subsequent suit after widow's death for possession—Defence, the same as in the first suit—Subsequent suit not barred by Civil Procedure Code, Act V of 1908, O XXIII, r 1 (3)*] The next presumptive reversioners of a deceased Hindu instituted a suit against his widow and her alienees for a declaration that an alienation by her was invalid and not binding on them. Pending the suit, the widow died and the reversioners withdrew the suit but did not ask for permission to bring a fresh suit They subsequently brought a suit against the alienee for the recovery of possession of properties from him and he set up the very same defences on the merits which he had set up in the first suit. *Held*, that the subsequent suit was not barred by the provision of Order XXIII, rule 1 (3), Civil Procedure Code (Act V of 1908). Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit and the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit. *Gopal Chandra Banerjee v. Purna Chandra Banerjee* (1898) 4 C.W.N, 110, followed *Achuta Menon v. Achutan Nair* (1895) I L R, 21 Mad 35, *Mechani Vazhalu Inshat in re. Oruganutlu Zayamma* (1910) M W.N, 782 and *Sennaia Reddiar v. Venkatachala Reddiar* (1915) 2 M.L.W, 177, overruled.

Singa Reddi v. Subba Reddi (1916) I.L.R., 39 Mad (F B), 987

——— O XXVI, R 9:—*See* RIGHT OF SUIT.

——— O XXXII, R. 7—*Arbitration, reference to—Minors parties—Guardian ad litem, submission by, without leave of Court—Award-decree validity of Appeal against, if competent—Compromise, decree on—Leave of Court, not obtained—Decree, if voidable—Suit to set aside decree, if competent—Partition suit—Setting aside of decree, effect of—Suit, if re-opened, against whom*] A suit can be brought on behalf of minors to set aside a decree passed on compromise in another suit or appeal in which the minors were parties on the ground that leave of Court under Order XXXII, rule 7 of the Civil Procedure Code, was not obtained by their guardian ad litem to enter into the compromise on their behalf *Leave of Court under Order XXXII, rule 7, must be obtained by a guardian ad litem of minors for agreeing on their behalf to refer through Court the subject-matter of a suit to arbitration, where no such leave was obtained, a decree passed on an award is not binding on the minors and a suit can be instituted on behalf of the minors to obtain a declaration that the decree does not bind them.* The avoidance of a decree in a partition suit will have the effect of re-opening the whole suit in respect of all the parties thereto and on an application being made to the Court it will proceed with the trial of the suit A suit will lie to set aside a decree passed on an award, when the objection raised is as to the validity of the award on the ground that no leave of Court was obtained for the submission to arbitration on behalf of minors who were parties to the suit, under Order XXXII, rule 7 of the Civil Procedure Code *Ghulam Khan v Muhammad Hassan* (1902) I L.R, 29 Calc, 167 (P C), explained. *Rajeshar Narain Singh v Chaudrain Bhagwant Kuar* (1891) I L R., 13 All, 30 (P C), *Hardeo Sahai v Gauri Shankar* (1906) I L R 28 All 35, *Latawan v Lachen* (1914) I L R 36 All, 69 *Lakshmana Chetti v. Chinnathambi Chetti* (1901) I L R, 24 Mad., 326, *Venkatachalla Reddi v. Ramiah Reddi* (1911) 21 M L J, 999, *Ganesha Row v Tuljaram Row* (1913) I L R, 36 Mad, 295 (P.C), *Bhimaji Govind v. Lakmabai* (1886) I L R, 10 Bom, 3 8, *Tincowry Dey v Fakir Chand Dey* (1903) I L R., 30 Calc, 218, *Khajoor onissa v Rowshun Jehan* (1877) I L R, 2 Cal, 184 and *Manohar Lal v Jadunath Singh* (1906) I.L R, 28 All, 68, referred to.

Vijaya Ramayya v Venkata-subba Rao .. (1916), I L R., 39 Mad, 853

——— O XXXIV RR. 3 AND 8—*Extension of time for paying mortgage amount only upon good cause—Non-passing of a foreclosure decree, not a good cause for extension—Civil Procedure Code (Act V of 1908), sec. 115—No interference, even with an order passed without jurisdiction, if justice does not require.*] Extension of time for

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payment of the mortgage amount due under a decree in suits instituted either by the mortgagor or the mortgagee can be given only where good cause is shown therefor and a party is not entitled to it as a matter of right, under Order XXXIV, rules 3 and 8 of the Code of Civil Procedure. An extension of time cannot be granted on the sole ground that no order for foreclosure absolute has been passed. The High Court is not bound to interfere in revision with an order for extension of time wrongly passed. English practice referred to.

Murugesa Mudaly v. *Ramasami Chetty* ... .. (1916) I.L.R., 39 Mad. 882.

——————————, O. XXXIV, R. 8, PROVISO—*Preliminary mortgage-decree by Appellate Court—Power to extend time for payment, only for first Court—Order of extension by Appellate Court—Appeal against, non-maintainability of—Civil Procedure Code (Act V of 1908), sec 148, no power to extend time under.*] No appeal lies from an order extending time for payment of the mortgage-amount due under a decree; such an order is not a decree within section 2, clause (2) of the Code of Civil Procedure. Even in cases where the preliminary mortgage-decree is passed by the Appellate Court, it is only the Court of First Instance that can extend time for payment under Order XXXIV, rule 8, proviso, of the Civil Procedure Code (Act V of 1908). *Venkatakrishna Ayyar* v. *Thiagaraya Chetti* (1900) I L.R., 23 Mad., 521, *Sheonarain* v. *Chunni Lal* (1901) I.L R., 23 All., 89 and *Ram Dhani Sahu* v. *Lalit Singh* (1909) I.L R., 31 All., 328, followed. Section 148 of the Civil Procedure Code (Act V of 1908) does not enable a Court to extend time for doing acts allowed by a decree. *Het Sing* v *Tika Ram* (1912) 9 A L J, 381 and *Suranjan Singh* v *Rama Bahal Lal* (1912) 17 I C., 912, followed.

Dharmaraja Ayyar v *Srinivasa Mudaliar* . .. (1916) I L.R., 39 Mad., 876

——————————, O. XXXVIII, R. 5—*Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Plaintiff's right over the deposit—No charge for the decree amount—Right of the Official Assignee*] When, on an application made by the plaintiff under Order XXXVIII, rule 5, of the Code of Civil Procedure for attachment before judgment of certain properties belonging to the defendant, the Court issued summons to the defendant to furnish security for a certain amount or to show cause against it and further ordered that certain goods belonging to the defendant should be attached until further notice, and the defendant paid into Court the amount specified in the summons but subsequently became an insolvent, *Held*, that the plaintiff had no charge on the money paid into Court as against the Official Assignee of the insolvent.

Errikulappa Chetty v *The Official Assignee, Madras.* (1916) I L R., 39 Mad, 903

——————————, O. XL, R. 4—*Receiver, misappropriation of income by—Property, meaning of—Wilful default, meaning of—Death of receiver—Application against legal representatives, if maintainable*] Under Order XL, rule 4 of the Code of Civil Procedure (Act V of 1908), an application can be made for execution being levied against the properties of a receiver in the hands of his legal representatives, in respect of his misappropriation of the income of the properties entrusted to his charge.

Raman Nair v. *Gopala Menon* .. .. (1916) I.L.R., 39 Mad., 684

——————————, O. XLIII, R. 1(r) AND O XXXIX, R. 2, CL (3)—*Interlocutory injunction, disobedience of—Order declining to arrest or attach property—Appealability—Petition to commit while suit pending—Order thereon after dismissal of suit, legality of—Imprisonment, order of, without first ordering attachment, illegal*] An appeal lies under Order XLIII, rule 1, clause (r) of the Civil Procedure Code (Act V of 1908), from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction and the Appellate Court can on appeal pass the order which the lower Court

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should have passed. Where the injunction was disobeyed and the application to commit was put in while the suit was pending, the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court, to take action for the breach. The Court can *in its discretion order either arrest or attachment of property and is not* bound in the first instance to attach and then only order imprisonment.

Suppi v. Kunhi Koya ... ... (1916) I.L.R., 39 Mad., 907

CIVIL REVISION PETITION, *conversion of appeal into, when permissible* :—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SEC. 46, CL. (3).

CIVIL RULES OF PRACTICE, R. 161 (a)—*Fixing of six months for applying for execution in Court to which decree is sent for execution—Object of the rule—Execution application after six months and partial execution thereon, validity of—Time not the essence of the rule—Civil Procedure Code (Act V of 1908), sec. 24, cl (1) (b)—Right of District Court to recall a case sent to a subordinate Court for execution*] Rule 161 (a) of the Civil Rules of Practice which enacts that "if after a decree has been sent to another Court for execution, the decree-holder does not, within six months from the date of the transfer, apply for the execution thereof, the Court to which the decree has been sent shall certify the fact that no application for execution has been made to the Court which passed the decree and shall return the decree to that Court", is in the nature of instruction or direction to the Court to return the papers to the transmitting Court if no steps are taken by the decree-holder within six months to execute the decree. A violation of this rule does not render the proceeding taken, as in this case after six months after transmission, void *ab initio*. The rule is only directory and not mandatory and the time mentioned is not of the essence of the rule. *Caldow v. Pixell* (1877) 2 C.P.D., 562, followed. Where a decree is sent to a District Court for execution by another Court and the District Court transfers the decree for execution to a Subordinate Court, the period of six months allowed by the rule for execution in favour of the decree-holder is to be counted from the time the decree is sent to the District Court and not to the Subordinate Court. Under section 24 (1) (b), Civil Procedure Code, the District Court is entitled to withdraw to its own file the execution proceedings transmitted by it to the Subordinate Court and to dispose of it.

Vellappa v. Subrahmanyam .. .. (1916) I.L.R., 39 Mad., 485

CLAIM PETITIONS —*See* PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC 19, CL. (b)

CLAIM PROCEEDINGS, *unsuccessful* :—*See* PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC 19, CL. (s)

CO-EXECUTORS.—*See* HINDU LAW 865

CO-HEIRS, *Muhammadan, lease by* :—*See* TENANTS-IN-COMMON.

COMMITMENT, *petition for, while suit pending* —*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLIII, R. 8 AND O. XXXIX, R. 2, CL. (3)

COMPENSATION.—*See* MADRAS ESTATES LAND ACT (I OF 1908), SEC. 6 AND SUB-SEC. (6) AND SEC. (8).

———— :—*See* SPECIFIC MOVEABLE PROPERTY.

————, *reasonable, acceptance of tender by Court as, effect of* :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 83.

COMPLAINANT, *residing before hearing, effect of*.—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 345.

COMPROMISE, *between co-executors, validity of* :—*See* HINDU LAW 865

————, *decree on—Leave of Court, not obtained—Decree, if voidable—Suit to set aside decree, if competent* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXII, R. 7.

————, *joint bond executed as part of, liability of the other party to* :—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 462.

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————, *of suit by Trustee where minor is party thereto*:—See TRUSTEE, *duties of.*

————, *of suit on behalf of minor, made without obtaining leave of Court*:—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 462.

COMPOUNDING *of an offence*:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 345.

COMPOUNDING OF OFFENCES:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 439

COMPOUND INTEREST *at enhanced rate.*—See TRANSFER OF PROPERTY (ACT IV OF 1882), SEC. 83.

———— *at the original rate only, deposit of, sufficiency of*—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 83.

CONCUBINAGE, *continuous*—See HINDU LAW ... 186

CONFESSION AND STATEMENT, [illegible]:—See CRIMINAL PROCEDURE [illegible]

CONFIDENTIAL COMMUNICATIONS [illegible] See (INDIAN) EASEMENTS ACT [illegible]

CONTEMPT, *gross, of a Subordinate Court by a second grade pleader, by unjustly attacking its impartiality in the discharge of its duties*—See LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 14.

CONTRACT, *breach of, by labourer or maistry*:—See MADRAS PLANTERS LABOUR ACT (I OF 1903), SS. 24 AND 35.

———— *Conditional proposal to make provision for the plaintiff by purchase of immoveable property on condition of her living with the promisor until her death—Acceptance by plaintiff and performance of condition—Suit* [illegible] *relative,* [illegible] *Privy* [illegible] ut of a [illegible] Repudi [illegible] idowed Rani, and to which, on her death in 1899, the three defendants had in litigation between themselves been declared to be entitled in equal shares as her heirs. The appellant had been brought up by the Rani from an early age, and had lived with her until 1886, when she was married, and then the Rani being anxious that the appellant should not leave her offered (amongst other things) to make ample provision for her by the purchase of immoveable property in consideration that she and her husband would continue to reside with her This they did until 1893, during which time the Rani purchased two small properties in her own name and transferred them after a time to the appellant In 1893 the Rani purchased Repudi also in her own name though making no concealment of her intention that the appellant was eventually to have it but the Rani's delay in transferring it to her caused unpleasantness, and the appellant's husband left and went to his own home Negotiations took place, and eventually the Rani on 12th October 1893 wrote to the appellant a letter in which she said. "Repudi was purchased for you alone. I shall retain it under me so long as I am alive and afterwards convey it to you yourself." Thenceforth the appellant and her husband lived with the Rani until her death. *Held* (reversing the decision of the High Court), that the letter was not merely an expression of intention but a conditional promise by the Rani, and the promise was accepted and the condition performed by the appellant and her husband, and there was accordingly a complete contract between the parties. *Maunsell* v *Hedges* (1854) 4 H.C L., 1039, *Maddison* v. *Alderson* (1883) L.R, 8 A C, 467 and *Jordan* v. *Money* (1854) 5 H.C L., 185, referred to and discussed *Held* also, that the Rani's dying declaration constituted a re-affirmation and confirmation of the contract, the true effect of the language being to declare that Repudi was already the appellant's and that the Rani knew an oral bequest to be unnecessary. From such a contract it was not open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village to the appellant, such possession to take effect from the

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Rani's death The cause of action in the suit was on a ground common to all the defendants. The third defendant did not appeal from either of the decrees against him in the District Court and in the High Court. He was however in each case made a respondent by another defendant who ... Council, the ... ndant to be ... are to bring ... Majesty in

Venkayyamma Rao v. Appa Rao ... ... (1916) I.L.R., 39 Mad (P C.), 509

CONTRACT ACT (IX OF 1872):—*See* LIMITATION ACT (IX OF 1908), ART 89.

———, SEC. 37 :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 54.

———, SS. 69 AND 70—*Suit for contribution —Co-owners—Purchasers of different portions of zamindari—Attachment for arrears of revenue—Payment by a purchaser of the whole amount of arrears—Suit by him for the entire amount against the zamindar and the other purchaser—Personal liability of registered holder only—Liability of share of the other purchaser—Zamindar liable, only for proportionate share—Sale-proceeds of zamindari, liability of—Property partly in Agency Tracts—Defendant purchaser, resident therein—Jurisdiction of Subordinate Court.*] The plaintiff was a purchaser in an auction-sale held in execution of a decree, of some villages in a zamindari of which the first defendant was the registered holder. The sixth defendant was a similar purchaser of some other villages therein within the jurisdiction of the Agency Court. For default in payment of revenue accruing due subsequent to the plaintiff's purchase, one of the villages purchased by him was attached by the Government, the plaintiff paid the full amount due on the entire zamindari to save his village from revenue sale The plaintiff brought the suit in the Subordinate Judge's Court against the first defendant, defendant's Nos 2 to 5 (who were his undivided brother, sons and nephew, respectively) and the sixth defendant, to recover the full amount paid by him from all the defendants personally and from the sale-proceeds of the rest of the zamindari kept in deposit in the Government treasury The defendants pleaded non-liability in law ... ed the further plea that ... to entertain the suit as ... is personally bound to ... holder; (b) that a co- ... ue due on an estate is ...

... bound to pay the whole or any portion of the amount, (*f*) that the plaintiff was entitled to sue the first defendant only for contribution and to recover from him and from the sale-proceeds in deposit only the share of revenue payable on account of the property in the hands of the first defendant *Subramania Chetti v. Mahalingasami Sivan* (1910) I.L.R, 33 Mad., 41, *Paruglys v. Patran Haji* (1912) 15 I.C, 262, *Narain Pai v. Appu* (1915) 28 I C, 456 and *Futteh Ali v. Gunganath Roy* (1882) I L.R, 8 Calc., 133, followed. *Raja of Vizianagram v. Raja Setrucherla Somasekhararaz* (1903) ...

referred to.

Jagapathi Raju v. Sadrusannama Arad ... ... (1916) I.L.R., 39 Mad., 795

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————, ss. 126, 140 141, 145, 69 AND 70:—See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss 30, 47, 59, 74 AND 94.

CONTRIBUTION, *cause of action for, only after payment:*—See LIMITATION.

————, *suit for, between joint-debtors*—See LIMITATION.

————, *suit for:*—See CONTRACT ACT (IX OF 1872), ss. 69 AND 70.

CO-OWNERS—See ADVERSE POSSESSION 879

———— See CONTRACT ACT (IX OF 1872), ss 69 AND 70.

———— See JOINT PROPERTY.

———— *Right of suit—Suit in ejectment against trespasser—Suit by one co-owner alone—Other co-owners, not parties—Suit if maintainable—Local inspection by judge—Judgment based solely on such inspection, if valid—Civil Procedure Code (Act V of 1908), O XXI, r. 9 (old Civil Procedure Code, Act XIV of 1882), sec. 392*] One of several co-owners can maintain an action in ejectment against a trespasser without joining the other co owners as parties to the action. A judgment should not be based solely on the result of the personal local inspection made by the judge. This rule applies to cases instituted under the new Code of Civil Procedure (Act V of 1908) as under the old Code (Act XIV of 1882)

Bhutari v. The Magnesite Syndicate, Ltd. ... ... (1916) I.L.R., 39 Mad., 501

————, *suit by one only, if maintainable:*—See RIGHT OF SUIT.

CONVERT *to Roman Catholic religion*—See CHURCH, ROMAN CATHOLIC.

CO PARCENER, *an undivided collateral, gift to the illegitimate son of, not ancestral property, as between the donee and his son*—See HINDU LAW ... 1029

————, *marriage of*—See HINDU LAW 587

CO-PARCENARY RIGHT OR COMMUNITY OF INTEREST, *by birth not the basis—Relationship to holder of the zamindari, necessary:*—See HINDU LAW.

COSTS—*Order of Appellate Court remanding a case—"Costs to abide the result," meaning of—Discretion of lower Court, if fettered—Costs to abide and follow the result and costs to follow the event, distinction between*] Where the High Court, in remanding a case to the lower Court, ordered that the costs should abide the result, *Held*, that the words "abide the result" only connote that the order as to costs is to await the passing of the final decision in the case, and have not the effect of fettering the discretion of the trying Judge. Distinction between "abide the result" and "abide and follow the result" or "follow the event" pointed out.

Periah v. Lakshmidevamma ... ... (1916) I.L.R., 39 Mad., 476

COSTS TO ABIDE THE RESULT, *meaning of:*—See COSTS.

COURT, *application to, wrong*.—See INSOLVENCY, *proceedings in*

————, *leave of, without obtaining compromise of suit made on behalf of minor:*—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 462.

"————," *Magistrate demanding security, not a, but an executive officer:*—See INDIAN PRESS ACT (I OF 1910), SEC. 3 (1), PRO.

COURT, DIVISIONAL, *for the disposal of criminal business—Powers of, to admit criminal appeals, when admission Court is sitting*—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss 421, 423 AND 537

COURT-AUCTION, *right of purchaser in, to substitute properties:*—See SUBSTITUTION OF PROPERTY AND SECURITY.

COURT FEES, *rightly payable only on principal debt secured below Rs. 5,000:*—See MADRAS CIVIL COURTS ACT (III OF 1873), ss 12 AND 13.

———— **AND JURISDICTION** *valuation for purpose of, same:*—See MADRAS CIVIL COURTS ACT (III OF 1873), ss 12 AND 13.

Rani's death. The cause of action in the suit was on a ground common to all the defendants The third defendant did not appeal from either of the decrees against him in the District Court and in the High Court. He was however in each case made a respondent by another defendant who ... Council, the ...endant to be ...are to bring ... Majesty in

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CONTRACT ACT (IX OF 1872).—*See* LIMITATION ACT (IX OF 1909), ART 63.

————, SEC. 37: —*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 54.

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for the full amount, while the sixth defendant raised the further plea that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against him *Held* (a) that the only person who is personally bound to pay the revenue to the Government is the registered holder, (b) that a co-owner who pays the Government the whole revenue due on an estate is ...

Subramania Chetti v. Mahalingaswami Sivan (1910) I.L.R., 33 Mad., 41, *Paruylyi v. Pakran Haji* (1912) 15 I.C., 262, *Narain Pai v. Appu* (1915) 28 I.C., 456 and *Fulteh Ali v. Gunganath Roy* (1882) I.L.R., 8 Calc., 133, ...

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Jagapathi Raju v. Badrusunnama Arad ... ... (1916) I.L.R., 39 Mad., 795

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167 of the Code applies to proceedings under Chapter XIV and not to those under section 110. *Emperor* v. *Basya* (1903) 5 Bom. L.R., 27, referred to

Re *Subbaraya Chetti* ... ... (1916) I.L.R., 39 Mad., 928

————————————————, SEC 164—*Difference between statement and confession—Statement taken on affirmation, under section 164 from a complainant, not a confession—Admissibility in evidence of statement, to prove perjury.*] A complainant's sworn statement charging another with an offence was recorded by a Magistrate as a "statement" under section 164 of the Criminal Procedure Code: *Held*, the fact that the statement happened also to amount indirectly to a confession of the complainant's own guilt of some other offence but not recorded as such by the Magistrate in accordance with the provisions of section 364 of the Code, is no bar to its admissibility in evidence against the complainant on a charge of perjury. *Semble*: Whether a statement is to be regarded as a *confession* or not depends on the connection in which and the purpose for which it was made. A statement recorded as such cannot be used as a confession, nor a confession, as a statement

Re *Ramanujamma* .. .. (1916) I.L.R., 39 Mad., 977

————————————————SS 179 AND 181—*Complainant in Madras town, doing business in mofussil by agent—Agent's duty to remit principal's money to Madras—Misappropriation by agent in mofussil—Jurisdiction to try offences under Indian Penal Code (Act XLV of 1860), sec. 406 or 409*] A firm in the town of Madras dealing in kerosine oil authorized an agent in a mofussil station to sell their oil and remit to them at Madras the sale-proceeds less his commission The agent sold the oil in the mofussil and without sending the proceeds misappropriated the same: *Held*: (*a*) that the proceeds were the property of the Madras firm, (*b*) that the case was governed by section 181 and not section 179 of the Criminal Procedure Code and (*c*) that as the misappropriation and consequent loss occurred to the Madras firm primarily only in the mofussil station, the Magistrate at that station and not the one in Madras had jurisdiction to try the offences under section 406 or 409, Indian Penal Code. Cases on the subject reviewed

Krishnamachari v. *Messrs. Shaw Wallace & Co* (1916) I L.R., 39 Mad., 576

————————————————, SEC. 195—*False endorsement on a promissory note—Indian Penal Code (Act XLV of 1860), sec. 193, complaint*

complaint before a Magistrate having no jurisdiction to entertain it was not the date of the institution of the Criminal Proceedings

Re *Parameswaran Nambudri* (1916) I.L.R., 39 Mad., 677

————————————————, SEC. 195—*Sanction, granting of, under, to be made on legal evidence—Section 195 (b), High Court hearing an appeal under—Judges divided equally in opinion—Whether an appeal lies under clause 15 of the Letters Patent.*] A Magistrate received a complaint of criminal breach of trust, examined the complainant on oath under section 200,

the complainant for preferring a false complaint, the Magistrate asked the complainant to show cause why sanction should not be given but as no witnesses were examined by him to show the truth of his complaint, the Magistrate granted sanction *Held* affirming the decision of SUNDARA AYYAR, J., that the above materials did not constitute legal evidence for the Magistrate to grant the sanction and that hence the sanction given should be set aside. *Quaere* Whether an appeal under clause 15 of the Letters Patent lies against an order of a Division Bench of the High Court when

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one of the Judges differs from his colleague on hearing an application under section 195 (*b*), Criminal Procedure Code, to revoke a sanction granted by a lower Court.

Bapu v. Bapu ... ... (1916) I.L.R., 39 Mad. (F.B.), 783

———————, SEC. 195 (*b*)—*Application under, to set aside the superior Court's refusal to revoke sanction to prosecute for preferring a false charge* :—See SANCTION TO PROSECUTE

———————, SEC. 195 (*b*), *High Court hearing an appeal under* :—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195.

——————— SEC. 250—*Information to village magistrate—Report to the police—Institution of complaint by Police thereon*] A man who complains to a village magistrate of a non-bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in person to the police station and made a complaint, and if the police charge the case, it is a case instituted on information given to a police officer within the meaning of section 250, Criminal Procedure Code. *The Sessions Judge of Tinnevelly* v. *Sivan Chetti* (1909) I.L.R., 32 Mad., 258 (F.B.), followed.

Nachimuthu Chetti v. *Muthusami Chetti* .. (1916) I.L.R., 39 Mad., 1006

———————, SEC. 256—*Summons-case and warrant-case, trial of—Procedure, that of warrant case—Warrant-case, withdrawn—Charge framed in summons-case—Right of accused to recall and cross examine prosecution witnesses—Magistrate, refusal of, illegal—Prejudice—Onus on prosecution*] When a summons-case and warrant-case are tried together, the procedure to be followed is that prescribed for the warrant-case. *Rajnarayan Koonwar v. Lala Tamoli Raut* (1885) I.L.R., 11 Calc., 91, followed. If the complaint in respect of the offence triable as a warrant-case is not proceeded with, but a charge be framed only in respect of the offence triable as a summons-case, the accused is entitled to recall and cross-examine the prosecution witnesses under section 256 of the Code of Criminal Procedure, as he could not have anticipated the withdrawal of the former charge and could not be said to have been in default. A refusal of the Magistrate to allow the accused to recall and cross-examine the prosecution witnesses is illegal and it is for the prosecution to show that the accused are not prejudiced thereby.

Re Sobhanadri . .. .. (1916) I.L.R., 39 Mad., 503

———————, SEC. 342—*Right of the Magistrate or Sessions Judge to put questions or take statements from accused when no evidence given by prosecution to implicate them—Answers taken from accused in contravention of section 342, not admissible in evidence.*] If in a criminal case the prosecution had not let in any evidence implicating the accused or some of the accused in the crime charged, the Magistrate is not entitled under section 342 of Criminal Procedure Code to put questions to such accused or to invite them to make a statement, and this rule equally applies to trials before the Sessions Court. Answers to questions received by the committing Magistrate in contravention of section 342 of the Criminal Procedure Code are not admissible in evidence against the accused in the subsequent trial before the Sessions Court. *Mohideen Abdul Kader* v. *Emperor* (1904) I.L.R., 27 Mad., 238 and *Reg.* v. *Berriman* (1854) 6 Cox. Cr. C., 388, followed.

Re Abdulla Ravuthan .. ... . (1916) I.L.R., 39 Mad., 770

———————, SEC. 345, *exhaustive*—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC 439

———————, SEC. 345—*Compounding an offence—Complainant resiling before hearing, effect of.*] Per ABDUR RAHIM, J. (AYLING, J., *dubitante*)—A composition arrived at between the parties of a compoundable offence is complete as soon as it is made, and it has the effect of an acquittal of the accused under section 345, Criminal Procedure Code, in respect of that offence, though one of the parties later on, resiles from the compromise and no statement or petition recording the compromise is filed in Court by the parties. *Murray* v. *Queen-Empress* (1894) I.L.R., 21 Calc., 103, referred to.

Kanni Rowther v. *Inayathalla Sahib* ... ... (1916) I.L.R., 39 Mad., 948

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——————, ss. 421, 233 AND 537—*Criminal appeal—Presentation of, to an officer of the Court, or to one of the Judges—Appellate Side Rules, r 1 (1) (f)—Divisional Court for the disposal of criminal business—Powers of, to admit criminal appeals, when Admission Court is sitting—Notes to the Weekly Sitting List—Charter Act (24 & 25 Vict, Cap 104), ss 31 and 14—Joint trial of two separate calendar cases—Offences, distinct—Illegality, not cured by section 537, Criminal Procedure Code—Retrial, if acquittal wrong*] When a case of acquittal taken up by the High Court in the exercise of its powers of revision was under the consideration of a Bench, notice was issued to the Public Prosecutor to appear at the further hearing of the revision and also to inform the Court whether Government intended to appeal against the acquittal. He appeared and handed in the appeals by the Government to the learned Judges who perused them and ordered notice forthwith. On that date an Admission Court constituted by a single Judge was sitting. *Held*, that there was a valid presentation of the appeals. The fact that a single Judge sitting in the Admission Court is entrusted with the duty of admitting criminal appeals, does not deprive the Divisional Court constituted for the disposal of criminal business of the right to exercise its power of admitting criminal appeals. It is by reference to the rules made by the High Court that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained and not by reference to the notes to the "Sittings List" which are merely instructions for the guidance of practitioners. Under section 13 of the Charter Act rules for the exercise of the High Court's appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by section 14 to determine which Judge shall sit alone and which in Divisional Courts. *Per* OLDFIELD, J —As regards presentation, no special method is enjoined in the Code of Criminal Procedure, and therefore the question is one of administrative convenience alone. So long as there is an actual presentation to an officer of the Court such as a Bench Clerk or to *one of the Judges, its members, the presentation is not invalid. Where*, on the presentation of a single complaint against the accused containing all the allegations necessary for the establishment of two cases, those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation contained in a document as to the amount of his assets, the Magistrate after recording the prosecution evidence continuously without discriminating between that which was relevant on each of these two charges, framed separate charges and also numbered them as different calendar cases, but when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross examined promiscuously in respect of both the charges, *Held*, that the joint trial of the two cases was illegal inasmuch as it contravened the provisions of section 233, Criminal Procedure Code and that the illegality could not be cured by section 537, Criminal Procedure Code *Subramania Ayyar* v *King-Emperor* (1902) I L R, 25 Mad., 61 (P.C.), followed. Where, in an appeal preferred by the High Court against the acquittal of an accused after an illegal trial, the Court is of opinion that the acquittal is wrong on the merits, the accused cannot be convicted and sentenced by the High Court; the only course open is to order that the accused be tried a second time. *Per* NAPIER, J —The decision of the Privy Council in *Subramania Ayyar* v. *King Emperor* (1902) I L R, 25 Mad, 61 (P C), does not compel the Court to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537, Criminal Procedure Code.

The Public Prosecutor v. *Kadiri Koya* ... ... (1916) I L.R., 39 Mad., 527

——————, ss. 429 AND 439, *inapplicability of, to an application to High Court to set aside the superior Court's refusal to revoke sanction to prosecute for preferring a false charge*—See SANCTION TO PROSECUTE.

——————, SEC. 432, *reference under—Indian Electricity Act (IX of 1910), sec. 33, scope of—"Every person," meaning of.*] The words "every person" in section 33 of the Indian Electricity Act is not confined to persons licensed under Parts II and III of the

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Act. Section 33 of the Act is not confined to cases in which the accident actually results in personal injury or death but also extends to cases likely to have resulted in loss of life or personal injury.

Re Hawkins ... ... (1916) I.L.R., 39 Mad., 686

————————————, SEC. 435—*See* INDIAN PRESS ACT (I OF 1910), SEC. 3 (1), PRO.

————————————, SS. 435 AND 439—*Charter Act (24 & 25 Vict., cap 104), sec. 15—High Court, powers of, in revision—Complaint of offences under Indian Penal Code (Act XLV of 1860), ss. 189 and 504—Charges framed—Prosecution evidence unreliable—Offences not made out—Prosecution not bona fide—Interlocutory order—Indian Penal Code (Act XLV of 1860), ss. 189 and 504—Process server's right to enter any house to effect service.*] A complaint was preferred against the accused in respect of offences under sections 189 and 504, Indian Penal Code, and charges were framed under the said sections by a Second-Class Sub-Magistrate. A criminal revision petition was filed by the accused in the High Court to quash the proceedings on the ground that the evidence on record was insufficient to substantiate either of the charges and that the proceedings were instituted out of pure malice and with the object of harassing the petitioner. A preliminary objection was taken as to the maintainability of the petition and the powers of the High Court to interfere in revision: *Held*, that though the power of revision has to be exercised with great care the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that in the interest of justice, it should do so. *Held* (on the facts of the case), that the case was a fit one for interference in revision, as a careful consideration of evidence of the prosecution led to the conclusions (1) that the ingredients necessary to constitute an offence under sections 189 and 504, Indian Penal Code, had not been made out and (2) that the case as presented to the Court bore considerable evidence of fabrication and that the development of the case in the later stages showed that it was not a case of *bona fide* prosecution but that the complainant was a tool in the hands of others. For an offence under section 504 of the Indian Penal Code, mere abuse will not do without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely. The fact of a process-server being entrusted with a *subpœna* to serve a witness described as residing in a particular house does not give him a general right of entry into any house without the permission of the owner or person in charge.

Re Kuppuswami Aiyar .. .. (1916) I.L.R., 39 Mad., 561

————————————, SS 435, 439 AND 133—*Revision petition to the High Court against an order under section 133—Order of a single Judge of the High Court—Appeal against order, if maintainable—Letters Patent (24 & 25 Vict., cap 104,) cl 15.*] No appeal lies under clause 15 of the Letters Patent, against an order of a single Judge of the High Court in a criminal revision petition preferred against an order of a Magistrate acting under section 133 of the Code of Criminal Procedure.

Subbayya v. Ramayya . . (1916) I.L.R., 39 Mad., 537

————————————, SEC 439—*Criminal revision under—Compounding of offences—Incompetency of High Court to sanction composition, in revision—Criminal Procedure Code (Act V of 1898), sec 345, exhaustive.*] The High Court sitting as a Court of Revision has no power to sanction the compounding of offences [illegible]
Procedure Code, wh[illegible]
composition of offe[illegible]
effected. Emperor v[illegible]

Re Rangayya ... ... (1916) I.L.R., 39 Mad., 604

————————————, SS 439, 422 AND 423—*Order of acquittal—Revision petition to the High Court by private parties—Power of High Court to interfere—Interference, in what cases—Service of notice of appeal on District Magistrate—Omission of service, effect of—Irregularity.*] The High Court has power to interfere in revision against an order of acquittal on

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... it considers that ...blic justice. The ...ere the question ...s no patent error ... Mere omission ... sections 422 and 423 of the Code of Criminal Procedure, is only an irregularity and will not render the proceedings *ab initio* void.

Vellayanambalam v. *Selai Serrai* ... (1916) I.L.R., 39 Mad., 505

———, SEC. 476—*Officer, preparing record of rights under Madras Estates Land Act (I of 1908), not a Court within the meaning of:*—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), ss. 164—167.

———, SEC. 488—*Maintenance—Criminal revision petition to the High Court—Order of a single Judge—Appeal against, if maintainable—Letters Patent, cl. 15—Criminal trial, order in.*] No appeal lies under clause 15 of the Letters Patent against an order of a single Judge of the High Court dismissing a criminal revision petition filed against an order of a Joint Magistrate passed under section 488 of the Code of Criminal Procedure (Act V of 1898)

Appadu v. *Appama* ... (1916) I L R., 39 Mad., 472

———, SEC. 488—"*Unable to maintain itself*", *meaning of—Child entitled to maintenance from its mother's tavazi not entitled to order for maintenance from father.*] A child that possesses a right to maintenance from its mother's tavazi is not entitled under section 488, Criminal Procedure Code (Act V of 1898), to an order for maintenance against its father. *Kariyadan Pokkar* v *Kayat Beeran Kutti* (1896) I L R., 19 Mad., 461, followed, *In re Parathy Valappal Moideen* (1913) M.W N., 997, not followed. The words "unable to maintain" in section 488 are not confined to physical inability but include also pecuniary inability.

Chantan v. *Mathu* ... (1916) I L.R., 39 Mad., 957

———, SEC. 530—*See* EUROPEAN BRITISH SUBJECT.

CRIMINAL REVISION PETITION *to the High Court—Order of a single Judge—Appeal against, if maintainable:*—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 488.

"CRIMINAL TRIAL":—*See* LETTERS PATENT (24 & 25 VICT., CAP. 104), CL. 15.

———, *order in:*—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 488.

CROSS-APPEAL, *special leave to, grant of:*—*See* CONTRACT.

DAMAGE, *remoteness of:*—*See* SECRETARY OF STATE IN COUNCIL.

——— *See* ESTATES LAND ACT (MADRAS) (I OF 1908), SEC. 189

——— *Suit for:*—*See* TORTS.

———, *suit for against the Secretary of State for India in Council, if maintainable:*—*See* TORTS.

———, *suit for, right of, for malicious procuring of an order for attachment before judgment:*—*See* ATTACHMENT BEFORE JUDGMENT.

———, *unliquidated claim for, which has become barred—Equitable set off, whether available if possession disturbed*—*See* LESSOR AND LESSEE.

DANCING WOMAN, *by illegitimate son of sudra, kept in continuous concubinage:*—*See* HINDU LAW ... 139

DAUGHTER'S SUIT FOR POSSESSION *of father's estate—Death of daughter, right of father's heirs to continue suit:*—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 2, CL. (11), O XXII, R 1

DEBTOR, *principal rights of surety against*—*See* NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), SS. 30, 47, 59, 74 AND 94.

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DECLARATION, *suit for*:—See MADRAS LAND ENCROACHMENT ACT (III OF 1905), SS 5, 6, 7 AND 14.

————, *suit for, by an assignee from subscriber to kuris if maintainable* — See SPECIFIC RELIEF ACT (I OF 1877), SEC. 42.

———— **OF TITLE** —See LESSOR AND LESSEE.

DECREE:—See LESSOR AND LESSEE.

———— *against a major, as minor, not a nullity—Court-sale in execution of decree, validity of—Indian Limitation Act (IX of 1908), art 12, applicability of.*] A decree obtained against a person treating him as a minor while in reality he was a major on its date is not a nullity; consequently a sale in execution of such a decree cannot be set aside on the ground that the Court had no jurisdiction to pass the decree. The period of limitation to apply to set aside the court-sale is one year as provided by article 12 of the (Indian) Limitation Act.

Seshagiri Rao v. *Hanumantha Rao* ... (1916) I L R., 39 Mad, 1031

———— *against widow, for husband's debt* —See HINDU LAW 565

————, *court-sale in execution of, validity of* —See DECREE *against a major as minor*

————, *final, expenses incurred in the*—See TRUSTEES OF A TEMPLE

———— *in mortgage suit* —See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 47, O. XXII, R 10

————, *nature of* —See (INDIAN) LIMITATION ACT (IX OF 1908), SS 132 AND 75

————, *passed in ignorance of the death of one of the respondents—Appellant entitled to rehearing.*— See APPEAL, *parties to an.*

————, *preliminary* —See COURT FEES ACT (VII of 1870), SEC 7, CL. (4).

————, *procedure to, not by way of execution.*—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC 47, O XXII, R. 10

DEFAMATION:—See TORTS.

DEFAMATORY STATEMENT, *made and published outside British India* —See TORTS.

DEFAULT, *wilful, meaning of*—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XL, R 4

DEFENCE, *struck out* —See FOREIGN JUDGMENTS.

DEPOSIT, *meaning of* —See (INDIAN) LIMITATION ACT (IX OF 1908), ARTS 59 AND 60

————, *compound interest at the original rate only* —See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 83

———— *of money into Court, time for, granted* —See Ex-parte DECREE.

———— *of security into Court, by the defendant who became subsequently insolvent—Plaintiff's right over the deposit.*—See CIVIL PROCEDURE CODE (ACT V OF 1908), O XXXVIII, R 8

———— *of usufructuary mortgage amount only—Refusal by mortgagee* —See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 83

DEPOSIT OR LOAN, *money left with a trader, not being a banker, if* —See (INDIAN) LIMITATION ACT (IX OF 1908), ARTS. 59 AND 60.

DIRECTORS *of a bank lending on unauthorised securities, not ultra vires*:—See PRESIDENCY BANKS ACT.

DISCIPLINARY PROCEEDINGS, *under clause* (10), *Letters Patent* —See APPEAL *to the Privy Council.*

DISCRETION *of lower Court, if fettered.*—See COSTS.

DISPOSSESSION OF LESSEE *within term by trespassers* —See LESSOR AND LESSEE.

DISTRAINT, *after expiry of lease*:—See (MADRAS) ESTATES LAND ACT (I OF 1908).

————, *illegal*;—See (MADRAS) ESTATES LAND ACT (I OF 1908), SS. 189, ETC.

DISTRIBUTION, *order of, a revision petition against, time taken to file and to prosecute, not to be deducted under section 14, Limitation Act*,—See LIMITATION ACT (IX OF 1908), ARTS 92 AND 120.

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————, rateable order for:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 74 AND 104.

————, rateable, wrongful, suit for money on the ground of, governed by article 62 and not by article 120 of the Limitation Act:—*See* LIMITATION ACT (IX OF 1908), ARTS. 62 AND 120

DISTRICT COURT, *right of, to recall a case, sent to a Subordinate Court for execution*:—*See* CIVIL RULES OF PRACTICE, R. 161 (*a*).

DISTRICT MAGISTRATE, *service of notice of appeal on*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 434, 422 AND 423.

DRINK, *unwholesome, exposing for sale*:—*See* MADRAS CITY MUNICIPAL ACT (III OF 1904), BY-LAW 169.

EASEMENTS ACT (INDIAN) (V OF 1882), SEC 15—*Prescriptive user, period necessary for—(Indian) Evidence Act (I of 1872), ss. 123, 124 and 163—Confidential communications, test of.*] In a suit to establish right of user by prescription against Government, the plaintiff is bound to prove under the last clause of section 15 of the Indian Easements Act, sixty years' user. *The Secretary of State for India* v. *Kota Bapasamma Garu* (1896) I.L.R., 19 Mad., 165, distinguished. The object of section 124 of the Evidence Act is to prevent disclosures to the detriment of public interests and the decision as to such detriment rests with the officer to whom the communication is made and does not depend on the special use of the word "confidential." *Venkatachella Chettiar* v *Sampathu Chettiar* (1909) I.L.R., 32 Mad., 62, followed

Nagaraja Pillai v *The Secretary of State* .. .. (1916) I L R, 39 Mad., 304

EAST INDIA COMPANY AND SECRETARY OF STATE FOR INDIA, *non-liability of, for acts done in exercise of Sovereign powers—Exceptions—American and English Laws* *See* TORTS

EJECTMENT, *suit by one tenant-in-common, in, maintainability of*.—*See* TENANTS IN-COMMON.

————, *suit for, subsequent to alienation* —*See* (MADRAS) PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), ss 5 AND 10, CL. (12).

————, *suit in, against trespasser* —*See* RIGHT OF SUIT.

EMOLUMENTS, *partition of, whether prohibited*:—*See* (MADRAS) PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), ss 5 AND 10, CL (2).

EQUITY OF REDEMPTION, *acquisition of, by trespasser*.—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 65 (c)

ESTATES LAND ACT (MADRAS) (I OF 1908)—*Lessee whose term has expired, whether a landholder under the Act—No power to distrain holding after expiry of lease.*] The provisions of the (Madras) Estates Land Act (I of 1908) do not empower a person who was a lessee of an estate to take proceedings after the expiry of his lease to sell the tenant's holding for arrears of rent due for a fasli covered by the period of his lease *Forbes* v. *Mularaj Bahadur Singh* (1914) I L R., 41 Calc, 926 (P.C), referred to. *Per* SPENCER, J.—His only remedy is to sue the tenant on his contract for rent *Per* SESHAGIRI AYYAR, J.—(1) A person to whom arrears are due is a landholder, notwithstanding the fact that his estate has terminated. (2) The law does not give him a first charge on the holding or the crops thereon (3) He can distrain the movable property or the trees in the holding of the defaulter. (4) He is not entitled to attach the holding

Sundaram Ayyar v *Kulathu Ayyar* . .. (1916) I L R, 39 Mad., 1018

————, SEC. 3, CL. (*d*) AND SEC. 6—*Whole inam village—Minor inams therein—Sarva inam of the temple, whole village described as—Landholder, meaning of, in section 6 of the Act*] Section 3, sub-section (2), clause (d), of the Estates Land Act excludes from the definition of " " [illegible]
particular village [illegible]
boundaries. A wh[illegible]
an estate within th[illegible]
village is described as sarva or rent-free agraharam of a deity it means that the whole village has been granted to the deity as inam. The term "land-

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holder" in section 6 of the Act need not be a beneficial owner of the "estate" and includes a receiver appointed to manage the estate.

Narayanaswami Naidu v. Subramanyam ... (1916) I.L.R., 39 Mad., 683

—————, ss. 3, 8 AND 185—*Private land—Conversion of ryoti into—Proof—Proviso to section 185, nature of.*] Per WALLIS, C.J.—Section 8 of the Estates Land Act does not impose retrospectively an absolute prohibition of the conversion of ryoti into private land not to be found in the definition or in the section specially dealing with evidence as to what is private land. Such a conversion should be proved by very clear and satisfactory evidence. The acquisition of kudivaram right in certain lands by the landlord and his letting them out as kambattam lands on terms negativing occupancy right with a view to prevent the assertion of such right is not sufficient to convert them into private lands within the meaning of the definition. *Per* SESHAGIRI AYYAR, J.—Land originally *seri* cannot become the private land of the landholder except in the one instance mentioned in the proviso to section 185 of the Act. The proviso is not in the nature of an exception but enacts a rule of substantive law. *Mullins v Treasurer of Surrey* (1880) 5 Q B D., 173 and *Maha Prasad Singh v. Ramani Mohan Singh* (1914) 27 M L J, 459, followed.

Zamindar of Chellapalli v Somayya ... (1916) I.L.R., 39 Mad., 341

—————, SEC. 6, SUB-SEC. (6) AND SEC. 8 —*Government lands under ryotwari tenure, purchased by zamindar—Release of revenue on such lands—Zamindari lands, acquired by Government under Land Acquisition Act (I of 1894)—Compensation—Substitution of ryotwari lands as zamindari lands—Suit to eject—Jurisdiction of Civil Courts—Acquisition by landholder of occupancy right—Acquisition by tenant of landholders' right, difference between.*] Where a zamindar who had purchased some ryotwari lands from a Government ryot and obtained a release of revenue due on such lands in lieu of compensation payable to him for some other lands taken up by the Government under the Land Acquisition Act (I of 1894), brought a suit in 1911 in the District Court to recover such lands from a tenant who was in possession thereof since 1901, and the defendant contended that he had acquired occupancy right thereto and that the Civil Courts had no jurisdiction to entertain the suit, *Held* (1) that, assuming that the suit lands were substituted as part of the zamindari, the plaintiff, who was a Government ryot of such lands prior to the substitution, had occupancy right therein and did not lose such right by becoming interested in them as a landholder, under the explanation to sub-section (6) of section 6 of the Madras Estates Land Act, (2) that the provisions of section 8 (1) of the Act refer to the acquisition of occupancy right by landholders and not to the acquisition of landholders' right by ryots and (3) that in any event the general provisions of section 8 (1) cannot affect the special provisions of the explanation to sub-section (6) of section 6 of the Act.

Zamindar of Sanivarappet v Zamindar of South Vallur (1916) I. L. R., 39 Mad., 944

—————, ss. 11 AND 151—*Suit for injunction by landholder against tenant—Agricultural holding—Erection of building on part of the holding—Part rendered unfit for agricultural purposes—Holding as a whole not rendered unfit, effect of—Right of landholder to reliefs under section 151—Bengal Tenancy Act (VIII of 1885), sec. 23.*] Section 151 of the Madras Estates Land Act gives the landholder a right to sue for any of the reliefs mentioned in clauses (1) and (2) thereof only when the holding *as a whole* was rendered substantially unfit for agricultural purposes by the acts of the ryot committed on the whole or any part of the holding. *Hari Mohun Misser v. Surendra Narayan Singh* (1907) I L R, 34 Calc., 718 (P C), followed.

Rama v. Arunachalam ... (1916) I L R, 39 Mad., 673

—————, SEC. 13, CL. (3), *not retrospective—Improvements at tenants' sole expense—Payment of higher rent therefor for sixty years—Presumption of a binding contract to pay at a higher rate under the Rent Recovery Act—(Madras) Estates Land Act (I of 1908), sec. 28—Sadalwar and Mathiri Kasuvu, not illegal cesses within section 143 of the Act.*]

Held, by NAPIER and KUMARASWAMI SASTRIYAR, JJ (SADASIVA AYYAR, J.,

came into force and where there had been a binding *contract* entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent, (ii) the section applies only to contracts and improvements made after the Madras Estates Land Act came into force, (iii) the right to levy increased assessment in consequence of improvements effected before the Act being a vested right in the landholder, the ... to defeat ... at it is to ... the Act ... veen the parties *Per* SADASIVA AYYAR and NAPIER, JJ.—Where the higher rate was regularly paid for sixty years even in respect of the improvements effected at the tenants' sole expense, the Courts could presume a lawful

Land Act.

Venkata Perumal Raja v. *Ramudu* ... .. (1916) I L R, 39 Mad., 84

————————, SEC 28:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 13, CL (3)

————————, SS 164—167—*Officer, preparing record of rights under—Criminal Procedure Code (Act V of 1898), sec. 476 not a "Court" within the meaning of*] A Revenue Officer preparing a record rights under sections 164—167 of the Madras Estates Land Act is only discharging an executive function of Government and is not a Court within the meaning of section 476 of the Code of Criminal Procedure.

Re *Hanumantha Rao* ... ... (1916) I L R, 39 Mad., 414

————————, SEC. 189 AND CL. (12) OF PART A OF SCHEDULE—*Suit to recover lands under the Act for non-payment of rent, non-maintainability of, in Civil Courts*] Section 189 and clause (12) of Part A of schedule to the Madras Estates Land Act (I of 1908) preclude ... er posses- ... payment ... holding. ... le of the ... L J., 33,

Ramanathan v. *Ramaswami* ... .. . (1916) I L.R., 39 Mad., 60

————————, SS. 189, 2.3, 134, 91 AND 77—*Ryotwari landowner—Illegal distraint—Suit for damages—Jurisdiction—Revenue Court—(Madras) Rent Recovery Act (VII of 1865), ss 49 and 78*] A suit by the tenant of a ryotwari landowner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops of the produce of land or trees in the defaulter's holding is solely cognizable by the Revenue Court *Per* WALLIS, C J —Sub-sections (2) and (3) of section 213 of the Madras Estates Land Act are in the nature of provisos and it would not be legitimate to cut down the operative portion of section 189 to which these provisos do not in terms apply, merely because otherwise the provisos would be "meaningless and even senseless" *West Derby Union* v *Metropolitan Life Assurance Society* (1897) A C, 647, referred to Sub-sections (2) and (3) which were drafted in place of sections 49 and 78 of the Rent Recovery Act were probably retained by inadvertence after the jurisdiction of the Civil Court had been taken away by section 189 in its present form *Obiter*.—Suits under section 91 of the Madras Estates Land Act are exclusively within the jurisdiction of the Civil Court. *Per* SADASIVA AYYAR and

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SRINIVASA AYYANGAR, J.—Clause (2) of section 213 saves the Civil Court's jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies such as injunction, declaration, possession, etc. *Per* SADASIVA AYYAR, J.—The proviso forming clause (3) of section 213 takes away the jurisdiction of the Civil Court even in respect of cases claiming other redress than pecuniary damages if the redress of damages had been already claimed by the plaintiff in a suit filed before the Collector under *clause (3) of section 213* *Quære*:—*Whether the remedy by a suit in the* Collector's Court to set aside a distress under section 95 can be availed of by a Government ryot's tenant whose moveables have been distrained under section 77 and whether assuming that he could do so, the jurisdiction is an exclusive one in the Revenue Court.

Narayanaswamy v. Venkataramana (1916) I L R., 39 Mad., 239

———, SS. 210 AND 211 AND ART. 8 OF PART A OF SCHEDULE—*Limitation Act (XV of 1877), sec. 7—Suits for arrears of rent—Minority as a ground of exemption—Statutes of Limitation when retrospective—Principles to be applied—Madras General Clauses Act (I of 1891) sec. 6, cl. (e) and sec. 8 cl. (d).]* A 'landholder' under the Madras Estates Land Act, who became a major on 5th October 1906 brought suits for recovering arrears of rent due for fasli 1315, after the Estates Land Act came into force, but within three years of his attaining majority. On the date the suits were brought, more than three years had elapsed after the rents had become due. The lower Courts dismissed the suit as barred by the limitation of three years prescribed by sections 210 and 211 and article 8 of Part A of the Schedule to the Estates Land Act: *Held* by WALLIS C.J. and KUMARASWAMI SASTRIYAR, J., agreeing with SADASIVA AYYAR, J. (SESHAGIRI AYYAR, J., dissenting) (a) that notwithstanding section 211 which prohibited the application of section 7 of the Limitation Act (XV of 1877) to suits under the Estates Land Act, the plaintiff was entitled to the *exemption and extension given by section 7 of the Limitation Act*, and (b) that the suits were therefore within time. Section 211 of the Estates Land Act should not be construed retrospectively so as to destroy or practically destroy *rights* of action existing on the date that Act came into force. Retrospective operation *of statutes* considered. *Ramakrishna Chetty v. Subbaraya Ayyar* (1915) I L R., 38 Mad., 101 and *Gopeshwar Pal v. Jiban Chandra* (1914) I L R., 41 Calc., 1125 followed. *Per* SESHAGIRI AYYAR, J.—As section 211 of the Estates Land Act expressly prohibited the application of section 7 *of the* Limitation Act the suit was barred by the three years' rule of limitation prescribed by the Estates Land Act. It is the rule of limitation that is in force at the time the suit is instituted that governs the action and not the one under which the rights accrued. *Sant Ram v. Kanya Lal* (1912) I L R., 35 All., 227 (P C), followed.

Rajah of Pittapur v. Venkatasubba Rao (1916) I L R., 39 Mad., 645

ESTOPPEL—*See* HINDU LAW 587

———, *doctrine of feeding the, meaning of*.—*See* EXPECTANCIES.

EUROPEAN BRITISH SUBJECT—*Summary trial outside British India by Justice of Peace—Jurisdiction—Criminal Procedure Code (Act V of 1898), sec. 530.]* The orders of the Governor-General in Council regulating the powers of the Justice of Peace beyond the limits of British India, confer no power on a District Magistrate to try offenders summarily under section 260 of the Code of Criminal Procedure (Act V of 1898)

Re Jeremiah ... ... (1916) I L.R., 39 Mad., 94

EVIDENCE *inadmissible, consent or want of objection on accused's part to the reception of*:—*See* (INDIAN) EVIDENCE ACT (I OF 1872), SEC. 33.

———, *hearsay, inadmissibility of*:—See (INDIAN) EVIDENCE ACT (I OF 1872) SEC. 33.

EVIDENCE ACT (INDIAN) (I of 1872), *sec. 33—Court's duty before admitting evidence under—Consent or want of objection on the part of the accused to the reception of inadmissible evidence—Duty of prosecution to prove the case—(Indian) Evidence Act (I of 1872), sec. 458—Hearsay evidence, inadmissibility of.]* Before admitting under section 33 of the Evidence Act,

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a deposition given on previous occasion a Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect; and even consent or want of objection on the part of the accused's pleader to the reception of such evidence will not, in spite of section 58 of the Evidence Act, entitle the Court to admit it under section 33. Hearsay evidence as to the complicity of the accused in the crime charged and evidence as to the commission of other offences by the accused not relevant for the purpose of the trial are inadmissible. Where a Sessions Judge convicted the accused relying mainly upon such inadmissible evidence as above described and did not warn the jury against acting on the same, their Lordships set aside the conviction as illegal. *Per* SESHAGIRI AYYAR, J.—The Evidence Act is not exhaustive of the rules of Evidence.

Re Annavi Muthiriyan . ... (1916) I.L.R., 39 Mad., 449

———, SEC. 58:—*See* (INDIAN) EVIDENCE ACT (I OF 1872), SEC. 33.

———, SEC. 92, CL. (*a*)—*Mistake in a sale-deed to the defendant resisting suit for possession—Specific Relief Act (I of 1877), sec. 31—Plea of mistake without previous rectification of sale-deed, maintainability of.*] The combined effect of section 92, clause (*a*) of (Indian) Evidence Act (I of 1872) and of section 31 of Specific Relief Act (I of 1877) is to entitle either party to a contract whether plaintiff or defendant to protect his right by proving a mistake in a written contract as, e.g., in this case, a mistake in the description of the property sold by giving a wrong survey number to the same. The facts that the party who is obliged to prove the mistake happens to be a defendant in the suit resisting a claim for possession of that property and that he has not previously obtained a rectification of his sale-deed are no bar to the advancement of the plea. *Mahendra Nath Mukherjee* v. *Jogendra Nath Roy Chaudry* (1897) 2 C.W.N., 260, followed. *Mahadeva Ayyar* v. *Gopala Ayyar* (1911) I.L.R., 34 Mad., 51, referred to.

Rangasami v. *Scuri* . .. .. (1916) I.L.R., 39 Mad., 792

———, SS. 123, 124 AND 163 —*See* (INDIAN) EASEMENTS ACT (V OF 1882), SEC. 15.

EXCOMMUNICATION FROM CASTE, *order of, passed by the Raja of Cochin—Communication of, to the* Kariasta *of a temple in British India—Transmission by* Kariasta *to* Pattamalai.—*See* TORTS.

EXECUTION *fixing of six months for, applying for, etc.* —*See* CIVIL RULES OF PRACTICE, R. 161 (*a*)

———, *for sale of mortgaged property, application for* —*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 47, 73 AND 104

———, *partial, on execution application after six months, validity of:*—*See* CIVIL RULES OF PRACTICE, R. 161 (*a*)

———, *personal against the mortgagor, provision for, in a mortgage decree.*—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 47, 73 AND 104

———, *right of District Court to recall a case sent to a subordinate Court for.*—*See* CIVIL RULES OF PRACTICE, R. 161 (*a*)

EXECUTION APPLICATION —*See* (INDIAN) LIMITATION ACT (IX OF 1908), ART. 182.

———, *after six months and partial execution thereon, validity of.*—*See* CIVIL RULES OF PRACTICE, R. 161 (*a*)

EXECUTION OF DECREE, *court-sale in, validity of* —*See* DECREE *against a major, as minor, not a nullity*

EXECUTION SALE *set aside for irregularities of decree-holder—Right of purchaser to return of poundage fees and to interest on purchase money—Right of suit—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, no bar by*] A court-sale was set aside on account of irregularities in its conduct perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of

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the poundage fees not returned to him and interest on the purchase money paid by him *Held* (overruling the objection that remedy for the return of the poundage fees lay only in execution), that a suit was maintainable for the recovery of the same. *Powell v Powell* (1875) 19 Eq., 422, followed The poundage fee is really part of the purchase-money paid *Held* also, that the purchaser was entitled to interest on the purchase-money paid by him *Raghubir Dayal v The Bank of Upper India, Limited* (1882) I.L.R. 5 All., 364, followed.

Parvathi Ammal v Govindasami Pillai (1916) I.L.R., 39 Mad., 803

EXECUTIVE OFFICER, *magistrate demanding security not a 'Court' but an:—* See INDIAN PRESS ACT (I OF 1910), SEC. 3 (1) PRO

EXECUTOR, *action of, without probate* —See HINDU LAW, 325

———, *claims of, against trust estate:*—See HINDU LAW, 365.

———, *mortgage of estate by one, to the other:*—See HINDU LAW, 365.

———, *probate obtained by one:*—See HINDU LAW, 365

———, *suit for account and for scheme against—Right of, as defendant to equities in such suit:*—See HINDU LAW, 365.

———, *trustee of charities under the will* —See HINDU LAW, 365

EXECUTORSHIP, *renunciation of.*—See HINDU LAW, 365.

EX-PARTE DECREE—*Setting aside, application for—Deposit of money into Court—Time for depositing, granted—Extension of time till a certain date—Deposit not made on that date—Dismissal of application on that date, legality of—Jurisdiction of Court—Time granted by Court for performance of any act till a certain date, meaning of*] When time is granted by a Court for the performance of any act till a certain date, it includes that date Where, on an application by a defendant to set aside an ex parte decree in a Small Cause suit, the Court granted time to the applicant till a certain date to deposit the decree amount, but dismissed the same as no deposit was made before the application was taken up for orders on that date *Held*, that the Court had no jurisdiction to pass the order dismissing the application *Dawkins v Wagner* (1832) 3 Dowl., 535, *Knox v Simmonds* (1791) 3 Bro C C, 358 and *Isaacs v Royal Insurance Co* (1870) L R 5 Ex., 296, followed

Perumal Nadan v Sivanamji Nadachi .. (1916) I L R, 39 Mad, 583

EXPECTANCIES—*Contracts for sale of, validity of—Transfer of Property Act (IV of 1882), sec 6—Indian Contract Act (IX of 1872) sec 23—Estate falling into possession—Specific performance, suit for—Maintainability of suit—Rule of English Law—Rule in India before Transfer of Property Act—Doctrine of feeding the estoppel, meaning of*] Contracts for sale of expectancies are void in India under the provisions of section 6 of the Transfer of Property Act and section 23 of the Indian Contract Act, and a suit for the specific performance of such a contract, instituted after the expectancy fell into possession is not maintainable The statute law of India forbids *transfers* of expectancies, and it would be futile to forbid such transfers if contracts to transfer them are to be enforced as soon as the estate falls into possession In England and in India before the Transfer of Property Act a mere chance of succeeding to an estate was a bare possibility incapable of assignment but in England it is settled law that in the case of such expectancies, equity will enforce a contract to convey the estate when it fell in, and a similar rule has been applied in India in cases which were not governed by the Transfer of Property Act Courts are bound to give effect to the plain provisions of the statute law, instead of following a course of English decisions which are based on a course of long established practice rather than on principle "Equitable doctrine of feeding the estoppel" explained *Raja Sahib Prahlad Sen v Baboo Budhu Singh* (1869) 2 B L.R., 111 at p 117, *Mussamut Oodey v Koomer Mussamut* (1870) 13 M I A 585 *Ram Mewan Singh v Pratap Singh* (1875) I L R, 8 Calc, 178, *Gulabai v Balaji Keshav* (1893) I.L.R 17 Bom., 232, *Sumsuddin v Abdul Husain* (1907) I L R, 31 Bom, 165, *Dhoorjeti Fulbavya v. Dhoorjeti Venkanna* (1907) I.L.R, 30 Mad 201, and *Sham Sundar Lal v. Acchan Kunwar* (1899) I.L.R, 21 All, 71 (P C), referred to.

Sri Jagannada Raju v. Sri Raja Prasada Row ... (1916) I L R, 39 Mad., 55

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EXPENSES *incurred in the final decree* :— *See* TRUSTEES OF A TEMPLE.

FATHER'S ESTATE, *possession of, daughter's suit for* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 2, CL. (11); O. XXII, R. 1 5

FATHER'S HEIRS, *right of, to continue suit—Daughter's suit for possession of father's estate—Death of daughter*.—*See* CIVIL PROCEDURE (ACT V OF 1908), SEC. 2, CL. (11), O. XXII, R. 1.

FOOD *not covering* "DRINK" :—*See* MADRAS CITY MUNICIPAL ACT (III OF 1904), BY LAW 169.

FORFEITURE, *relief against* :—*See* LANDLORD AND TENANT.

———— ———— ————:—*See* TENANTS-IN-COMMON.

FORFEITURE CLAUSES.—*See* TENANTS-IN-COMMON.

FOREIGN COURT—*Appearance by the defendant—Protest against jurisdiction—Defence on the merits—To get refund from the creditor's son to whom the suit debt was repaid and to avoid arrest—Voluntary submission to jurisdiction*.] The defendant who was sued in a foreign Court, viz., a Court in the Cochin State, appeared and defended the suit against him on the merits but protested against the jurisdiction of the Court. His reasons for appearing and defending the suit were: (1) that the creditor's son to whom he had repaid the suit debt refused to refund the money unless he defended the suit brought by the father and (2) that if a decree were passed against him, he might be arrested when he went to Cochin on business or to see his relations *Held*, that the defendant must be deemed to have submitted to the jurisdiction of the foreign Court voluntarily notwithstanding his protest against its jurisdiction. *Parry & Co.* v *Appasami Pillai* (1880) I.L.R., 2 Mad., 407 (F.B.), overruled

Rama v *Krishna* ... ... (1916) I.L.R., 39 Mad., 392 (F.B.), 733

FOREIGN DECREE, *execution of, in British India—Competency of British Indian Courts to question the jurisdiction—Appearance to save property from seizure—Denial of jurisdiction and claim—Jurisdiction, submission to, whether voluntary*.] It is competent to the executing Court to refuse execution of a foreign decree sought to be executed in British India under section 44 of the Code of Civil Procedure on the ground that such decree was passed without jurisdiction. Submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign tribunal. *Voinet* v *Barrett* (1885) 55 L.J. Q.B.D., 39, *Guiard* v. *De Clermont and Donner* (1914) 30 T.L.R., 511 and *Bissière and Co.* v. *Brockner and Co.* (1889) 6 T.L.R., 85, followed *Parry & Co* v *Appasami Pillai* (1880) I.L.R., 2 Mad., 407 (F.B.), doubted. *Per* WALLIS, OFFG. C.J.—Whether submission was for the purpose of saving property or voluntary, is a question of fact in each case. *Per* SESHAGIRI AYYAR, J.—The change in the language between section 223 of the Civil Procedure Code (Act XIV of 1882) and *Order XXI, rule 7, of the Code of 1908* does not warrant the conclusion that in regard to decrees obtained within British India the executing Court has no jurisdiction to question the jurisdiction of the Court which passed the decree. The words "as if they have been passed by the Courts in British India," relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court.

Veeraraghava Ayyar v. *Muga Sait* ... ... (1916) I.L.R., 39 Mad., 24

FOREIGN JUDGMENT—*Defence struck out—No decision on the merits—No cause of action*.] Where in a suit in a foreign Court defence was struck out and judgment entered for plaintiff, *Held*, that the judgment is not one decided on the merits and thus not being conclusive could not of itself constitute a cause of action to the suit

Viswanatha Reddi v *Keymer* ... ... (1916) I.L.R., 39 Mad., 95

FOREST ACT (MADRAS) (XXI OF 1882), SS. 6, 10, 16 AND 17—*Notification under section 16—Notice under section 6 a condition precedent—Irregularity due to absence of notice, not cured by knowledge under section 17—Grant of personal inam of lands including poramboke, meaning of*.] A Forest Settlement officer who is constituted a Court for the decision of claims to lands which it is proposed to include in a reserved forest, has, in the absence

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of notice required by section 6 of the Act, no jurisdiction to make any decision affecting the right to those lands. *Nusservanjee Pestonjee v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadur* (1855) 6 M.I.A., 134 and *Sonnby v. London (Ont) Water Commissioners* (1906) A.C., 110, followed. Poramboke in the phrase, grant of "lands besides poramboke," means poramboke or unassessed waste. *Secretary of State for India v. Raghunathathatha Chariar* (1913) 24 M.L.J., 31, followed *Narayanasami Naidu v. Secretary of State for India* (1913) 24 M.L.J., 36, distinguished

Balkrishna Rao v. The Secretary of State for India .. (1916) I.L.R., 39 Mad., 494

GENERALIA SPECIALIBUS NON-DEROGANT (*maxim*), *application of*:—*See* SPECIFIC MOVEABLE PROPERTY, ETC.

GIFT OF LANDS, *by co-parcener, less than his share, validity of*.—*See* HINDU LAW ... 587

—— *to the illegitimate son of an undivided collateral co-parcener, not ancestral property, as between the donee and his son*.—*See* HINDU LAW ... 1029

—— *to wife and children or children alone*.—*See* MALABAR LAW.

GOVERNMENT LANDS *under ryotwari tenure purchased by zamindar*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8

GOVERNMENT OF INDIA ACT OF 1915 (5 & 6 GEO. V, CAP. 61), SEC. 65, 3 AND 4, WILL IV CAP 85, SEC 43 OR 24 AND 25, VICT, CAP 67, SEC 22—*Sections 4 and 22 of the Indian Press Act (I of 1910), whether ultra vires of the Imperial Legislature, of India as contravening*.—*See* INDIAN PRESS ACT (I OF 1910), SS 3 (1), 4 (1), 17, 19, 20 AND 22

GOVERNMENT ORDER.—*See* SECRETARY OF STATE FOR INDIA

——, SS. 106 AND 107.—*See* INDIAN PRESS ACT (I OF 1910), SEC 3 (1), PRO.

——, *under section* 4 (1), *forfeiting security and copies of newspaper, legality of*.—*See* INDIAN PRESS ACT (I OF 1910), SS. 3 (1), 4 (1), 17, 19, 20 AND 22

GOVERNMENTAL OR SOVEREIGN FUNCTION, *nature of*.—*See* TORTS.

GRACE, *days of, for payment of rent*.—*See* LANDLORD AND TENANT.

GUARDIAN ad litem, *submission by, without leave of Court*.—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O XXXII, R 7.

GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 2, 12, 21, 24 AND 25—*Muhammadan Law—Shafi, school of—Guardianship of minor son—Indian Majority Act (IX of 1875)—Habeas Corpus, nature of*.] A father can apply under section 25 of the Guardians and Wards Act (VIII of 1890) for the custody of his minor son though the minor had all along been in the custody of his grandmother but never in the custody of his father *Per* SADASIVA AYYAR, J.—The word "custody" in all the three places where that word occurs in section 25 (1) includes both actual and constructive custody of a minor. Under Muhammadan Law, a minor continues to remain in the custody of his guardian till he attains the age of 18, notwithstanding (that under) the Shafi School to which he is subject, his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15 The word "guardian" in

Ibrahim Nachi v. Ibrahim Sahib ... .. (1916) I.L.R., 39 Mad., 608

——, SS. 17 AND 19—*Guardianship of minor children—Father, marrying a second time—No disability*.] Under section 19 of the Guardians and Wards Act, the Court must be satisfied that the husband or father is unfit to be the guardian of his wife or

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though [illegible] her life.
Er era [illegible] Singaram
Chetti [illegible] *Rama-*
krishna [illegible]

Lakshmamma v. Subrahmanyam ... .. (1916) I.L.R., 39 Mad., 1035

——— *Alienation of a share of a member of a joint Hindu family—No right to alienee for mesne profits from the date of alienation till suit for partition.*] A purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant-in-common with the other members and hence he is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition. *Nanjaya Mudali v. Shanmuga Mudali* (1914) 26 M.L.J., 570, followed. The *obiter dicta* in *Aiyyagiri Venkataramayya v. Aiyyagiri Ramayya* (1902) I.L.R., 25 Mad., 690, *Chinna Pillai v. Kalimuthu Chetti* (1912) I.L.R., 35 Mad., 47 and *Subba Row v. Ananthanarayana Ayyar* (1914) 24 M.L.J., 94, disapproved and not followed.

Maharaja of Bobbili v. Venkataramanjulu Naidu (1916) I.L.R., 39 Mad., 265

——— *Decree against widow for husband's debt—Attachment of property—Previous alienation by widow for no justifiable cause—Attachment and sale thereupon, effective to convey reversionary interest.*] A plaintiff who had obtained a decree against a Hindu widow in respect of a debt due by her late husband attached a certain property as belonging to her husband which she had sold to a stranger several years before the attachment, for no purpose binding on the reversioners: *Held*, that the decree-holder was entitled to attach and bring to sale the reversionary interest in the property, subject to the enjoyment thereof by the alienee during the widow's lifetime.

Chidambaramma v. Hussainamma . ... (1916) I.L.R., 39 Mad., 565

——— *Gift to the illegitimate son of an undivided collateral co-parcener, not ancestral property as between the donee and his son.*] Property given for maintenance to the illegitimate son of an undivided deceased collateral co-parcener is not "ancestral property" of the illegitimate son in which the son of that illegitimate son gets a right by birth. *Nagalinga Pillai v. Rama* [illegible] (1901) I.L.R., 24 Mad., 429 and *Hazarimal Babu v. Abaniuath* (1913) 17 C.L.J., 38 distinguished.

Krishnaswami Naidu v. Seethalakshmi Ammal (1916) I.L.R., 39 Mad., 1029

——— *Illegitimate son of a sudra—By a dancing woman kept in continuous and exclusive concubinage—Right to succeed to joint family property.*] The illegitimate son of a sudra by a dancing woman who was by pr[illegible] a prostitute before she came into his keeping but who was kept by [illegible] continuous and exclusive concubinage thereafter, is entitled to get [illegible] [illegible] share in the joint family property after his father's death [illegible] the connection between his father and mother was not [illegible] adulterous. This right is not subject to a further condition that [illegible] could have taken place between the father and the mother accord[illegible] custom of the caste to which the mother belonged.

[illegible]

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Privy Council on the ground that the will was valid. The plaintiff brought the present suit to recover maintenance from the defendant from 1902 when he ceased to be maintained by his father. The plaintiff did not admit that the defendant was the natural son of the late zamindar or that he and the defendant were members of an undivided family. The defendant contended that a junior member of the family of the holder of an impartible zamindari was not entitled to claim maintenance from the holder, and that the suit was not maintainable by reason of the agreement with plaintiff's father and the will of the late zamindar and on the ground that the plaintiff did not claim any maintenance as a member of the defendant's family. *Held*, that the arrangement made by the late zamindar with the plaintiff's father was not a provision for the maintenance of the latter and all his descendants, and did not operate to bar the plaintiff's claim. A junior member of the family of the holder of an impartible zamindari is entitled to maintenance only on account of his relationship to the holder and not on account of any co-parcenary interest in the property or community of interest therein acquired by birth. *Held* (on the facts of the case), that, as the plaintiff did not advance any claim based on relationship but refused to admit any relationship with the defendant, his claim for maintenance could not be sustained. That, as there was no community of interest in the property, it was not burdened with his claims in the hands of the defendant who was the legatee under the will.

Sri Rajah Rama Row v. Rajah of Pittapur (1916) I.L.R., 39 Mad., 393

——— *Joint family—Partition, suit for, by one member, whether effects separation.*] A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. *Suraj Narain v. Iqbal Narain* (1913) I.L.R., 35 All., 80 at p. 87 (P.C.), followed

Soundararajan v. Arunachalam Chetty (2) ... (1916) I.L.R., 39 Mad., 159

——— *Partition—Marriage of co-parcener—Provision for expenses of Marriage at partition—Expenses incurred subsequent to suit but before decree—Anticipatory provision for future marriage, right for. Decree in partition suit—Gift by co-parcener of lands, less than his share, validity of—Estoppel.*] An unmarried co-parcener is not entitled to have an anticipatory provision made for the expenses of his future marriage at partition. *Srinivasa v. Tiruvengadathiengar* (1915) I.L.R., 38 Mad., 556, dissented from. Where the expenses of marriage of a co-parcener were incurred subsequent to the institution of a suit for partition but prior to the decree of the Court of first instance, *Held*, that the severance of the joint family was effected only by the decree, and that the expenses should be credited to him in the account to be taken in the suit. Where a member of a joint Hindu family made a gift of some immoveable property, which was not unreasonable regard being had to the extent of his share in all the joint family properties, and his undivided son did not impeach the gift during his father's life-time, *Held*, that neither the son nor the grandson could question the validity of the same after the donor's death.

Narayana v. Ramalinga ... . (1916) I.L.R., 39 Mad., 587

——— *Reversioner—Right of presumptive reversionary heir to declaration of his right—Suit against widow in possession of her husband's estate for waste and wrong dealing with property. Failure to prove charges—Right of reversioner to sue for protection of the husband's estate.*] A plaintiff who brought a suit as presumptive reversionary heir against a widow in possession of her husband's estate, in order to protect the property, and made charges against the widow of waste misappropriation and other wrong dealing with the property, none of which charges were established, was held not entitled to a declaration of his right as reversionary heir, even though his title had been disputed, in the suit. It is not legitimate to give such a plaintiff under cover of a prayer for "further relief," and after the substantial heads of his claim have failed, any greater right to obtain such a declaration than he would have had if it had been asked for directly, and unaccompanied by other and unfounded claims. *Jaipal Kunwar v. Indar Bahadur Singh* (1901) I.L.R., 26 All., 238, s.c., L.R., 31 I.A., 67 and *Venkatanarayana Pillai v. Subbammal* (1915) I.L.R., 38 Mad., 406 (P.C.), s.c., L.R., 42 I.A., 125, distinguished.

Janaki Ammal v. Narayanasami Aiyer ... (1916) I.L.R., 39 Mad. (P.C.), 634

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though not binding on the reversioners were binding on her for her life. *Seetamula v Kristamma* (1903) I.L.R., 26 Mad., 143, followed. *Singaram Chetti v. Kalianasundaram Pillai* (1914) M.W.N., 735. referred to. *Ramakrishna v. Tripura Bai* (1909) I L.R., 33 Bom., 88, dissented from
Subamma v. Subrahmanyam ... . (1916) I L.R., 39 Mad., 1035

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. . . .

the connection between his father and mother was not incestuous or adulterous. This right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged.
Soundararajan v. Arunachalam Chetty (1) .. (1916) I. L.R., 39 Mad., 136

——— *Impartible zamindari—Maintenance of junior members—Basis of the right—Co-parcenary right or community of interest by birth not the basis—Relationship to holder of the zamindari necessary—Provision for maintenance—Agreement with junior member, construction of—Adoption by zamindar—Subsequent bequest of zamindari—Suit for maintenance against legatee—Denial of relationship with legatee—Suit, not maintainable*] The plaintiff's father was adopted by the zamindar of Pittapur who died in 1890 leaving a will bequeathing all his properties including the zamindari which is an impartible estate, to the defendant who claimed also to be the natural son of the testator The late zamindar had entered into an agreement with the plaintiff's father in 1882 whereby he agreed to pay him Rs. 1,500 a month and a lump sum of Rs. 6,000 a year. The will confirmed that arrangement. The plaintiff's father sued to recover the zamindari from the defendant denying that the latter was the natural son of the late zamindar and also impugning the validity of the will. The suit was finally dismissed by the

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Privy Council on the ground that the will was valid. The plaintiff brought the present suit to recover maintenance from the defendant from 1902 when he ceased to be maintained by his father. The plaintiff did not admit that the defendant was the natural son of the late zamindar or that he and the defendant were members of an undivided family. The defendant contended that a junior member of the family of the holder of an impartible zamindari was not entitled to claim maintenance from the holder, and that the suit was not maintainable by reason of the agreement with plaintiff's father and the will of the late zamindar and on the ground that the plaintiff did not claim any maintenance as a member of the defendant's family. *Held*, that the arrangement made by the late zamindar with the plaintiff's father was not a provision for the maintenance of the latter and all his descendants, and did not operate to bar the plaintiff's claim. A junior member of the family of the holder of an impartible zamindari is entitled to maintenance only on account of his relationship to the holder and not on account of any co-parcenary interest in the property or community of interest therein acquired by birth. *Held* (on the facts of the case), that, as the plaintiff did not advance any claim based on relationship but refused to admit any relationship with the defendant, his claim for maintenance could not be sustained. That, as there was no community of interest in the property, it was not burdened with his claims in the hands of the defendant who was the legatee under the will.

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Narayana v. Ramalinga ... . (1916) I.L.R., 39 Mad., 587

——— *Reversioner—Right of presumptive reversionary heir to declaration of his right—Suit against widow in possession of her husband's estate for waste and wrong dealing with property Failure to prove charges—Right of reversioner to sue for protection of the husand's estate.*] A plaintiff who brought a suit as presumptive reversionary heir against a widow in possession of her husband's estate, in order to protect the property, and made charges against the widow of waste misappropriation and other wrong dealing with the property, none of which charges were established, was held not entitled to a declaration of his right as reversionary heir, even though his title had been disputed, in the suit It is not legitimate to give such a plaintiff, under cover of a prayer for "further relief," and after the substantial heads of his claim have failed, any greater right to obtain such a declaration than he would have had if it had been asked for directly, and unaccompanied by other and unfounded claims. *Jaipal Kunwar v. Indar Bahadur Singh* (1901) I L R, 26 All, 238, s c, L R, 31 I.A., 67 and *Venkatanarayana Pillai v. Subbammal* (1915) I.L.R, 38 Mad., 406 (P.C); s c, L.R., 42 I.A., 125, distinguished.

Janaki Ammal v. Narayanasami Aiyer ... (1916) I.L.R, 39 Mad. (P.C.), 634

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——— *Stridhanam—Saudayika—Gift of property by a father to his daughter before her marriage—Power of alienation.*] A gift of property by a father to his daughter before her marriage is *saudayika stridhanam* which is at her absolute disposal. *Per* SESHAGIRI AYYAR, J—*Saudayika stridhanam* is gifts from affectionate kindred and includes both *Yautaka* and *Ayautaka* not received from strangers. Hindu Law texts examined. *Ponnusawmy Moodelly* v. *Subbaroya Moodelly* (1859) 6 Selwin's S D.A., Rep. 7, referred to. *Judoo Nath Sircar* v. *Bussunt Coomar Roy Choudhry* (1873) 19 W.R., 264. applied. *Bhau* v. *Raghunath* (1906) I L R., 30 Bom., 229, referred to. *Dantuluri Rayapparaz* v. *Mallapudi Rayudu* (1865) 2 M.H.C.R, 360, distinguished. *Quære*:—Whether immoveable property received from the husband should be excluded from this species of disposable property.

Muthukaruppa Pillai v. *Seethammal* .. .. (1916) I.L.R., 39 Mad., 298

——— *Will—Co-executors—Probate obtained by one executor—Subsequent application by the other co executor for joint probate—Compromise between co-executors—Mortgage of estate by one executor to the other—Renunciation of executorship—Validity of compromise—Action of executor without probate, validity*

130 — *Suit for account and for scheme, against trustee—Right of trustee as defendant to equities in such suit—Decree in favour of trustee as defendant—Civil Procedure Code (Act V of 1908), sec 92.*] It is doubtful if an executor is competent in law to compromise the claims of his co-executor against the testator's estate; but assuming that he has such a power it is essential that the compromise should be entered into *bona fide* and for the benefit of the estate. *Per* WALLIS, C.J—The Probate and Administration Act does not say that section 82 is to apply only to cases of Hindus governed by the Hindu Wills Act, but section 2 provides that chapters II to XIII, which include section 82 are to apply to every Hindu. *Per* SESHAGIRI AYYAR, J—It is not incumbent on an executor of the will of a Hindu to obtain probate before acting as an executor. Section 82 of the Probate and Administration Act is no bar to an executor acting as a representative of a Hindu testator's estate, because a co-executor had alone obtained probate of the will in his name. Section 92 of the said Act should be confined to cases where probate

account, if he was under a liability to account to the trust at the date of
from the taking of
in his favour for the
e, though a suit by

Chidambara Mudaliar v. *Krishnasami Pillai* ... (1916) I L.R, 39 Mad., 365

——— *Will—Revocation of will—Will disposing of property and nominating boy for adoption to be completed later and giving wife power to complete it if he does not do so—Subsequent completion of adoption by testator—Subsequent will making different disposition of*
Later will held in former suit illegal
testator had no power to do—Dep
testator being the sole co-parcener
by which he appointed his wife *S* and his daughter *R* executrices, and in which he nominated as his son, one *V* a son of his daughter, but stated that he had not completed the adoption, and he directed that if he should die before completing it, *S* should after his death perform the necessary ceremonies, and take the grandson in adoption, and the will contained the

and give my properties to that son." The testator completed the adoption of *V* on 9th February 1890. On 21st March 1890 he executed another will

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of adoption. On 4th April 1890 the testator died. The will of 1889 was not admitted to probate, but a grant of probate was made of the will of 1890. V died on 4th June 1891. In 1894 the appellant as reversionary heir of V obtained a decree declaring the will of 1890 void and inoperative according to Hindu law as disposing of ancestral property over which the testator ha·
respondent
In a suit b·
tion was illegal and invalid, *Held*, that the document executed by the testator in 1889 was a will and not a mere non-testamentary authority to adopt. It contained the appointment of executors, and was executed by a testator who at its date had power to dispose of the property of which he purported to dispose. *Held* also, that after the completion of V's adoption and the consequent admission into the joint family of another co-parcener, the testator had no power to dispose of the property which on his death was ancestral property, and to that extent the will of 1889 became ineffectual But there was no such inconsistency between the two wills as that the provisions of the earlier will could not stand with the existence of the later will The will of 1890 no doubt prevailed over the will of 1889, but the contingent power to adopt was unaffected by anything in the later will. *Held* further, that the question whether the disposition of the property in the later will revoked the provisions as to its disposal in the earlier will, turned upon the application of the doctrine of dependant relative revocation which was really a question of intention, and that under the circumstances an alternative inconsistent disposition which was not valid or effectual in itself did not revoke an earlier disposition of the same property *Alexander* v. *Kirkpatrick* (1874) L R., 2 H.L. Sc & Div., 397, followed in principle.

Venkatanarayna Pillai v *Subbammal* ... (1916) I.L R, 39 Mad. (P.C.), 107

HINDU WIDOW—*Maintenance secured by deed*—*Subsequent unchastity*—*Living chaste at the time of suit, effect of*] Where in a suit by a Hindu widow against her deceased husband's brother for maintenance at the rate fixed by agreement, it was found that the plaintiff had since lived an immoral life but reformed her ways at the time of the suit, *Held* that she lost her right to the rate fixed in the deed but was entitled to a starving allowance. Texts and case law reviewed.

Sathyabhama v. *Kesavacharya* . ... .. (1916) I.L R, 39 Mad., 658

HUNDI, *payable to bearer, delivery of, effect of*:—*See* NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 30, 47, 59, 74 and 94.

ILLEGITIMATE SON *of a sudra by a dancing woman kept in continuous concubinage*:—*See* HINDU LAW 136

———— *of an undivided collateral co parcener, gift to, not ancestral property as between the donee and his son*:—*See* HINDU LAW... 1029

IMPARTIBLE ZAMINDARI:—*See* HINDU LAW 398

INAM, *grant of*:—*See* CIVIL COURTS

———, *personal, grant of, of lands, including poramboke, meaning of*:—*See* FOREST ACT (MADRAS) (XXI OF 1882), ss. 6, 10, 16 AND 17.

———, *service*:—*See* PROPRIETARY ESTATES VILLAGE SERVICE (MADRAS) ACT (II OF 1894), ss. 5 AND 10, CL. (2).

INCOME, *meaning of*:—*See* INCOME-TAX ACT (II OF 1886), PART IV, SCH. II, SEC. 3, CL. (5)

INCOME-TAX ACT (II OF 1886), PART IV, SCH II, SEC. 3, CL. (5)—*Annuity in Mysore Province*—*Annuitant resident in British India*—*Remittance by agent to her in British India*—"*Income*," *meaning of*—*Income, if taxable in British India*] Where a person was enjoying an annuity in Mysore Province, instalments of which were remitted by her agent to her while she was

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resident in British India, the remittances were "Income" under Part IV of Schedule II of the Income-Tax Act, and these sims were "received in British India" within the definition contained in section 3, clause (5), of the Act and therefore taxable.

Narasammal v. The Secretary of State for India ... (1916) I L.R., 39 Mad., 885

INJUNCTION, *disobedience to, no offence under Indian Penal Code* —See (INDIAN) PENAL CODE (ACT XLV OF 1860), SEC. 188.

—— ——, *interlocutory, disobedience of*:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLIII, R. 1 (r) AND O. XXXIX, R. 2, CL. (3).

INTERNATIONAL LAW:—See JURISDICTION.

INTERPRETATION, *principle of*— (INDIAN) LIMITATION ACT (IX OF 1908), ART. 182

INSOLVENCY, *proceedings in—Application to a wrong Court—Limitation Act (IX of 1908) sec. 14, inapplicability of, to insolvency proceedings—Appeal, notice of, only to interested parties*] Section 14 of the Limitation Act does not apply to proceedings under the Provincial Insolvency Act. Hence an application filed in a wrong Court to declare a debtor an insolvent and re-presented to a right Court can be said to be presented only on the date of its re-presentation and if on such date of its re-presentation the application is not maintainable for any reason such as that the act of fraudulent preference, as in this case, having occurred more than three months before the date of re-presentation it is liable to be rejected. In an appeal by a creditor in insolvency proceedings it is sufficient if notice is given of the appeal only to the parties directly affected by the order of the lower Court, and not to all creditors who may have any remote or possible interest in the result of the appeal.

Tiasi Deva Rao v. Parameshwaraya ... . (1916) I L.R., 39 Mad., 74

JOINT BOND, *a, executed as part of a compromise, liability of the other party*:— See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 462

JOINT DEBTORS, *suit for contribution between*:—See LIMITATION.

JOINT FAMILY.—See HINDU LAW 159

—— —— *property, right to succeed to*—See HINDU LAW 138

JOINT JUDGMENT DEBTORS—*Release of some—Liability of others—English law—Indian Contract Act (IX of 1872), sec. 44—Rule of justice, equity and good conscience—Rule of English law, applicability of*] A release by a decree-holder of some of the joint judgment-debtors from liability under the decree, does not operate as a release of the other judgment-debtors from liability under the decree. The rule of English law should not be applied in India, as it is based on the substantive rule applicable to contractual joint debtors, which is different under section 44 of the Indian Contract Act, and is not in consonance with justice, equity and good conscience. *Quære*. Whether the English law should be applied in cases arising within the original jurisdiction of the High Courts. *Chinnamannar and Gurusami v. Sadasiva* (1882) I.L.R., 5 Mad., 357, referred to.

Moolchand v. Alwar Chetty ... ... (1916) I.L.R., 39 Mad., 548

JOINT PROPERTY—*Co-owners—Purchase of an undivided moiety—Occupation of the other moiety in virtue of a lease deed—Subsequent holding over—Limitation Act (IX of 1908), arts. 110, 115 and 120—Article applicable.*] Articles 110 and 115 of the Limitation Act presuppose the existence of a contract, express or implied, where there is no such contract or any relationship of landlord and tenant subsisting between the parties or no holding over as tenant, but when the relationship is referable to rights as co-owners, a suit for recovery of the moiety of a house and rent for a period of six years is governed by article 120 of the Limitation Act *Robert Watson &* 790, applied *Quære*:— ld be kept up after the *Ramiah v. Gundala*

Madar v. Kadar Moideen .. .. (1916) I L.R., 39 Mad., 54

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JUDGMENT :—*See* LETTERS PATENT (MADRAS), CL. 15.

JUDGMENT DEBT, *payment of a portion of, into Court by persons other than the applicant—No right to take credit for*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 89 (b).

"JUDICIAL ACT," *what is*:—*See* INDIAN PRESS ACT (I OF 1910), SEC. 3 (1), PROVISO.

JURISDICTION :—*See* COURT FEES ACT (VII OF 1870), SCH. II, ART. 17.

———— *See* (MADRAS) ESTATES LAND ACT (I OF 1908), SS. 189, ETC.

———— *See* EUROPEAN BRITISH SUBJECT.

———— *See* PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC. 19, CL. (s).

———— *Ruling Prince or Chief—Consent of Local Government—Submission to jurisdiction—Waiver—International law—Civil Procedure Code (Act V of 1908), sec. 86, construction of.*] Where His Highness Raja of Cochin was impleaded as a defendant in a suit in the capacity of a trustee of a temple, without the consent of the Local Government under section 86 of the Code of Civil Procedure (Act V of 1908) *Held*, that the suit was not maintainable as against the Raja of Cochin in the absence of consent of the Local Government under section 86 of the Code of Civil Procedure. *Per* OLDFIELD, J.—The recognition of cases of waiver, as excepted from the ordinary provision of International Law as understood in England, cannot be imported into the clear language of the Indian Code. *Chandulal* v. *Awad bin Umar Sultan* (1897) I.L.R., 21 Bom., 351, dissented from. *Per* SADASIVA AYYAR, J.—Objection to jurisdiction is enough to show that there was no voluntary submission by the defendant to the jurisdiction of the Court. *Parry & Co.* v. *Appasami Pillai* (1881) I.L.R., 2 Mad. 407 (F.B.), approved. *Veeraraghava Iyer* v. *Muga Sait* (1916) I.L.R., 39 Mad., 24, referred to.

Narayana Moothad v. *The Cochin Sircar* ... .. (1916) I.L.R., 39 Mad., 661

———— *of a foreign Court, Competency of British Indian Courts to question*.—*See* FOREIGN DECREE, *execution of, etc.*

———— *of Civil Courts*:—*See* MADRAS ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SCH. 8.

———— *of Court*:—*See Ex parte* DECREE.

———— *of High Court*:—*See* INDIAN PRESS ACT (I OF 1910), SS. 3 (1), 4 (1), 17, 19, 20 and 22.

———— *of Subordinate Court*:—*See* INDIAN CONTRACT ACT (IX OF 1872), SS. 69 AND 70.

———— *of Subordinate Courts to take proceedings under section 14 for all cases coming under section 13, clause (6), not* ejusdum generis.—*See* LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 14.

————, *ouster of*.—*See* CIVIL COURTS.

———— *protest against, appearance by the defendant under*:—*See* FOREIGN COURT.

————, *submission to, whether voluntary*.—*See* FOREIGN DECREE, *execution of, etc.*

————, *voluntary submission to*.—*See* FOREIGN COURT.

JURISDICTION AND CLAIM, *denial of*:—*See* FOREIGN DECREE, *execution of, etc.*

JUSTICE OF PEACE, *summary trial outside British India by*:—*See* EUROPEAN BRITISH SUBJECT.

JUSTICE, EQUITY AND GOOD CONSCIENCE, *rule of—Rule of English law, applicability of*:—*See* JOINT JUDGMENT-DEBTORS.

JUSTIFICATION:—*See* TORTS.

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———— cl. 15—"*Judgment*," *order of a single Judge rejecting Provincial Small Cause Courts Act (IX of 1887), sec 25, a revision petition under—Appealability.*] The order of a single Judge of the High Court rejecting a petition to send for the records and to revise the judgment of the lower Court exercising Small Cause Court jurisdiction is a "judgment" within the meaning of clause 15 of the Letters Patent and is therefore appealable; it is immaterial whether before such refusal the records were called for or notice issued to the other side. *Chappan* v. *Moidin Kutti* (1899) I L R, 22 Mad., 68 (F.B.) and *Taljaram Row* v. *Alagappa Chettiar* (1912) I L.R, 35 Mad., 1 (F B.), followed *Venkatarama Ayyar* v. *Malalai Ammal* (1900) I L R, 23 Mad., 169 and *Puthukudi Abdu* v. *Pavikka Kunhikutti* (1904) I L R, 27 Mad, 340, overruled In matters of discretion such as this, the Court will not ordinarily interfere on appeal though it has jurisdiction to do so *Golding Wharton Salt Works Company* (1876) 1 Q B D, 374, followed.

Srinivasa Iyengar v. *Ramaswami Chettiar* ... (1916) I.L R, 39 Mad, 235

LIMITATION:—*See* CONTRACT.

————*See* LIMITATION ACT (IX OF 1908).

————*See* MADRAS LAND ENCROACHMENT ACT (III OF 1905), SS. 4, 5, 6, 7 AND 14.

———— *Adverse possession—Claim by person to lands notified by Government as reserved forest lands under Madras Forest Act (Madras Act V of 1882)—Onus of proof—Islands formed in bed of sea at mouth of tidal navigable river—Right of the Crown to such islands—Limitation Act (XV of 1877), arts. 144 and 149—Right of appeal to High Court from decision of District Court under Madras Forest Act—Right under general provisions as to appeals in Civil Procedure Code.*] In this appeal the question for determination was whether the Secretary of State in Council (appellant) was entitled to

ross n of possession for a certain requisite period lies on the person assert-

the period of 12 years however being extended to 60 years by article 149; and the onus of establishing possession for the required period is upon the claimants. *Radha Gobind Roy* v. *Inglish* (1880) 7 C L.R., 364, followed. *Secretary of State for India* v. *Vira Rayan* (1885) I L.R., 9 Mad, 175, distinguished. In this case, *Held* (reversing the decision of the High Court), that on the evidence the claimants had not proved adverse possession for a period sufficient to establish a right against the Crown. Though an appeal from the District Judge to the High Court is not provided for in the Madras

of ... *Kamaraju* v. *Secretary of State for India* (1888) I L R, 11 Mad, 309, approved. *Rangoon Botatung Company* v *Collector of Rangoon* (1912) I L.R., 40 Calc., 21 (P C.); s c, L R., 39 I A, 197, distinguished

Secretary of State for India v. *Chelikani Rama Rao* ...
(1916) I.L R, 39 Mad. (P.C.), 617

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———— *Application against the legal representatives of receiver:*—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XL, R. 4.

————, *application for rateable distribution by holder of a mortgage decree*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS 47, 73 AND 104.

———— *from the expiry of time fixed*:—*See* LIMITATION ACT (IX OF 1908), ART 80.

———— *Suit for contribution between joint debtors—Exoneration of defendant by the decree on the ground of limitation—Plaintiff paying the whole decree—Cause of action for contribution only after payment*] The plaintiff and the defendant having each borrowed a certain sum of money from a stranger executed a joint promissory note in 1903 for the total amount in favour of the stranger After receiving some amounts from both the promisors, the promisee sued them both in 1911 but the decree was for the balance due, only against the present plaintiff, the present defendant being exonerated on his plea of limitation. After paying the decree amount in March 1912 the plaintiff immediately sued the defendant for contribution: *Held*: (1) that the right to sue for contribution arose only on plaintiff's payment, (2) that the defendant was liable to contribute in spite of the fact that he was exonerated under the previous decree on the ground of limitation and (3) that the suit was not barred by limitation, the cause of action having arisen only on the date of plaintiff's payment *Gardner* v. *Brookes* (1897) 2 Ir. R, 6 and *Woolmersharsen* v *Gullick* (1893) 2 Ch D., 514, followed The liability to contribute is based on an equity arising out of the co debtor's payment and it has no reference to the original liability to the common promisee. The *obiter dictum* in page 311, *Subramania Ayyar* v. *Gopala Aiyar* (1910) I L R, 33 Mad, 308, not followed.

Abraham Servai v. *Raphial Muthirian* .. ... (1916) I.L.R., 39 Mad., 288

———— *Suit for specific performance—Rule of English law—Rule before the Transfer of Property Act (IV of 1882)*:—*See* EXPECTANCIES.

LIMITATION ACT (XV OF 1877), SEC. 7 —*See* LIMITATION.

———— **(IX OF 1908)**, ARTS 11 AND 13—*Civil Procedure Code (Act V of 1908), O XXI, r 63—Claim petition filed on the original side of the High Court—Claim allowed—Appeal under the Letters Patent, if competent—Order confirming original order—Suit under Order XXI, rule 63, after one year from date of original order but within one year from order on appeal—Starting point of limitation.*] A claim petition was filed by the second defendant objecting to the attachment of certain properties as belonging to the first defendant in execution of a decree passed by the High Court on its original side. The petition was allowed in favour of the claimant by an order passed by a single Judge of the High Court on its original side. The plaintiff, who was the decree-holder, filed an appeal against the order to the High Court under the Letters Patent and the original order was confirmed on appeal. The plaintiff brought a suit under Order XXI, rule 63 of the Code of Civil Procedure (Act V of 1908) to establish his right to attach the property, more than one year from the date of the original order but within one year from the date of the order passed on appeal: *Held*, that article 11 and not article 13 of the Limitation Act (IX of 1908) applied to the case but the suit was not barred, as the starting point of limitation under article 11 was the date of the order passed on appeal. The word "order" in article 11 of the Limitation Act should be construed as meaning the only subsisting order in the case, which is the appellate order (when there has been an appeal), in accordance with recognized principles of jurisprudence. An appeal lies under the Letters Patent against an order of a single Judge of the High Court on its original side, passed on a claim petition filed therein.

Venugopal Mudali v. *Venkatasubbiah Chetty* ... (1916) I L.R., 39 Mad., 1186

————, ART. 12, *applicability of*:—*See* DECREE *against a major as minor.*

————, SEC. 14. *See* LIMITATION ACT (IX OF 1908), ARTS 62 AND 120.

————, ARTS. 31, 49 AND 115:—*See* SPECIFIC MOVEABLE PROPERTY.

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——————, ARTS. 59 AND 60—*Loan or deposit—Money left with a trader, not being a banker, if loan or deposit—Deposit, in article 60, meaning of.*] Under article 60 of the (Indian) Limitation Act (IX of 1908), money left in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee is a banker Article 60 and not article 59 of the (Indian) *Limitation* Act (IX of 1908) applies to a suit to recover money so deposited, even though it is payable on demand The word "deposit" in article 60 is used in a non-legal sense. *Official Assignee of Madras* v. *Smith* (1909) I.L.R., 32 Mad., 68, *Perundevitayar Ammal* v. *Namalvar Chetti* (1895) I.L.R., 18 Mad., 390 and *Ishur Chander Bhaduri* v *Jibun Kumari Bibi* (1889) I.L.R., 16 Calc., 25, followed. *Dharam Das* v *Ganga Devi* (1907) I.L.R., 29 All., 773 and *Ichha Dhanji* v *Natha* (1889) I.L.R., 13 Bom., 338, dissented from. *Sinclair* v *Brougham* (*Birkbeck Bank Case*) (1914) A C, 398, referred to.

Subrahmaniam Chettiar v. *Kadiresan Shettiar* ... (1916) I.L.R., 39 Mad., 1081

——————, ARTS. 62 AND 120—*Suit for money on the ground of wrongful rateable distribution, governed by article 62 and not by article 120 of the Limitation Act—Limitation Act, sec. 14—Time taken to file and to prosecute a revision petition against order of wrongful distribution, not to be deducted under section 14.*] A suit for money under section 73, clause (2), Civil Procedure Code, on the ground that the plaintiff and not the defendant was entitled to receive the same in proceedings in execution of a decree for rateable distribution is governed by article 62 and not by article 120 of the Limitation Act (IX of 1908), the cause of action arising on the date of wrongful payment to the defendant. In computing the period of limitation for the filing of such a suit the plaintiff is not entitled to deduct under section 14 of the Limitation Act the period of time taken by him to file a revision petition in the High Court or the time during which the plaintiff was prosecuting the revision petition against the order of wrongful distribution *Vishnu Bhikaji Phadke* v *Achut Jagannath Ghate* (1891) I.L.R. 15 Bom., 438, followed *Ramaswamy Chetty* v. *Harikrishna Chettiar* (1911) 21 M.L.J., 705, not followed.

Baijnath Lala v *Ramadoss* ... . (1916) I.L.R., 39 Mad., 62

——————, ART 80—*Promissory note payable on demand—Agreement fixing time for payment—Suit, by payee—Limitation, from the expiry of the period fixed.*] Article 80 of the Limitation Act is the article applicable to a suit by the payee on a promissory note payable on demand but accompanied by an agreement fixing a period for payment and time begins to run from the expiry of the period fixed in the accompanying agreement. *Simon* v *Hakim Mahomed Sheriff* (1886) I.L.R., 10 Mad., 368 and *Somasundaram Chettiyar* v. *Narasimha Chariar* (1906) I.L.R., 29 Mad., 212, overruled

Annamalai Chetty v. *Velayuda Nadar* ... ... (1916) I.L.R., 39 Mad., 129

——————, ART 89—*Agent liability of, to principal, suit on—Limitation—Agency, termination of—Indian Contract Act (IX of 1872).*] Money is moveable property within the meaning of article 89 of the Limitation Act. *Ashgar Ali Khan* v *Kurshed Ali Khan* (1902) I.L.R., 24 All., 27 (P C), followed Article 89 applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run when the account is, during the continuance of the agency, demanded and refused, or, when no such demand is made when the agency terminates. An agency is determined when the agent ceases to represent the principal though his liability in respect of acts done by him as agent may continue. *Babu Ram* v. *Ram Dayal* (1890) I.L.R., 12 All., 541 and *Fink* v. *Buldeo Das* (1890) I.L.R., 26 Calc., 715, dissented from *Jogesh Chandra alias Dhala Ghose* v. *Benode Lal Roy* (1908) 14 C W N., 122, not followed.

Venkatachalam v. *Narayanan* .. (1916) I.L.R., 39 Mad., 376

——————, ART. 91 OR 124, *applicability of:—*

See TRUSTEES OF A TEMPLE.

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——————, ARTS 110, 115 AND 130.—See JOINT PROPERTY.

——————, ART. 120:—See HINDU LAW 865

——————, ARTS 132 AND 75—*Mortgage bond—Interest payable annually—Principal payable on a future date—Principal and interest payable immediately on default—Option to mortgagee to enforce payment—Suit after twelve years from default, if barred—Gift by a Hindu widow of a mortgage bond due to her husband—Gift, if valid and to what extent—Suit by widow, competency of transferee to continue—Decree, nature of.*] Suits for money due on hypothecation bonds, though containing stipulations for payment in instalments, are governed by article 132 and not by article 75 of the (Indian) Limitation Act (IX of 1908), and there is no warrant for importing into the former the words of the latter article. A hypothecatee is not bound to take advantage of a clause in his bond, which, in case of default in payments of interest, enables him (*a*) to demand the principal before its due date and (*b*) also claim a higher rate of interest from the date of default. Hence a suit restricted to a claim to recover the principal and interest at the original rate, brought within twelve years from the date originally fixed for payment of the principal though beyond twelve years from the date of first default in respect of interest, is not barred by limitation. *Nettakaruppa Goundan* v. *Kumarasami Goundan* (1889) I L R., 22 Mad, 20, *Astley* v *Earl of Essex* (1874). 18 [illegible] *Knotts* (1876) 5 Ch. D., 175, [illegible] *agavathar* (1897) I.L R. 20 [illegible] widow of a mortgage bond [illegible] her husband, is valid to the [illegible] the date of the gift, and the transferee is competent after her death to prefer a second appeal in a suit filed by her on the bond and obtain a decree for recovery of interest only due thereon

Narna v. *Ammani Amma* ... ... (1916) I L.R., 39 Mad, 981

——————, ARTS. 181, 182 AND 183 —See MORTGAGE-DECREE.

——————, ART. 182—*Interpretation, principle of—Execution application—Article 182, clause (6)—Notice, issue of, whether, gives a fresh starting point.*] Article 182 of the Limitation Act should receive a fair and liberal but not too technical a construction, so as to enable the decree-holder to obtain the fruits of his decree The issue of notice referred to in clause (6) of article 182 of the Act need not be in respect of an application made in accordance with law. The words "in accordance with law" found in clause (5) should not be introduced into clause (6) when the legislature has not thought fit to do so *Jamna Dut* v. *Bishnath Singh* (1909) 6 A L.J., 944 and *Deo Narain Singh* v. *Sri Bhagwat Naik* (1911) 10 I.C, 411, followed. A decision, especially on procedure, cannot be treated as *res judicata* when that procedure itself is changed by the statute law.

Varadaraja Mudali v. *Murugesam Pillai* ... .. (1916) I.L.R, 39 Mad., 923

——————, SCH. I, ART 182—*Application for execution of decree to Court which passed the decree—Application made after transfer of* [illegible] *t," meaning of—Civil* [illegible] *-Civil Procedure Code* [illegible] their Lordships of the [illegible] High Court) that an [illegible] made to the "proper [illegible] le I of the Limitation [illegible] running, and that the [illegible] *Maharajah of Bobbili* v. *Narasaraju Peda Bahara Simhulu Bahadur Garu* (1912) I.L R, 37 Mad., 231, upheld.

Maharajah of Bobbili v. *Narasaraju Bahadur* .. (1916) I L R, 39 Mad. (P C.), 640

——————, SCH. II, ARTS. 134 AND 144:—See ADVERSE POSSESSION.

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———, ss. 5, 12 and 29:—See Provincial Insolvency Act (III of 1907), sec 46, cl. (3).

———, sec. 14:—See Limitation Act (IX of 1908), arts. 62 and 120.

———, sec 14, inapplicability of, to insolvency proceedings:—See Insolvency, proceedings in.

———, sec. 14—Withdrawal of suit—Fresh suit, filing of, whether saved by] Section 14 of the (Indian) Limitation Act (IX of 1908) applies only to cases where a Court itself decides that it is unable to entertain a suit for want of jurisdiction or other cause of a like nature and has no application to a case where the plaintiff himself withdraws his suit on discovery of a mere technical defect which would involve a failure. Vinzplal v. Shomeshanar (1905) I L R, 29 Bom, 219 and Upendra Nath Nag Choudhury v. Surya Kanta Ray Choudhury (1913) 20 I C, 205, followed

Arunachellam Chettiar v. Lakshmana Ayyar ... (1916) I L R., 39 Mad, 936

LOAN OR DEPOSIT, *money left with a trader not being a banker*—See (Indian) Limitation Act (IX of 1908), arts 59 and 60.

LOCAL BOARDS ACT (MADRAS) (V OF 1884) sec 73—*Mortgagee with possession, whether intermediate holder—Its right to recover rent*] A mortgagee with possession is an intermediate tenure-holder within the meaning of section 73 of the Local Boards Act (V of 1884) and is entitled to recover rent by summary process. The tenant's liability to pay him is not abrogated by a contract to which he was not a party.

Jagannadhulu v. Manager of Kandigam Estate ... (1916) I L R., 39 Mad, 269

MADRAS CITY MUNICIPAL ACT (III OF 1904), by law 169—*Exposing for sale unwholesome drink (aerated waters)—"Food" in by-law not covering "drink"*] The word "food" in by-law 169 framed under the Madras City Municipal Act (III of 1904) which prohibits the exposing or keeping for sale any article intended for human food which is unwholesome or unfit for human consumption does not include drinks such as aerated waters.

The Crown Prosecutor v. Ganapathi Iyer .. (1916) I L.R , 39 Mad., 302

MADRAS CITY POLICE ACT (III OF 1888), sec 75—"*Place of public resort*," *meaning of—Madras harbour, if, a place of public resort—Disorderly behaviour in harbour premises if, an offence under section 75—"Public place," meaning of—Right of public to go if necessary—Madras Port Trust Act (II of 1905), by law 22, meaning of*] The Madras harbour is a place of public resort within the terms of section 75 of the Madras City Police Act. Though the by laws passed under the Port Trust Act provide for the prosecution as trespassers of persons who enter the harbour premises without having business there or with the ships lying in the harbour, yet the by-laws were not intended to exclude respectable members of the public who have been freely allowed to enter the harbour premises. A legal right of access by the public is not necessary to constitute a public place. A public place is one where the public go, no matter whether they have a right to go or not. *The Queen v. Wellard* (1884) 14 Q B.D., 63, followed *Kiston v. Ashe* (1899) 1 Q B , 245, referred to.

The Crown Prosecutor v. Govindarajulu ... .. (1916) I.L.R., 39 Mad., 886

MAGISTRATE *a village, information to*.—See Criminal Procedure Code (Act V of 1898), sec. 250.

———, *demand of security by, after dispensing with security, legality of*:—See Indian Press Act (I of 1910), sec. 3 (1), pro

———, *demanding security not a "Court", but an executive officer*—See Indian Press Act (I of 1910), sec 3 (1), proviso.

———, *demand of security by, under proviso to section 3 (1), legality of*:—See Indian Press Act (I of 1910), ss 3 (1), 4 (1), 17, 19, 20 and 24

MAINTENANCE:—See Criminal Procedure Code (Act V of 1898), sec. 488.

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————, *child entitled to, from its mother's tavazhi but not from father.*—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 488.

————, *of members other than the senior male in a tarwad:*—*See* MALABAR LAW.

————, *of junior members:*—*See* HINDU LAW 396

————, *provisions for:*—*See* HINDU LAW 396

————, *suit for, against legatee*:—*See* HINDU LAW 396

MAISTRY OR LABOURER, *breach of contract by—Prosecution of maistry:*—*See* MADRAS PLANTERS LABOUR ACT (I OF 1903), SS. 24 AND 35.

MAJORITY ACT (INDIAN) (X OF 1875):—*See* GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 2, ETC.

MALABAR LAW—*Gift to wife and children or children alone—Presumption—Incidents of tarwad property—Right of management in the senior male—Maintenance of other members—Right to partition—Alienation of member's share—Its attachment and sale in execution.*] When properties are given by a person to his wife and children or children alone following the Marumakkattayam law the presumption is that the donees take the property with the incidents of tarwad property and the right of management of the properties forming the subject of the gift is vested in the senior male member amongst the donees. Persons subsequently born into the tavazhi are entitled to be maintained but not to claim partition. Any one member of a tarwad or a tavazhi cannot alienate his share nor can it be attached and sold in execution of a personal decree against any of the members. *Per* SRINIVASA AYYANGAR, J.—It is not the giving of the properties by a person to his wife and children that constitutes the tarwad, but if properties are given to a wife and children following the Marumakkattayam law, they as tavazhi hold those properties with the incidents of tarwad property and the right of management of the properties is vested in the senior male member of the tavazhi. *Kunhacha Umma* v. *Kutti Mammi Hajee* (1893) I L.R., 16 Mad., 201 (F.B.), followed.

Chakkra Kannan v. *Kunhi Pokker* ... ... (1916) I.L.R., 39 Mad., 317

MALABAR TARWAD—Karnavan, *becoming a stani—Succeeding* karnavan *incapable of business management—Karar vesting management in stani—Renewal of an otti deed by* karnavan, *validity of.*] *Per* SESHAGIRI AYYAR, J. (NAPIER, J., *dubitante*):—An arrangement among the members of a Malabar tarwad by which a previous *karnavan* who had become a *stani* was given certain specific powers of management in respect of the tarwad, without any express power to obtain renewals of mortgages in favour of the tarwad, does not deprive the actual *karnavan*, however incapable he may be, of the power of renewing usufructuary mortgages in favour of the tarwad. The renewal being binding on the members of the tarwad, they cannot set up adverse possession but must submit to a redemption by the mortgagor. The relation to the tarwad of a member who had become a *stani* discussed. *Chappan Nayar* v. *Assen Kutti* (1889) I.L.R., 12 Mad., 219, doubted.

Krishnan Kidavu v. *Raman* .. .. (1916) I.L.R., 39 Mad., 918

MALICE, *absence of:*—*See* SECRETARY OF STATE IN COUNCIL.

MALICIOUS PROCURING OF AN ORDER *for attachment before judgment—No right of suit for damages therefor.*—*See* ATTACHMENT BEFORE JUDGMENT.

MARRIAGE *of coparcener:*—*See* HINDU LAW 587

————, *future, anticipatory provision for, right for:*—*See* HINDU LAW ... 587

————, *second, of a father of minor children, no disability*:—*See* GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 17 AND 19.

MATHIRI KASUVU AND SADALWAR, *not illegal cesses under section* 143, (*Madras*) *Estates Land Act* (I *of* 1908) —*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 13, CL. (3).

MESNE PROFITS, *claim for, by plaintiff from date of deposit, if sustainable:*—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 83.

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———, *no right to alience for, from the date of alienation till suit for partition* :—*See* HINDU LAW. 21

MINING LEASE, *covenants in a, exception to rule—English and American laws, rules of* :—*See* TENANTS-IN-COMMON.

MINOR, *compromise of suit on behalf of, made without obtaining leave of the Court* :—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 462.

———, *guardian of, promissory note by, not signing as such, whether binding on minor's estate* :—*See* PROMISSORY NOTE *by guardian of minor*.

MINOR CHILDREN, *guardianship of* —*See* GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 17 AND 19.

MINORS, *parties to arbitration* .—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXII, R. 7.

MISTAKE IN SALE-DEED, *etc* :—*See* INDIAN EVIDENCE ACT (I OF 1872), SEC. 92, CL. (a)

———, *proofs of, without previous ratification of sale-deed, maintainability of* :—*See* INDIAN EVIDENCE ACT (I OF 1872), SEC. 92, CL. (a)

MORTGAGE—*anomalous* :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58, 60 AND 98.

——— *by two persons of two properties for a single debt—Payment by one his portion—Suit against other for the balance—Transfer of Property Act (IV of 1882), sec. 67.*] There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of equity of redemption the mortgagee is bound to distribute his debt rateably on the mortgaged properties *Krishna Ayyar v Muthukumarasawmiya Pillai* (1906) I.L.R., 29 Mad., 217, followed Where therefore the *plaintiff sued the defendant—one of the mortgagors, for the recovery of the* balance of mortgage money due under a deed of mortgage, without joining the other mortgagor, *Held*, that the plaintiff was entitled to a decree for a sale of the plaint-mentioned properties for the whole of the balance due on the mortgage.

Venkata Subba Reddi v Bagiammal . (1916) I.L.R., 38 Mad., 419

——— *Decree of Court splitting up mortgagee's rights—Transfer of Property Act (IV of 1882), sec. 67, cl (d), analogy of.*] The principle of the rule embodied in section 67, clause (d) of the Transfer of Property Act enabling one of several mortgagees to enforce by suit the payment of his portion of the mortgage money, when the mortgagees sever their interests with the consent of the mortgagor, is applicable to a case where the severance is effected by a decree of Court binding on the mortgagor.

Vijayabushanammal v Ecalappa Mudaliar .. . (1916) I.L.R., 39 Mad., 17

——— *extinguishment of* .—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 60 (c).

———, *possessory, for one year with covenant to treat it as sale, in default of payment—No right to redeem after one year* —*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58, 60 AND 98

——— *properties advertised for sale by the official receiver as subject to* :—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22

——— *simple* :—*See* ADVERSE POSSESSION.

MORTGAGE OF IMMOVEABLE PROPERTY, *directors lending on unauthorized securities, such as, not ultra vires of the bank* :—*See* PRESIDENCY BANKS ACT (XI OF 1876), SS. 36 AND 37.

MORTGAGE-BOND, *writer of a, if, can be treated as an attestor* :—*See* HINDU LAW 1039

——— *See* (INDIAN) LIMITATION ACT (IX OF 1908), ARTS 132 AND 75.

——— *due to husband, gift of, by a Hindu widow, validity of, extent of* :—*See* (INDIAN) LIMITATION ACT (IX OF 1908), ARTS. 132 AND 75.

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MORTGAGE DECREE:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 73 AND 104.

sale was passed in a mortgage suit on the 7th October 1901, and an application for order absolute was made on the 6th April 1904, subsequent applications were made in 1907, 1910 and 1912, all within three years of the immediately ...ent-debtor in most of ... out the relief prayed ... he 15th April 1912; ... barred by limitation ... of the decree: *Held*, that the application was not barred by limitation. *Held* also, that the following propositions are deducible from the decided cases.—(1) The preliminary decree passed under section 88 of the Transfer of Property Act is executable. (2) In order to obtain the order absolute under section 89 of the Transfer of Property Act, steps have to be taken in execution. (3) To such application article 182 or 183 of the Limitation Act will apply as the decree happens to be of a mufassal Court or of the original side of the High Court. (4) There is a fresh starting point given to the decree holder after the preliminary decree ripens into a final decree (5) A decree-holder will have twelve years under section 48 of the Code of Civil Procedure, to perfect the preliminary decree and another twelve years under the same section if he gets the order absolute within the first twelve years *Abdul Majid v. Jawahir Lal* (1914) I.L.R, 36 All, 350 (P C), followed. *Munna Lal v. Sarat Chunder* (1915) 21 C.L J, 118 (P C), followed. *Ashfaq Husain v. Gauri Sahai* (1911) I.L.R, 33 All, 264 (P C), explained. *Mallikarjunudu v. Lingamurti Pantulu* (1902) I L R, 25 Mad, 245 (F B) and *Rungiah Goundan & Co. v. Nanjappa Row* (1903) I L.R., 26 Mad, 780, referred to.

Husain v. Karim ... ... (1916) I L.R, 39 Mad., 544

MORTGAGEE, *option to, to enforce payment of principal and interest immediately on default*:—*See* (INDIAN) LIMITATION ACT (IX OF 1908), ARTS. 132 AND 75.

————, *refusal by—Deposit of usufructuary mortgage amount only*·—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 83.

———— (DECREE-HOLDER), *left in possession under decree—Liability under decree to account and to credit surplus income annually*—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC 258

———— (DECREE-HOLDER), *receipt by, not certified to Court, effect of—Certificate within ninety days, if necessary*—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258.

———— *with possession, whether intermediate holder*:—*See* (MADRAS) LOCAL BOARDS ACT (V OF 1884), SEC. 73.

MORTGAGE SUIT, *decree in*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 47, O. XXII, R. 10.

MORTGAGOR, *dispossession of, after mortgage, not adverse to mortgagee*.—*See* ADVERSE POSSESSION 811

———— *in possession, duty of, to pay public charges, purely personal*.—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 65 (c)

————, *provision for execution personally against*.—*See* CIVIL PROCEDURE (ACT V OF 1908), ss. 47, 73 AND 104.

MOVEABLE PROPERTY, *suit to recover*.—*See* PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC 19, CL. (s).

MUHAMMADAN LAW—*See* GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 2, ETC.

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————————Lubbais of Coimbatore district—Right of succession—Exclusion of females—Custom—Retention of rule of Hindu Law—Proof of custom, standard of—Family custom, proof of—Abandonment of custom.] Among the Lubbais of the Coimbatore district, who are Hindu converts to Muhammadanism, a custom prevails under which they retain the rule of Hindu Law which excludes females from the right of succession. *Mirabivi v. Vellayanna* (1885) I.L.R., 8 Mad., 464 and *Kunhambi v. Kalanthar* (191) 27 M.L.J., 158, referred to It is open to them to abandon the custom and follow the ordinary rule of Muhammadan Law *Rajkishan Singh v. Ramjoy Surma Mozoomdar* (1876) I.L.R., 1 Calc., 186, referred to *Per* SRINIVASA AYYANGAR, J—*Custom in its legal sense means a rule exceptional to the general rule of law.* In India, in many cases, it is impossible to say that any particular usage which is pleaded is in derogation of a general law, consequently the inquiry in many cases is as to what is the law and not what is the usage at variance with law. Nature of custom and standard of proof thereof required in England and in India compared. *Harbai v. Gorbai* (1875) 12 Bom. H.C.R., 294, *Rarichan v. Perachi* (1892) I.L.R., 15 Mad., 281, *Kunhi Raman v. Kunhi Parvathi* (1910) M.W.N., 642 and *Ramandra Deb v. Rajeswar Dass* (1885) 12 I.A., 72, referred to

Shaik v. Muhammad ... ... (1916) I.L.R., 39 Mad., 664

NEGLIGENCE *of servants of Public Works Department:—See* TORTS

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 28 AND 30, *scope of.—See* PROMISSORY NOTE *by guardian of minor*

————————, ss 30, 47, 59, 74 AND 94—*Hundi payable to bearer—Surety—Contract of suretyship only between surety and creditor—Right of surety against principal debtor—Indian Contract Act (IX of 1872), ss 126, 140, 141, 145, 69 and 70—Right of holder, not being holder in due course—Delivery of hundi payable to bearer, effect of—Holder, right of.*] A person who becomes a surety without the concurrence thereto of the principal debtor, gets as against the latter, only the rights given by sections 140 and 141 of the Indian Contract Act (IX of 1872) and not those given by section 145 Such a person cannot invoke in his favour the aid of sections 69 and 70 of the Act *Hodgson v. Shaw* (1834) 3 My. & K., 183, referred to A person obtaining by payment, after dishonour by the drawee, delivery of a negotiable instrument payable to bearer, acquires the rights of a holder thereof and can under section 59 of the Negotiable Instruments Act (XXVI of 1881), recover from the drawer, the amount due thereon, on proof of presentment and notice of dishonour as required by sections 74, 30 and 94 of the Act *Gajapathy Kistna Chandra Deo v. Srinivasa Charlu* Appeal No 25 of 1909, referred to. *Nanak Ram v. Mehin Lal* (1877) I.L.R., I All., 487, distinguished.

Muthu Raman v. Chinna Vellayan (1916) I.L.R., 39 Mad., 965

NON-DELIVERY OF GOODS —*See* SPECIFIC MOVEABLE PROPERTY.

OCCUPANCY RIGHT, *acquisition of, by landholders:—See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC (6) AND SEC 8

OFFICIAL ASSIGNEE, *right of, to money paid into Court* —*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXVIII, R. 5

OFFICIAL RECEIVER, *order without notice to, illegal* —*See* PROVINCIAL INSOLVENCY ACT (III OF 1908), SEC. 46, CL. (3).

————————, *properties advertised for sale by the, as subject to mortgage:—See* PROVINCIAL INSOLVENCY ACT (III OF 1907), ss 20 AND 22

ONUS:—*See* CIVIL COURTS.

———:—*See* INDIAN PRESS ACT (I OF 1910), ss. 3 (1), 4 (1), 17, 19, 20 AND 22

——— *on prosecution:—See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 256.

ORDER ABSOLUTE, *application for* —See MORTGAGE DECREE.

——— *for rateable distribution.—See* CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 73 AND 104.

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ORDER *of a single Judge of the High Court—Appeal against order, if maintainable:—See* Criminal Procedure Code (Act V of 1898), ss. 435, 439 and 133.

—— *without notice to Official Receiver, illegal:—See* Provincial Insolvency Act (III of 1907), sec 46, cl. (3).

OTTI-DEED, *renewal of, by* karnavan, *validity of:—See* Malabar Tarwad.

PARTITION:—*See* Hindu Law 587

————, *right to:—See* Malabar Law.

————, *suit for, by one member of a joint family, whether effects separation:—See* Hindu Law 159

PARTITION SUIT :—*See* Civil Procedure Code (Act V of 1908), O XXXII, r. 7.

PAYMENT *to some only of the trustees not valid —See* Trust.

PENAL CODE (INDIAN) (ACT XLV of 1860):—*See* Criminal Procedure Code (V of 1898), sec. 195.

————————, ss. 147, 426 and 447—*Obstruction to public way by building a wall—Pulling down the wall in* bona fide *e.* a wall , were pulled , or of mischief, or of criminal trespass (sections 147, 426 and 447 of the Indian Penal Code).

Re *Dharmalinga Mudaly* .. . . (1916) I L.R, 39 Mad, 57

————————, sec 188—"*Promulgated,*" *meaning of—Injunction, disobedience to—No offence under Penal Code*] The word "promulgated" under section 188 of the Penal Code refers to orders issued under the Code of Criminal Procedure and not to judgments and orders of Civil Courts

Mammali v *Kutti Ammu* . ... (1916) I.L.R., 39 Mad., 543

PENALTY :—*See* Transfer of Property Act (IV of 1882), sec 83.

PERPETUITIES, *rule of:—See* Transfer of Property Act (IV of 1882), sec. 54.

PERSONAL INAM, *grant of, of lands including poramboke, meaning of —See* (Madras) Forest Act (XXI of 1882), ss 6, 10, 16 and 17.

PLANTERS LABOUR ACT (MADRAS) (I of 1903), ss 24 and 35—*Breach of contract by maistry or labourer—Prosecution of maistry—Successive prosecutions and convictions, if permissible under the Act—Directions by the Magistrate to complete performance—Successive directions, if permitted by the Act.*] Under section 35 of the Madras Planters Labour Act (I of 1903), the Magistrate has power to issue successive directions to a maistry or labourer

Unwin v. *Clarke* (1866) 1 Q.B, 417 and *Cutler* v. *Turner* (1874) 9 Q B., 502, followed.

Whitton v *Mammad Maistry* .. . . (1916) I L.R., 39 Mad., 889

PLEADER, *second grade, gross contempt of a Subordinate Court by, by unjustly attacking its impartiality in discharge of its duties.—See* Legal Practitioners Act (XVIII of 1879), sec. 14

PLEADINGS —*See* Specific Moveable Property, etc.

POLICE, *report to—Institution of complaint thereupon.—See* Bailable offence.

PORAMBOKE, *grant of personal inams of lands, inculding meaning of.—See* Civil Procedure Code (Act V of 1908), ss 6, 10, 16 and 17.

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—————Lubbais of Coimbatore district—Right of succession—Exclusion of females—Custom—Retention of rule of Hindu Law—Proof of custom, standard of—Family custom, proof of—Abandonment of custom.] Among the Lubba's of the Coimbatore district, who are Hindu converts to Muhammadanism, a custom prevails under which they retain the rule of Hindu Law which excludes females from the right of succession. [illegible] (1885) I.L.R., 8 Mad., 164 and Kunhambi v. Kalanthar [illegible] to them to abandon the custom [illegible] Singh v. [illegible] that any [illegible] consequently [illegible] is the usage at variance with [illegible] thereof required in England and in those [illegible] 12 Bom. H.C.R., 294, Karichan v. Perachi (1892) I.L.R., 15 Mad., [illegible], Raman v. Kunhi Parvathi (1910) M.W.N., 612 and Ramendra Deb v. Rajeswar Dass (1885) 12 I.A., 72, referred to.

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—————, ss. 30, 47, 59, 74 AND 94—*Hundi payable to bearer—Surety—Contract of suretyship only between surety and creditor—Right of surety against principal debtor—Indian Contract Act (IX of 1872), ss. 126, 140, 141, 145, 69 and 70—Right of holder, not being holder in due course—Delivery of hundi payable to bearer, effect of—Holder, right of.*] A person who becomes a surety without the concurrence thereto of the principal debtor, gets as against the latter, only the rights given by sections 140 and 141 of the Indian Contract Act (IX of 1872) and not those given by section 145. Such a person cannot invoke in his favour the aid of sections 69 and 70 of the Act. *Hodgson v. Shaw* (1834) 3 My. & K., 183, referred to. A person obtaining by payment, after dishonour by the drawee, delivery of a negotiable instrument payable to bearer, acquires the rights of a holder thereof and can under section 59 of the Negotiable Instruments Act (XXVI of 1881), recover from the drawer, the amount due thereon, on proof of presentment and notice of dishonour as required by sections 74, 30 and 94 of the Act. *Gajapathy Kistna Chandra Deo v. Srinivasa Charlu* Appeal No. 25 of 1909, referred to. *Nanak Ram v. Mehin Lal* (1877) I.L.R., 1 All., 487, distinguished.

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OFFICIAL RECEIVER, *order without notice to, illegal*:—*See* PROVINCIAL INSOLVENCY ACT (III [illegible]

————— [illegible] to mortgage:—*See* PROV[illegible]

ONUS :—*See* CIVIL COURTS.

—————:—*See* INDIAN PRESS ACT (I OF 1910), ss. 3 (1), 4 (1), 17, 19, 20 AND 22.

————— *on prosecution*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 256.

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————— *for rateable distribution*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 73 AND 104.

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————, *right to*:—*See* MALABAR LAW.

————, *suit for, by one member of a joint family, whether effects separation*:—*See* HINDU LAW 159

PARTITION SUIT:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXII, R. 7.

PAYMENT *to some only of the trustees, not valid*:—*See* TRUST.

PENAL CODE (INDIAN) (ACT XLV of 1860):—*See* CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 195.

————————, ss. 147, 426 AND 417—*Obstruction to public way by building a wall—Pulling down the wall in bona fide exercise of the right of public way, no offence.*] The complainant built a wall obstructing a public way. Immediately after this, the accused, who were members of the public, in the *bona fide* exercise of their right of way, pulled down the wall. *Held*, that the accused were not guilty either of rioting, or of mischief, or of criminal trespass (sections 147, 426 and 417 of the Indian Penal Code).

Re *Dharmalinga Mudaly* ... . (1916) I.L.R., 39 Mad., 57

————————, SEC 188—"*Promulgated*," *meaning of—Injunction, disobedience to—No offence under Penal Code.*] The word "promulgated" under section 188 of the Penal Code refers to orders issued under the Code of Criminal Procedure and not to judgments and orders of Civil Courts.

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PLANTERS LABOUR ACT (MADRAS) (I of 1903), ss 24 AND 35—*Breach of contract by maistry or labourer—Prosecution of maistry—Successive prosecutions and convictions, if permissible under the Act—Directions by the Magistrate to complete performance—Successive directions, if permitted by the Act.*] Under section 35 of the Madras Planters Labour Act (I of 1903), the Magistrate has power to issue successive directions to a maistry or labourer to complete the performance of his contract. *Re Panga Maistry* (1913) I.L.R., 36 Mad., 497, dissented from. Successive prosecutions can be instituted and convictions obtained against a maistry in respect of successive defaults made by him under section 24, clauses (*a*), (*b*) and (*c*) of the Act. *Unwin* v. *Clarke* (1866) 1 Q.B., 417 and *Cutler* v. *Turner* (1874) 9 Q.B., 502, followed.

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PLEADER, *second grade, gross contempt of a Subordinate Court by, by unjustly attacking its impartiality in discharge of its duties*:—*See* LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC 14.

PLEADINGS:—*See* SPECIFIC MOVEABLE PROPERTY, ETC.

POLICE, *report to—Institution of complaint thereupon*:—*See* BAILABLE OFFENCE.

PORAMBOKE, *grant of personal inams of lands, including meaning of*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), ss 6, 10, 16 AND 17.

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————————— Lubbais of Coimbatore district—Right of succession—Exclusion of females—Custom—Retention of rule of Hindu Law—Proof of custom, standard of—Family custom, proof of—Abandonment of custom.] Among the Lubba's of the Coimbatore district, who are Hindu converts to Muhammadanism, a custom prevails under which they retain the rule of Hindu Law which excludes females from the right of succession. *Mirabivi v. Vellayanna* (1885) I.L.R., 8 Mad., 464 and *Kushambi v. Kalanthar* (191) 27 A.L.J., 150, referred to. It is open to them to abandon the custom and follow the ordinary rule of Muhammadan law. *Rajkishen Singh v. Ramjoy Surma Mozoomdar* (1876) I.L.R., 1 Calc., 186, referred to. *Per* SRINIVASA AYYANGAR, J.—Custom in its legal sense means a rule exceptional to the general rule of law. In India, in many cases, it is impossible to say that any particular usage which is pleaded is in derogation of a general law, consequently the inquiry in many cases is as to what is the law and not what is the usage at variance with law. Nature of custom and standard of proof thereof required in England and in India compared. *Harbai v. Gorlas* (1876) 12 Bom. H.C.R. 104, *Ramchan v. Perachi* (1892) I.L.R., 15 Mad., 231, *Kunhi Raman v. Kunhi Parvathi* (1910) M.W.N., 612 and *Fanindra Deb v. Rajeswar Dass* (1885) 12 I.A., 72, referred to.

Shaik v. Muhammad ... . (1916) I.L.R., 39 Mad., 664

NEGLIGENCE *of servants of Public Works Department:—See* TORTS.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 28 AND 30, *scope of*:—*See* PROMISSORY NOTE *by guardian of minor*.

————————————————, ss. 30, 47, 59, 74 AND 94—*Hundi payable to bearer—Surety—Contract of suretyship only between surety and creditor—Right of surety against principal debtor—Indian Contract Act (IX of 1872), ss. 126, 140, 141, 145, 69 and 70—Right of holder, not being holder in due course—Delivery of hundi payable to bearer, effect of—Holder, right of.*] A person who becomes a surety without the concurrence thereto of the principal debtor, gets as against the latter, only the rights given by sections 140 and 141 of the Indian Contract Act (IX of 1872) and not those given by section 145. Such a person cannot invoke in his favour the aid of sections 69 and 70 of the Act. *Hodgson v. Shaw* (1834) 3 My. & K., 183, referred to. A person obtaining by payment, after dishonour by the drawee, delivery of a negotiable instrument payable to bearer, acquires the rights of a holder thereof and can under section 59 of the Negotiable Instruments Act (XXVI of 1881), recover from the drawer, the amount due thereon, on proof of presentment and notice of dishonour as required by sections 74, 30 and 94 of the Act. *Gajapathy Kistna Chandra Deo v. Srinivasa Charlu*, Appeal No. 23 of 1909, referred to. *Nanak Ram v. Mehin Lal* (1877) I.L.R., 1 All., 487, distinguished.

Muthu Raman v. Chinna Vellayan (1916) I.L.R., 39 Mad., 903

NON DELIVERY OF GOODS:—*See* SPECIFIC MOVEABLE PROPERTY.

OCCUPANCY RIGHT, *acquisition of, by landholders:—See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8.

OFFICIAL ASSIGNEE, *right of, to money paid into Court:—See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXVIII, R. 5.

OFFICIAL RECEIVER, *order without notice to, illegal:—See* PROVINCIAL INSOLVENCY ACT (III OF 1908), SEC. 46, CL. (3).

——————, *properties advertised for sale by the, as subject to mortgage*:—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

ONUS:—*See* CIVIL COURTS.

——:—*See* INDIAN PRESS ACT (I OF 1910), SS. 3 (1), 4 (1), 17, 19, 20 AND 22.

—— *on prosecution*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 256.

ORDER ABSOLUTE, *application for*:—*See* MORTGAGE DECREE.

—— *for rateable distribution*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 47, 73 AND 104.

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ORDER *of a single Judge of the High Court—Appeal against order, if maintainable*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 435, 439 AND 133.

——— *without notice to Official Receiver, illegal*:—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SEC 46, CL. (3).

OTTI-DEED, *renewal of, by karnavan, validity of*.—*See* MALABAR TARWAD.

PARTITION:—*See* HINDU LAW 587

———, *right to*:—*See* MALABAR LAW.

———, *suit for, by one member of a joint family, whether effects separation*:—*See* HINDU LAW 159

PARTITION SUIT:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXII, R. 7.

PAYMENT *to some only of the trustees not valid*:—*See* TRUST.

PENAL CODE (INDIAN) (ACT XLV of 1860):—*See* CRIMINAL PROCEDURE CODE (V OF 1898), SEC 195.

———, ss. 147, 426 AND 447—*Obstruction to public way by building a wall—Pulling down the wall in bona fide exercise of the right of public way, no offence.*] The complainant built a wall obstructing a public way Immediately after this, the accused, who were members of the public, in the *bona fide* exercise of their right of way, pulled down the wall *Held*, that the accused were not guilty either of rioting, or of mischief, or of criminal trespass (sections 147, 426 and 447 of the Indian Penal Code).

Re *Dharmalinga Mudaly* ... . (1916) I.L.R, 39 Mad, 57

———, SEC 188—"*Promulgated,*" *meaning of—Injunction, disobedience to - No offence under Penal Code.*] The word "promulgated" under section 188 of the Penal Code refers to orders issued under the Code of Criminal Procedure and not to judgments and orders of Civil Courts

Mammali v Kutti Ammu . ... (1916) I.L.R, 39 Mad., 543

PENALTY:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 83.

PERPETUITIES, *rule of*:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 54.

PERSONAL INAM, *grant of, of lands including poramboke, meaning of*:—*See* (MADRAS) FOREST ACT (XXI OF 1882), ss 6, 10, 16 AND 17.

PLANTERS LABOUR ACT (MADRAS) (I of 1903), ss. 24 AND 35—*Breach of contract by maistry or labourer—Prosecution of maistry—Successive prosecutions and convictions, if permissible under the Act—Directions by the Magistrate to complete performance—Successive directions, if permitted by the Act.*] Under section 35 of the Madras Planters Labour Act (I of 1903), the Magistrate has power to issue successive directions to a maistry or labourer to complete the performance of his contract *Re Panga Maistry* (1913) I L R, 36 Mad, 497, dissented from. Successive prosecutions can be instituted and convictions obtained against a maistry in respect of successive defaults made by him under section 24, clauses (*a*), (*b*) and (*c*) of the Act. *Unwin* v. *Clarke* (1866) 1 Q B, 417 and *Cutler* v. *Turner* (1874) 9 Q.B., 502, followed.

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———— *Lubbais of Coimbatore district—Right of succession—Exclusion of females—Custom—Retention of rule of Hindu Law—Proof of custom, standard of—Family custom, proof of—Abandonment of custom.*] Among the Lubba's of the Coimbatore district, who are Hindu converts to Muhammadanism, a custom prevails under which they retain the rule of Hindu Law which excludes females from the right of succession. *Mirabivi* v *Vellayanna* (1885) I.L.R., 8 Mad., 464 and *Kunhambi* v. *Kalanthar* (191) 27 M.L.J., 156, referred to It is open to them to abandon the custom and follow the ordinary rule of Muhammadan Law *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1876) I L.R., 1 Calc., 186, referred to *Per* SRINIVASA AYYANGAR, J —Custom in its legal sense means a rule exceptional to the general rule of law. In India, in many cases, it is impossible to say that any particular usage which is pleaded is in derogation of a general law, consequently the inquiry in many cases is as to what is the law and not what is the usage at variance with law. Nature of custom and standard of proof thereof required in England and in India compared. *Harbai* v *Gorbai* (1875) 12 Bom. H C.R. 494, *Korichan* v *Perachi* (1892) I L R, 15 Mad., 281, *Kunhi Raman* v *Kunhi Parvathi* (1910) M.W N, 642 and *Fanindra Deb* v. *Rajeswar Dass* (1885) 12 I A, 72, referred to

Shaik v. *Muhammad* ... . (1916) I.L.R, 39 Mad., 664

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ORDER ABSOLUTE, *application for.—See* MORTGAGE DECREE.

———— *for rateable distribution*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 47, 73 AND 104.

under section 17 of the Insolvency Act III of 1909. Consequently a security bond, executed to the Court by a third party for the appearance of the judgment-debtor in the course of the execution proceedings carried on without the leave of the High Court, was obtained without jurisdiction and was void in law. A reference to the High Court under section 69 of the Presidency Small Cause Courts Act should state clearly the points on which there is a difference of opinion among the judges of the Small Cause Court.

Easwara Iyer v. *Govindarajulu Naidu* . ... (1916) I.L.R., 39 Mad., 689

———————————, SEC. 57—*Intimation to the creditor that debtor is about to suspend payment—Transfer of goods to creditor thereafter, but before the filing of a petition for declaration of insolvency, not a* bona fide *transfer*—Bona fides *a requisite under section 57 of the Act*]. After receiving notice from the debtor's agent that the debtor

of insolvency, (*b*) that though by the transaction of taking possession of the goods, the creditor became the transferee of goods, he was not a *bona fide* transferee for value within section 57 of the Presidency Towns Insolvency Act (III of 1909), as the act of taking possession was after knowledge of the act of insolvency and (*c*), that, though the body of section 57 of the Act has not expressly prescribed that the transfer should be *bona fide* yet *bona fides* is legally necessary to claim the benefit of the section *Per Curiam.*—The provisions and the wording of the Presidency Towns Insolvency Act being almost the same as those of the English Bankruptcy Act, the rulings of the English Courts on the latter Act are to be followed in interpreting the Indian Act. *Obiter*:—A mere intimation to a creditor by the debtor or his agent that the debtor is insolvent does not amount to an act of insolvency.

The Mercantile Bank of India, Ltd. v. *The Official Assignee, Madras.* (1916) I.L.R, 39 Mad., 250

PRESCRIPTIVE USER, *period necessary for*:—*See* (INDIAN) EASEMENTS ACT (V OF 1882).

PRESS, *keeping a, whether a "licensed calling" or common law right*:—*See* INDIAN PRESS ACT (I OF 1910), SEC. 3. (1), PRO.

PRESS ACT (INDIAN) (I OF 1910), SEC. 3 (1), PRO., *construction of—Original order of Magistrate dispensing with security—Demand of security by Magistrate thereafter, legality of—Government of India Act (5 & 6 Geo. V, cap. 61), ss. 106 and 107 and Criminal Procedure Code (Act V of 1898), sec 435—High Court, power of, to issue writ of* certiorari, *under, to cancel Magistrate's order—Magistrate demanding security, not a "Court" but an executive officer—Writ of* certiorari, *when, can be issued—"Judicial Act," what is,—Indian Press Act (I of 1910), sec 22, whether a bar to issue of writ of* certiorari—*"Proviso," object of—Keeping a press whether a "licensed calling" or common law right.*] *Per* ABDUR RAHIM, OFFG. O.J., and SESHAGIRI AYYAR, J. (AYLING, J, not dissenting).—The Chief Presidency Magistrate acting under section 3 (1) of the Indian Press Act is not a "Court" but is only an executive officer entrusted with the performance of certain administrative duties, whose details are left entirely to his discretion, hence an order by him requiring security from the keeper of a press, even if in excess of his powers, is not capable of being revised by the High Court, either by means of a writ of *certiorari* issued under sections 106 and 107 of the Government of India Act (5 & 6 Geo. V, cap. 61) or by the exercise of revisional powers as provided by section 435, Criminal

RAHIM, OFFG. O J., and SESHAGIRI AYYAR, J.—Whether an act is judicial or not, depends on the nature of the powers conferred by the legislature, the

character of the act sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations. *Per Curiam.*—Every keeper of a printing press who makes a declaration under section 4 of the Press and Registration of Book Act (XXV of 1867) after the commencement of the Indian Press Act (I of 1910), is simultaneously liable to deposit such security as the Magistrate demands under section 3 (1) of the Indian Press Act, even though the press and the newspaper published therein were in existence before the passing of the Press Act. But the Magistrate may, under the proviso to section 3 (1), make an order dispensing with a security. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., *contra*)—If once a Magistrate dispenses with security, he cannot thereafter cancel such order and demand security. The words "or may from time to time cancel or may make any order under this sub-section," which are to be found in the same proviso as that which enables a Magistrate to make an order dispensing with security cannot be construed to include an order dispensing with security. A proviso appended to a section is either an explanation or qualification of the section. It does not add to or enlarge the scope of the section. *West Derby Union* v. *Metropolitan Life Assurance Society* (1897) A.C., 647, referred to. *Per* AYLING, J.—The substance, and not the form, must be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely, qualifying that which goes before, and this proviso is really such a one. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J.—The Supreme Court of Madras had the right to issue writs of *certiorari* as the King's Bench in England, and that right has been preserved to the High Court by the Charters of 1861 and 1865, the Letters Patent of 1865 and the Government of India Act of 1915 and no Act of any legislature has taken away this right. *Nundo Lal Bose* v. *The Corporation for the town of Calcutta* (1885) I.L.R. 11 Calc., 275, referred to. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., *contra*)—Even supposing the act of the Magistrate to be only judicial, section 22 of the Indian Press Act has not taken away this right, in cases where the Magistrate demands under section 3 (1) of the Act security from the keeper of a press in excess of his powers. *Ex parte Bradlaugh* (1878) 3 Q.B.D., 509 and *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417 at p. 442 referred to. *Per* AYLING, J.—Section 22 precludes revision of an order demanding security whether it was with or without jurisdiction. The Press Act is a self contained and complete Act. *Quaere*: Whether the order of the Magistrate demanding security is not judicial? Power of issuing writ of *certiorari* being only discretionary, it cannot be issued where there is delay in applying for it. *Per* ABDUR RAHIM, OFFG. C.J.—When the powers of revision of the High Court are exercisable only in respect of proceedings of ordinary Courts, writs of *certiorari* are available to quash proceedings not only of Courts but of special tribunals specially constituted and entrusted with duties of a judicial character. *Per* ABDUR RAHIM, OFFG. C.J. (SESHAGIRI AYYAR, J., *contra*). Proceedings will not be removed to the Superior Court by a writ of *certiorari* unless that Court can deal with them fully and satisfactorily. *Per* SESHAGIRI AYYAR, J.—Even after the Indian Press Act, the right to keep a press and to use it is a common law right and it cannot be likened to a "licensed trade or calling." Even if a statute expressly takes away the power to issue writs of *certiorari*, it must be deemed that it is taken away only in respect of acts not *ultra vires*.

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—————, ss. 3 (1), 4 ( ), 17, 19, 20 AND 22—*Demand of security by magistrate under proviso to section 3 (1), legality of—Order by Government under section 4 (1), forfeiting security and copies of newspaper, legality of—Jurisdiction of High Court under section 17, extent of—"Words . . . which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" in section 4 (1), meaning of—"Hatred" or "contempt," "Government established by law in British India," in section 4 (1), meaning of—Intention of writer whether essential under section 4 (1)—Onus under section 4 (1), whether on applicant—"In aid of the proof of the nature (or tendency) of the words" in section 20, effect of—Sections 4 and 22, whether* ultra vires *of*

the Imperial Legislature of India as contravening section 43 of 3 & 4 Will. IV, cap. 85 or 24 & 25 Vict, cap 67, section 22 or the Government of India Act 5 & 6 Geo. V, cap 61 of 1915, sec. 65] The petitioner in this case who was the keeper of a printing press and publisher of a newspaper therein made this application to the High Court under section 17 of the Indian Press Act (I of 1910) for cancellation of (*a*) an order of the Chief Presidency Magistrate of Madras demanding from her under section 3 (1) of the Act, security for two thousand rupees in supersession of a previous order made by him dispensing with security and (*b*) an order of the Governor-in-Council, Madras, declaring under section 4 (1) the security of the two thousand rupees so deposited and all copies of the newspaper wherever found, to be forfeited to His Majesty. In dismissing the application on the ground that some of the specified articles (hereinafter called extracts) of the newspaper were of the objectionable nature described in section 4 (1) of the Press Act, their Lordships of the Special Bench, *Held*, as follows :- In an application, made under section 17 of the Indian Press Act, the only question which the Special Bench of the High Court can determine is whether the extracts complained of did not contain any words of the nature described in section 4 (1) and the Court has no jurisdiction to determine any other question such as (*a*) whether the particular order of the Magistrate demanding security was beyond his powers or (*b*) whether section 4 or 22 of the Press Act is *ultra vires* of the powers of the Imperial Legislature of India as contravening any Act of Parliament, or (*c*) whether the order of forfeiture was legally made. In re *Mahomed Ali* (1914) I.L.R., 41 Calc., 466, referred to. Advocating "Home rule for India" is not *per se* objectionable. But such advocacy must not offend existing laws "Hatred" and "contempt" "towards the Government" occurring in section 4 may be created by articles "imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties," or by articles unjustly "accusing the Government of hostility or indifference to the welfare of the people." Though the operative or enacting portion of section 4 (1) (*c*) does not make the intention or motive of the writer of the articles complained of material in considering whether the words are not of the nature described in section 4 (1), explanation II thereto requires that the writer must *intend* to excite hatred, contempt or disaffection if his writings are to be brought within clause (*c*), the intention being deducible mainly from the words used. The words "the Government established by law in India" occurring in section 4 are not to be construed as indicating only the supremacy of the British Crown over India and the British connection with it, as opposed to independence *Per* ABDUR RAHIM, OFFG C J, and AYLING J.—The phrase in section 4 "any words . which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" can relate only to the natural and probable effect which the words themselves are likely to produce on a normal reader of the paper, possessed at least of average capacity and the phrase cannot relate to any and every possible effect which they can ingeniously be supposed to produce. *Per* SESHAGIRI AYYAR, J.—The phrase is not confined to probable effects only, but includes also *reasonably possible* effects which the words can produce. *Per* ABDUR RAHIM, OFFG C.J., and SESHAGIRI AYYAR, J.—The onus of proving that the extracts complained of are not of the objectionable nature described in section 4 (1) is on the applicant *Per* AYLING J.—The Act does not throw the onus either on the applicant or on the Government, but the tendency of the words has to be determined by the Court from the words themselves. *Per* AYLING, J.—Articles dwelling adversely on the foreign origin and character of the Government can also create hatred and contempt. *Per* ABDUR RAHIM, OFFG C J.—"Hatred" and "contempt" in section 4 (*c*) mean something more than mere disapproval or dislike *Per* AYLING, J.—"Hatred" and "contempt" in section 4 (1) (*c*) do not mean only such hatred and contempt as would lead to the commission of crimes referred to in the other clauses of the sub section, viz., murder, violence resistance to law, intimidation of public servants, etc. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J.—The words in section 4 (1) (*c*), viz., "the Government established by law in British India" mean the British rule, and the collective body of men authorised by law to administer executive Government in British India—

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character of the act sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations. *Per Curiam.*—Every keeper of a printing press who makes a declaration under section 4 of the Press and Registration of Book Act (XXV of 1867) after the commencement of the Indian Press Act (I of 1910), is simultaneously liable to deposit such security as the Magistrate demands under section 3 (1) of the Indian Press Act, even though the press and the newspaper published therein were in existence before the passing of the Press Act. But the Magistrate may, under the proviso to section 3 (1), make an order dispensing with a security. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., *contra*).—If once a Magistrate dispenses with security, he cannot thereafter cancel such order and demand security. The words "or may from time to time cancel or may make any order under this sub-section," which are to be found in the same proviso as that which enables a Magistrate to make an order dispensing with security cannot be construed to include an order dispensing with security. A proviso appended to a section is either an explanation or qualification of the section. It does not add to or enlarge the scope of the section. *West Derby Union* v. *Metropolitan Life Assurance Society* (1897) A.C., 647, referred to. *Per* AYLING, J.—The substance, and not the form, must be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely, qualifying that which goes before, and this proviso is really such a one. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J.—The Supreme Court of Madras had the right to issue writs of *certiorari* as the King's Bench in England, and that right has been preserved to the High Court by the Charters of 1861 and 1865, the Letters Patent of 1865 and the Government of India Act of 1915 and no Act of any legislature has taken away this right. *Nundo Lal Bose* v. *The Corporation for the town of Calcutta* (1885) I.L.R., 11 Calc., 275, referred to. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., *contra*).—Even supposing the act of the Magistrate to be only judicial, section 22 of the Indian Press Act has not taken away this right, in cases where the Magistrate demands under section 3 (1) of the Act security from the keeper of a press in excess of his powers. *Ex parte Bradlaugh* (1878) 3 Q.B.D., 509 and *Colonial Bank of Australasia* v. *Willan* (1874) L.R., 5 P.C., 417 at p. 442, referred to. *Per* AYLING, J.—Section 22 precludes revision of an order demanding security whether it was with or without jurisdiction. The Press Act is a self contained and complete Act. *Quaere*: Whether the order of the Magistrate demanding security is not judicial? Power of issuing writ of *certiorari* being only discretionary, it cannot be issued where there is delay in applying for it. *Per* ABDUR RAHIM, OFFG. C.J.—While the powers of revision of the High Court are exercisable only in respect of proceedings of ordinary Courts, writs of *certiorari* are available to quash proceedings not only of Courts but of special tribunals specially constituted and entrusted with duties of a judicial character. *Per* ABDUR RAHIM, OFFG. C.J. (SESHAGIRI AYYAR, J., *contra*).—Proceedings will not be removed to the Superior Court by a writ of *certiorari* unless that Court can deal with them fully and satisfactorily. *Per* SESHAGIRI AYYAR, J.—Even after the Indian Press Act, the right to keep a press and to use it is a common law right and it cannot be likened to a "licensed trade or calling." Even if a statute expressly takes away the power to issue writs of *certiorari*, it must be deemed that it is taken away only in respect of acts not *ultra vires*.

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————————, ss. 3 (1), 4 ( ), 17, 19, 20 AND 22—*Demand of security by magistrate under proviso to section 3 (1), legality of—Order by Government under section 4 (1), forfeiting security and copies of newspaper, legality of—Jurisdiction of High Court under section 17, extent of—"Words . . . which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" in section 4 (1), meaning of—"Hatred" or "contempt," "Government established by law in British India," in section 4 (1), meaning of—Intention of writer whether essential under section 4 (1)—Onus under section 4 (1), whether on applicant—'In aid of the proof of the nature (or tendency of the words' in section 20, effect of—Sections 4 and 22, whether* ultra vires *of*

the Imperial Legislature of India as contravening section 43 of 3 & 4 Will. IV, cap. 85 or 24 & 25 Vict, cap 67, section 22 or the Government of India Act 5 & 6 Geo. V, cap. 61 of 1915, sec. 65.] The petitioner in this case who was the keeper of a printing press and publisher of a newspaper therein made this application to the High Court under section 17 of the Indian Press Act (I of 1910) for cancellation of (*a*) an order of the Chief Presidency Magistrate of Madras demanding from her under section 3 (1) of the Act, security for two thousand rupees in supersession of a previous order made by him dispensing with security and (*b*) an order of the Governor-in-Council, Madras, declaring under section 4 (1) the security of the two thousand rupees so deposited and all copies of the newspaper wherever found, to be forfeited to His Majesty. In dismissing the application on the ground that some of the specified articles (hereinafter called extracts) of the newspaper were of the objectionable nature described in section 4 (1) of the Press Act, their Lordships of the Special Bench, *Held*, as follows:—In an application, made under section 17 of the Indian Press Act, the only question which the Special Bench of the High Court can determine is whether the extracts complained of did not contain any words of the nature described in section 4 (1) and the Court has no jurisdiction to determine any other question such as (*a*) whether the particular order of the Magistrate demanding security was beyond his powers or (*b*) whether section 4 or 22 of the Press Act is *ultra vires* of the powers of the Imperial Legislature of India as contravening any Act of Parliament, or (*c*) whether the order of forfeiture was legally made. In re *Mahomed Ali* (1914) I.L.R., 41 Calc, 466, referred to. Advocating "Home rule for India" is not *per se* objectionable. But such advocacy must not offend existing laws "Hatred" and "contempt" "towards the Government" occurring in section 4 may be created by articles "imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties," or by articles unjustly "accusing the Government of hostility or indifference to the welfare of the people." Though the operative or enacting portion of section 4 (1) (*c*) does not make the intention or motive of the writer of the articles complained of material in considering whether the words are not of the nature described in section 4 (1), explanation II thereto requires that the writer must *intend* to excite hatred, contempt or disaffection if his writings are to be brought within clause (*c*), the intention being deducible mainly from the words used. The words "the Government established by law in India" occurring in section 4 are not to be construed as indicating only the supremacy of the British Crown over India and the British connection with it, as opposed to independence *Per* ABDUR RAHIM, OFFG C J, and AYLING, J.—The phrase in section 4 "any words . . . which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" can relate only to the natural and probable effect which the words themselves are likely to produce on a normal reader of the paper, possessed at least of average capacity and the phrase cannot relate to any and every possible effect which they can ingeniously be supposed to produce *Per* SESHAGIRI AYYAR, J.—The phrase is not confined to probable effects only, but includes also *reasonably possible* effects which the words can produce *Per* ABDUR RAHIM, OFFG. C J, and SESHAGIRI AYYAR, J—The onus of proving that the extracts complained of are not of the objectionable nature described in section 4 (1) is on the applicant *Per* AYLING J—The Act does not throw the onus either on the applicant or on the Government, but the tendency of the words has to be determined by the Court from the words themselves. *Per* AYLING, J—Articles dwelling adversely on the foreign origin and character of the Government can also create hatred and contempt. *Per* ABDUR RAHIM, OFFG C J—"Hatred" and "contempt" in section 4 (*c*) mean something more than mere disapproval or dislike *Per* AYLING, J.—"Hatred" and "contempt" in section 4 (1) (*c*) do not mean only such hatred and contempt as would lead to the commission of crimes referred to in the other clauses of the sub section, viz., murder, violence, resistance to law, intimidation of public servants, etc. *Per* ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J.—The words in section 4 (1) (*c*), viz, "the Government established by law in British India" mean the British rule, and the collective body of men authorised by law to administer executive Government in British India—

the existing political system as distinguished from any particular set of administrators or individuals administering the country for the time being. In this sense the "Government" includes not only Government of India b[illegible] also Local Government *Queen-Empress v. Bal Gangadar Tilak* (1898) [illegible] *Bhaskar* (1906) 8 Bom. L.R., 421, *Queen-*[illegible] (1891) I L R., 19 Calc, 35 and *Reg.* v. [illegible] 11 Cox's Cr. C, 51, referred to *Per* [illegible] other definition in the Press Act, the phrases [illegible] overnment," "Government of India," "Local Government" used in the Indian Press Act are to be interpreted as defined in section 3, the General Clauses Act. *Per* ABDUR RAHIM, OFFG. C.J.—The protection afforded by explanation 2 to section 4 (1) is extended only to comments on Government's measures and actions, etc, and not to attacks on Government *itself* and these have to be judged by the light of section 4 alone without reference to the explanation. *Construing the extracts on the above principles* —ABDUR RAHIM, OF[illegible] extracts Nos 1, 2, 8, 11, 12 and 13 to be of the nature described [illegible] to be also of the nature described [illegible] extracts Nos 1, 2, 8, 9, 10, 11, 12, 1[illegible] in section 4 (1) (c) and extract N[illegible] No. 4 (d) to be of the nature desc[illegible] AYYAR, J, held extracts Nos 2, 8, 11 [illegible] section 4 (1) (c) and extract No 11 to [illegible] 4 (1) (e). *Per* ABDUR RAHIM, OFFG. CJ—The Indian [illegible] not impose any duty on a Local Government to issue any warning to or to ask for any explanation from the keeper of the press before taking action under the Act *Per* AYLING, J.—The fact that the words complained of are those of correspondents and not of the editor or publisher, does not in any way minimize the responsibility of the editor or publisher and the intention of the writer must be ascribed to the publisher. *Per* ABDUR RAHIM, OFFG. C J—The Indian Legislature is not competent to enact anything which will affect any unwritten laws of the realm whereon may depend the allegiance of the subject to the Crown. *Quere* Whether section 4 of the Indian Press Act is *ultra vires* of the Imperial Legislature of India. Allegiance is the return which the subject renders to the sovereign for the protection afforded by the latter *In the matter of Ameer Khan* (1870) 6 B L.R, 392, *In the matter of Ameer Khan* (1870) 6 B L R, 456 and *Secretary of State* v *Moment* (1913) I L R, 40 Calc, 391 (P C.), referred to. *Per* SESHAGIRI AYYAR, J.—Section 4 of the Indian Press Act does not contravene section 43 of 3 & 4 Will. IV (corresponding to section 65 of the Government of India Act, 1915) and is not *ultra vires* of the Imperial Legislature. The section does not deprive the subject of the right of showing that the forfeiture has not been incurred Simply because, instead of providing for the taking of the decision of the Court first and then declaring the forfeiture, the section has reversed the process, the section cannot be said to affect any unwritten law whereon may depend allegiance of the subject to the Crown Section 22 of the Press Act only enacts that the declaration of forfeiture shall be conclusive evidence of the fact that the forfeiture has taken place and not that the forfeiture has been legally made The words "in aid of the proof of the nature or tendency of the words" in section 20 of the Indian Press Act, do not emp[illegible] to tender in evidence, other articles of the newspa[illegible] the party proceeded against can also d[illegible] AYLING and SESHAGIRI AYYAR, JJ—I[illegible] general policy of the paper when tha[illegible] nection with the articles complained of are useless.

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———————, SEC. 22. *whether a bar to issue of writ of certiorari* —See INDIAN PRESS ACT (I OF 1910), SEC 3 (1), PRO

PRINCIPAL, *liability of agent to, suit on*:—See LIMITATION ACT (IX OF 1908), ART 89.

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PRINCIPAL AND INTEREST, *payable immediately on default—Option to mortgagee to enforce payment—Suit after twelve years from default, if barred* :—*See* LIMITATION ACT (IX OF 1908), ARTS. 132 AND 75.

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PRIVILEGES, *absolute* :—*See* SECRETARY OF STATE IN COUNCIL.

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PROBATE AND ADMINISTRATION ACT (V OF 1881), SS. 2, 4, 82 AND 92—*Applicability to all Hindus* —*See* HINDU LAW 365

PROCEDURE *to final decree, not by way of execution* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC 47, O. XXII, R. 10.

PROMISSORY-NOTE *by guardian of minor, not signing as such, whether binding on minor's estate— Negotiable Instruments Act* (XXVI *of* 1881), ss 28 *and* 30, *scope of.*] A negotiable instrument executed by the guardian of a Hindu minor for purposes binding on the minor is enforceable against the minor's estate though the instrument was not signed by the executant in his capacity as guardian. The minor is not personally liable on the instrument. The case is governed by the principles of Hindu Law and sections 28 and 30 of the Negotiable Instruments Act (XXVI of 1881) are not applicable *Subramania Aiyar* v *Arumuga Chetty* (1913) I L.R , 26 Mad , 330, followed.

Krishna Chettiar v. *Nagamani Ammal* .. ... (1916) I.L R., 39 Mad., 915

———— ———— *payable on demand* —*See* LIMITATION ACT (IX OF 1908), ART. 80

"PROMULGATION," *meaning of.*—*See* INDIAN PENAL CODE (ACT XLV OF 1860), SEC 188.

PROPERTY, *ancestral* :—*See* (MADRAS) PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), SS. 5 AND 10, CL (2).

———— ————, *in Agency tracts* —*See* CONTRACT ACT (IX OF 1872), SS. 69 AND 70.

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PROPERTY AND SECURITY, *substitution of* :—*See* SUBSTITUTION OF PROPERTY AND SECURITY.

PROPRIETARY ESTATES VILLAGE SERVICE (MADRAS) ACT (II OF 1894), SS 5 AND 10, CL. (2)—*Service inam—Enfranchisement, partition of, whether prohibited—Alienation, validity of—Subsequent suit for ejectment—Transfer of Property Act (IV of 1882), sec 43—Ancestral property—Property inherited by maternal grandsons—Interests, nature of* :] The enfranchisement, of a service *inam* under section 10, clause (2) of the Madras Proprietary Estates Village Service Act (II of 1894) does not destroy the rights of any member of a joint family who has a hereditary interest in it. The alienation of a service inam is void and though it is subsequently enfranchised, the alienee cannot invoke the aid of section 43 of the Transfer of Property Act in his favour. *Ramasurami Naick* v *Ramasami Chetty* (1907) I L R , 30 Mad , 255; *Narhari Sahu* v *Siva Narithan Naidu* (1913) M.W.N , 415, and *Jochu Ramayya* v *Phara Satchi* (1913) M.W N , 980, referred to. Property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest by birth according to the Mitakshara law Cases reviewed.

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PROPRIETARY ESTATES VILLAGE SERVICE (MADRAS) ACT (II OF 1894), SS. 5 AND 10, CL (2)—*Service inam—Emoluments, partition of, whether prohibited—Alienation, validity of—Subsequent suit for ejectment—Transfer of Property Act* (*IV of* 1882), *sec* 43—*Ancestral property—Property inherited by maternal grandsons—Interests, nature of* , The enfranchisement, of a service *inam* under section 10, clause (2) of the Madras Proprietary Estates Village Service Act (II of 1894) does not destroy the rights of any member of a joint family who has a hereditary interest in it. The alienation of a service inam is void and though it is subsequently enfranchised, the alienee cannot invoke the aid of section 43 of the Transfer of Property Act in his favour *Ramaswami Naick* v *Ramaswami Chetty* (1907) I L.R , 30 Mad , 255; *Narhari Sahu* v *Siva Narithan Naidu* (1913) M W.N , 415, and *Lochu Ramayya* v *Phara Satchi* (1913) M.W N , 989, referred to Property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest by birth according to the Mitakshara law Cases reviewed.

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PUBLICATION, *meaning of:—See* TORTS.

PUBLIC PLACE, *meaning of:—See* MADRAS CITY POLICE ACT (III OF 1888), SEC. 75.

PUBLIC WAY, *obstruction to, by building a wall —See* (INDIAN) PENAL CODE, (ACT XLV OF 1860), SS. 147, 426 AND 447

PUBLIC WORKS DEPARTMENT, *servants of, negligence of:—See* TORTS.

PURCHASER AND VENDOR:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 55 (4).

PURCHASER IN COURT-AUCTION, *to substituted properties.—See* SUBSTITUTION OF PROPERTY AND SECURITY.

RATEABLE DISTRIBUTION:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS 47, 73 AND 104.

RECEIPT, *meaning of.—See* CIVIL PROCEDURE CODE (ACT V OF 1908), O XXI, R 89 (b)

RECEIVER, *application against the legal representatives of, if maintainable—See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XL, R 4

———, *death of:—See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XL, R. 4.

———, *misappropriation of income by —See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XL, R 4

REDEMPTION *equity of, acquisition of, by trespassers—See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 65 (c).

——— ———, *suit for —See* MADRAS CIVIL COURTS ACT (III OF 1873), SS. 12 AND 13.

——— ———, *suit for by mortgagor, maintainability of —See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 60, 67-93.

REHEARING, *appellant not entitled to —See* APPEAL, *parties to an.*

RELIGIOUS ENDOWMENTS ACT (XX OF 1863) *Change of village from one district to another, for revenue purposes—Religious institution in the village—Power of original committee of the original district to control the institution—No power for the committee of the new district to appoint trustees.*] The Religious Endowments Act (XX of 1863) contemplates the creation of division or district committees once for all, soon after the passing of the Act to take the place of the Board of Revenue and the local agents referred to in Regulation VII of 1817. It is only the committee that is originally appointed in that behalf or its successor that can exercise jurisdiction over a particular religious institution and any order of Government transferring a certain village in which a particular religious institution is situated from one district to another for purposes of revenue administration does not deprive the original temple committee of its powers over the institution (such as appointing trustees for the same) or enable the committee of the new district to which the village is transferred to exercise any power over the institution

Rangappa v. Bhimappa ... ... (1916) I.L R , 39 Mad., 949

——— ——— ——— ——— ———, SEC 3— *Suit for scheme for a temple falling under section 3—Civil Procedure Code (Act V of 1908), sec 92—Jurisdiction of Court to frame scheme under—Temple committee, power of*] Ever since 1842 when the Board of Revenue handed over the management of the temple of Srirangam to certain trustees, one trustee was chosen hereditarily every year from a certain family in the locality called the "Sthalathars" and two other trustees were appointed till 1863 by the Board and later on by the temple committee formed under the Religious Endowments Act (XX of 1863). In several litigations connected with the temple, the temple was treated as one falling under section 3 of Act XX of 1863. *Held,* that the temple was one falling under section 3 and not under section 4 and was thus subject to the control of the temple committee Though the Court cannot interfere with the statutory powers conferred upon the members of the temple committee so as to deprive them of their statutory functions, yet the Court has jurisdiction to frame a scheme under section 92, Civil Procedure Code (Act V of 1908) in respect even

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of a temple subject to the control of the temple committee, and introduce changes in the administration which the committee is not legally competent to introduce and which are desirable and necessary to meet the altered circumstances of the time Considering that the actual management of the temple must vest in the trustees subject to the statutory control of the committee, their Lordships held it undesirable in framing a scheme to introduce as the lower Court did, a new body of people called a Board of Control over the trustees and hence abolished the same. In the result their Lordships framed a scheme for the temple providing among other things, for (*a*) the appointment of two additional trustees for the better management of the temple, (*b*) the tenure of office of the trustees appointed being only for five years, (*c*) the preparation of annual budget and audit of temple accounts and (*d*) the appointment of a cashier under the trustees. *Per Curiam*:—The powers of the committee or any other statutory body do not become suspended by the occurrence of a vacancy among its members. Powers of a temple committee considered. *Santhalva* v. *Manjanna Shetty* (1911) I L R, 34 Mad, 1, dissented from. English and Indian cases, reviewed.

Sitharama Chetty v. *Sir S. Subrahmania Iyer* .. (1916) I.L.R., 39 Mad. 700

RELIGIOUS INSTITUTION *in a village transferred from one district to another for revenue purposes, power to control, only with the committee in the original district but not with the new district.*—*See* RELIGIOUS ENDOWMENTS ACT (XX OF 1863).

RENT, *a higher, payment of, for sixty years—Presumption as to a binding contract therefor, under the Rent Recovery Act (VIII of 1865)*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 13, CL. (3).

———, *non-payment of, suit to recover lands under (Madras) Estates Land Act (I of 1908) for, non-maintainability of* —*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 189, ETC.

———, *suit for*:—*See* LESSOR AND LESSEE

RENT RECOVERY ACT (MADRAS) (VIII OF 1865)—*Presumption of a binding contract to pay higher rent*.—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 13, CL (3).

——————— SS. 49 AND 78·—*See* (MADRAS) ESTATES LAND ACT (I OF 1908).

RES JUDICATA, *if, ground of decision*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC 11.

RESPONDENTS, *death of one of the, decree passed in ignorance of*:—*See* APPEAL, *parties to*.

RETRIAL, *if acquittal wrong*.—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS 237, 421 AND 537.

REVENUE, *arrears of, attachment of*:—*See* INDIAN CONTRACT ACT (IX OF 1872), SS. 69 AND 70.

————, *release of, on Government lands under ryotwari tenants, purchased by zamindar*·—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8.

REVENUE COURT:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SS. 189, ETC.

REVENUE PURPOSES, *change of village from one district to another*.—*See* RELIGIOUS ENDOWMENTS ACT (XX OF 1863).

REVENUE SALE, *on non-payment of public revenue—Purchase by trespasser—Extinguishment of mortgage*:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 65 (*c*).

REVERSIONARY INTEREST, *attachment of, and sale thereupon*:—*See* HINDU LAW 505

REVERSIONER:—*See* HINDU LAW 634

REVERSIONERS, *suit by, to declare an alienation invalid during widow's life-time, withdrawal of—Subsequent suit after widow's death for possession, not barred*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 1 (3).

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REVISION, *incompetency of High Court to sanction composition of offences in*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 439.

————, *power of the High Court to interfere in*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 115.

REVISION PETITION *to the High Court, against an order under section* 133:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS 435, 439 AND 133.

REVOCATION *by dependent relative*:—*See* HINDU LAW, WILL 107

———— *of will*:—*See* HINDU LAW, WILL 107

RYOTWARI LANDOWNER:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SS 189, ETC.

RYOTWARI LANDS *acquired by Government under Land Acquisition Act (I of 1894)*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8.

————, *substitution of, as zamindari lands*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. (8).

RYOTWARI TENURE, *Government lands under, purchased by zamindar*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8.

SADALWAR AND MATHIRI KASUVU, *not illegal cesses within section 143 of the (Madras) Estates Land Act (I of 1908)*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 13, CL. (3).

SALE, *free of incumbrance*:—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SS 20 AND 22.

————, *irregularity, vitiating the*:—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

————, *properties advertised for, by the official Receiver as subject to mortgage*:—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

————, *suit by mortgagee previous to, for redemption—Decree for sale, in favour of mortgagor as defendant for redemption and recovery of possession, not executed by mortgagee or mortgagor*:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 60, 67—93.

SALE OF LAND —*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 55 (4).

SALE PROCLAMATION, *change in the, on the day of sale*:—*See* PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

SANCTION, *granting of, to be or made on legal evidence*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195.

SANCTION FOR COMPOSITION, *in revision, incompetency of High Court to*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 439.

SANCTION TO PROSECUTE *for preferring a false charge—Refusal to revoke by superior Court—Application to High Court to set aside refusal, under Criminal Procedure Code (Act V of 1898), sec. 195 (6), maintainability of—Judges of High Court equally divided in opinion—Senior Judge's opinion to prevail under clause 36, Letters Patent—Criminal Procedure Code (Act V of 1898), ss. 429 and 439, inapplicability of, to such application—Application to a superior Court under Criminal Procedure Code (Act V of 1898), sec. 195, to set aside a sanction given by an inferior Court not an appeal within the Indian Limitation Act (IX of 1908), art. 154.*] *Held*, by the Full Bench: (1) An order refusing to revoke a sanction granted by a lower Court is one grant- [illegible] urt under section [illegible] ala v. *Veena Chetti* [illegible] udges composing [illegible] on on hearing an [illegible] Procedure Code, [illegible], the procedure to [illegible] ent and not [illegible] accordingly [illegible] ower confer- [illegible] Code, is not a part of the appellate and revisional jurisdiction of the High Court

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of a temple subject to the control of the temple committee, and introduce changes in the administration which the committee is not legally competent to introduce and which are desirable and necessary to meet the altered circumstances of the time Considering that the actual management of the temple must vest in the trustees subject to the statutory control of the committee, their Lordships held it undesirable in framing a scheme to introduce as the lower Court did, a new body of people called a Board of Control over the trustees and hence abolished the same In the result their Lordships framed a scheme for the temple providing among other things, for (a) the appointment of two additional trustees for the better management of the temple, (b) the tenure of office of the trustees appointed being only for five years, (c) the preparation of annual budget and audit of temple accounts and (d) the appointment of a cashier under the trustees. *Per Curiam* —The powers of the committee or any other statutory body do not become suspended by the occurrence of a vacancy among its members. Powers of a temple committee considered. *Santhalva v Manjanna Shetty* (1911) I L R, 34 Mad, 1, dissented from. English and Indian cases, reviewed.

Sitharama [illegible] .. (1916) I.L.R., 39 Mad. 700

RELIGIOUS INSTI[illegible] *revenue purposes, power to control* [illegible] *district but not with the new district.—See* RELIGIOUS [illegible] (XX OF 1863).

RENT, *a higher, payment of, for sixty years—Presumption as to a binding contract therefor, under the Rent Recovery Act* (VIII of 1865) :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 13, CL (3).

———, *non-payment of, suit to recover lands under (Madras) Estates Land Act (I of 1908) for, non-maintainability of* —*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 189, ETC

———, *suit for* :—*See* LESSOR AND LESSEE

RENT RECOVERY ACT (MADRAS) (VIII OF 1865)—*Presumption of a binding contract to pay higher rent* —*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 13, CL (3).

——————— SS. 49 AND 78—*See* (MADRAS) ESTATES LAND ACT (I OF 1908).

RES JUDICATA, *if, ground of decision* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC 11.

RESPONDENTS, *death of one of the, decree passed in ignorance of* :—*See* APPEAL, *parties to.*

RETRIAL, *if acquittal wrong* :—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS 233, 421 AND 537.

REVENUE, *arrears of, attachment of* :—*See* INDIAN CONTRACT ACT (IX OF 1872), SS. 69 AND 70.

———, *release of, on Government lands under ryotwari tenants, purchased by zamindar* —*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC [illegible]

REVENUE C[illegible] LAND ACT (I OF 1908), SS. 189, ETC.

REVENUE F[illegible] GIOUS ENDOWMENTS ACT [illegible]

REVENUE SALE, *on non-payment of public revenue—Purchase by* [illegible] *Extinguishment of mortgage* :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 65 (c).

REVERSIONARY INTEREST, *attachment of, and sale thereupon* :—*See* HINDU LAW .. 505

REVERSIONER :—*See* HINDU LAW .. 634

REVERSIONERS, *suit by, to declare an alienation invalid during widow's life-time, withdrawal of—Subsequent suit after widow's death for possession, not barred* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 1 (3).

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REVISION, *incompetency of High Court to sanction composition of offences in*:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC 439.

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REVISION PETITION *to the High Court, against an order under section 133* —See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS 435, 439 AND 133.

REVOCATION *by dependent relative* —See HINDU LAW, WILL . 107

——— *of will*:—See HINDU LAW, WILL . 107

RYOTWARI LANDOWNER:—See (MADRAS) ESTATES LAND ACT (I OF 1908), SS. 189, ETC.

RYOTWARI LANDS *acquired by Government under Land Acquisition Act (I of 1894)*:—See (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 6, SUB-SEC (6) AND SEC. 8.

———, *substitution of, as zamindari lands*:—See (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC (6) AND SEC (8).

RYOTWARI TENURE, *Government lands under, purchased by zamindar*:—See (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8.

SADALWAR AND MATHIRI KASUVU, *not illegal cesses within section 143 of the (Madras) Estates Land Act (I of 1908)*:—See (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 13, CL. (3).

SALE, *free of incumbrance*:—See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS 20 AND 22.

———, *irregularity, vitiating the*:—See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

———, *properties advertised for, by the official Receiver as subject to mortgage* —See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

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SALE OF LAND.—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 55 (4).

SALE PROCLAMATION, *change in the, on the day of sale* —See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20 AND 22.

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SANCTION FOR COMPOSITION, *in revision, incompetency of High Court to* —See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 439.

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[illegible] a bench of the High Court are equally divided on opinion on hearing an application under section 195, clause (6), of the Criminal Procedure Code, [illegible] matter, the procedure to [illegible] e Letters Patent and not [illegible] cedure Code; accordingly [illegible] riam:—The power conferred upon the High Court by section 195 (6), Criminal Procedure Code, is not a part of the appellate and revisional jurisdiction of the High Court

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conferred by chapters 31 and 32 of the Criminal Procedure Code, but it is a special power conferred by section 195 (6) of the Code. *Held*, by the Division Bench (SUNDARA AYYAR and SPENCER, JJ.), that an application to a superior Court under section 195, clause (*b*), Criminal Procedure Code, to revoke a sanction granted by an inferior Court is not an appeal within the meaning of article 154 of the Limitation Act and hence is not governed by the rule of 60 days allowed by that article for criminal appeals. *Per* SPENCER, J., in the Division Bench—But delay in applying may be a ground for refusing to grant sanction.

Bapu v. *Bapu* (1916) I.L.R., 39 Mad. (F.B.), 760

SAPINDAS *consent of, refusal of, on personal grounds, improper:—See* HINDU LAW

——— ———, *remoter, consent of —See* HINDU LAW 77

SECRETARY OF STATE FOR INDIA, *suit against the, for damages, if maintainable —See* TORTS.

SECRETARY OF STATE FOR INDIA AND EAST INDIA COMPANY, *suit against, non-liability of, for acts done in exercise of sovereign powers—Exceptions—American and English Laws.—See* TORTS.

SECRETARY OF STATE IN COUNCIL *suit against, in respect of illegal order of District Magistrate under Assam Labour and Emigration Act (VI of 1901), sec. 91, and also for alleged defamation in a Government Order—Damage, remoteness of—Liability of defendant under the Government of India Act (I of 1858)—No liability on the ground that the order was made in the course of employment, and that the acts were done by Government servants in the exercise of statutory powers—Alleged ratification by the Local Government—Government Order—Absolute privilege—Absence of malice.*] Suit by the plaintiff, who represented the Assam Labour Supply Association in Ganjām and other districts, against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjām suspending and dismissing one *T S*, the Local agent of the Association in Ganjam, and closing his depot to recruiting under the Assam Labour and Emigration Act (VI of 1901), whereby the plaintiff was prevented from earning from the members of the association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor in-Council on appeals by the plaintiff and others against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion. *Held*, by the Court on appeal (affirming the judgment of WALLIS, J., on the Original Side), that (1) as the action of the Collector and District Magistrate who was found to have acted without any malice was not directed against the plaintiff, but only against others and as the injury to the plaintiff, if any, was not the direct consequence of the Collector's act but was only very remotely connected with it, the plaintiff had no cause of action and (2) the Governor-in-Council was not liable for the publication of the defamation as the same was done on a privileged occasion, i.e., in the course of its official duties. *Held* further, by SADASIVA AYYAR, J.:—(a) Even the Collector and District Magistrate was not personally liable as he only did his duty imposed on him by the statute [vis., section 22, clause (3) of Assam Labour and Emigration Act (VI of 1901)] and (b) as in doing so he was not the agent of the Government and as the act was not done on Government's behalf, the Government could not ratify the same, nor can Government be liable even if it had ratified the same. *Held* further, by BAKEWELL, J., that so far as the plaintiff was concerned, as he was neither an employer nor his agent, he was, according to the Act, carrying on an illegal business and his suit was liable to be dismissed also on this ground.

Ross v. *The Secretary of State for India* ... ... (1916) I.L.R., 39 Mad., 781

SECURITIES, *unauthorized, such as mortgage of immoveable property, directors lending on, not ultra vires.—See* PRESIDENCY BANKS ACT (XI OF 1876), SS 36 AND 37.

SECURITY, *demand of, by Magistrate under proviso to section 3 (1), legality of:—See* INDIAN PRESS ACT (I OF 1910), SS 3 (1), 4 (1), 17, 19, 20 AND 22.

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—— —— *summons to defendant to furnish—Money paid into Court—Subsequent insolvency of the defendant—Plaintiff's right over the deposit—Right of the Official Assignee* :—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXVIII, R. 5.

—— ——, *to keep the peace, order to give, order of a single Judge in revision against* :—See LETTERS PATENT (24 & 25 VICT , CAP. 104), CL 15

SECURITY AND COPIES OF NEWSPAPER, *Government's order under section 4 (1), forfeiting* —See INDIAN PRESS ACT (I OF 1910), SS 3 (1), 4 (1), 17, 19, 20 AND 22.

SELF-ACQUISITION .—See ALIYASANTANA LAW.

SERVICE INAM .—See (MADRAS) PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), SS. 5 AND 10, CL. (2).

SERVICE, *omission of, effect of* :—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 439, 422 AND 423.

SPECIFIC MOVEABLE PROPERTY, *the return of, suit for—Specific Relief Act (I of 1877), sec. 11—Civil Procedure Code (Act V of 1908), O. XXI, r. 31—Pleadings—Suit against a carrier—Non-delivery of goods—Compensation—Limitation Act (IX of 1908), arts. 31, 49 and 115—Maxim, generalia specialibus non-derogent, application of*] In order to entitle a plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree so obtained by the stringent methods provided in Order XXI, rule 31 of the Code of Civil Procedure, it is necessary that he should allege and prove facts which entitle him to compel the delivery of specific moveable property under the provisions of section 11 of the Specific Relief Act Where in a suit against a carrier, the plaint asked for the recovery of one plank of wood that was not delivered to the consignee and also for Rs. 21-12-0 being the loss of interest but contained no allegation that the defendant was in possession of the plank in question and it was obvious from the correspondence that he was not in possession of the same: *Held*, that, in so far as the suit could be regarded as a suit for the return of the specific plank, the case did not come within section 11 of the Specific Relief Act and the suit must be dismissed; that if the suit was regarded as one for compensation for failure to deliver the plank in breach of the contract under the bill of lading, it was governed by article 31 and not by article 49 or 115 of the Limitation Act. By the amendment in 1899 of article 31 of the Limitation Act, the legislature clearly indicated its intention that the *article* should apply to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. Article 49 is inapplicable to such a case; even if it were applicable, its operation would be excluded by the special article 31 as amended on the principle *generalia specialibus non-derogant*. *The British India Steam Navigation Company* v *Hajee Mahomed Esack & Company* (1881) I L.R., 3 Mad., 107, *Dunmull* v. *British India Steam Navigation Company* (1886) I L R , 12 Calc., 477 and *Great Indian Peninsula Railway Company* v. *Rassett Chandmull* (1895) I.L.R , 19 Bom., 165, referred to.

Venkatasubba Rao v. *The Asiatic Steam Navigation Co , Calcutta.* (1916) I.L.R , 39 Mad , 1

SPECIFIC PERFORMANCE, *suit for, maintainability of—Rule of English law—Rule in India before Transfer of Property Act* :—See EXPECTANCIES

SPECIFIC RELIEF ACT (I of 1877), SEC. 11 :—See SPECIFIC MOVEABLE PROPERTY, ETC.

—— —— ——, SEC. 27 (b) —See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 54.

—— —— ——, SEC. 42 : -See MADRAS VILLAGE COURTS ACT (MADRAS ACT I OF 1889), SEC. 24

—— —— ——, SEC. 42—*Declaration, suit for—Legal character or right to property, meaning of—Rights under a contract, declaration as to, if maintainable—Section 42, not exhaustive—Ordinary rule—Exception—Kuri, subscriber to—Assignee from subscriber—Right of, to continue payment—Suit for declaration by, if maintainable*] Section 42 of the Specific

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Relief Act does not contemplate a suit for a declaration that a valid personal contract subsists between the plaintiff and the defendant, as it is not a suit for a declaration of title to a legal character or a right to property. Section 42 of the Specific Relief Act is not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained. *Robert Fischer v. The Secretary of State for India in Council* (1898) I.L.R., 22 Mad., 270 (P.C.), referred to. *Kristaya v. Kasipati* (1880) I.L.R., 9 Mad., 55, referred to. But a declaratory relief will not be given in respect of rights arising out of a contract which would affect *only* the pecuniary relationship between the parties to the contract, unless there are exceptional circumstances in a case to take it out of the ordinary rule. Where the plaintiff, who was the purchaser of the rights of the second defendant who was *a subscriber to a half-ticket in a kuri started by the first defendant* as its proprietor, sued the latter for a declaration that he was not a defaulter and was entitled to continue to pay the subscriptions to the *kuri*, *Held*, that the suit for declaration was not maintainable.

Ramakrishna v. Narayana ... ... (1916) I.L.R., 39 Mad., 80

STANI, KARNAVAN *becoming a* —*See* MALABAR TARWAD

STATEMENT AND CONFESSION, *difference between* —*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 164.

SUBORDINATE COURT, *erroneous order of, to pay court fees on total amount payable on redemption above Rs 5,000 —Appeal —No jurisdiction to the High Court but to the District Court* —See MADRAS CIVIL COURTS ACT (III OF 1873), SS. 12 AND 13

———— ————, *gross contempt of, by a second grade pleader by unjustly attacking its impartiality in the discharge of its duties* —See LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 14.

———— ———— ————, *jurisdiction of* —*See* INDIAN CONTRACT ACT (IX OF 1872), SS. 69 AND 70.

————————————, *right of District Court to recall a case sent to, for execution* —*See* CIVIL RULES OF PRACTICE, R. 161 (a).

SUBORDINATE COURTS, *jurisdiction of, to take proceedings for all cases coming under section 13, clause (f), not ejusdem generis.*—*See* LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 14.

SUBSTITUTION OF PROPERTY AND SECURITY— *Right of purchaser in Court-auction to substituted properties—Transfer of Property Act (IV of 1882), ss. 2 (d), 8, 36, 44 and 52—"Contract to the contrary" in section 36 of the Transfer of Property Act.* After a decree for sale on a mortgage, the mortgagor who was in possession gave a lease of his properties to the first defendant *for one year from July 1907 till July 1908 with a covenant for payment of* the rent on 10th January 1908. In ignorance of this lease and the reservation of a rent the mortgage properties and the crops were brought to sale *in November 1907* and plaintiff purchased the lands together with the crops thereon and the sale was confirmed in December 1907. The crops were harvested in January 1908 by the lessee. *In a suit by the purchaser for the rent of the whole year from the mortgagor and his lessee, Held*: (a) that the purchase of the right, title and interest of the mortgagor to the lands and of the standing crops thereon entitled the purchaser to receive the whole rent reserved which was the thing substituted by the mortgagor for the crops, (b) that sections 8 and 36 of the Transfer of Property Act (IV of 1882) were *inapplicable* as the purchase was in Court-auction, (c) that a stipulation to pay rent of a year's lease at particular date is a contract to the contrary within the meaning of section 36 of the Transfer of Property Act (IV of 1882), which enacts that the right to rent as between the transferor and the transferee ordinarily accrues from day to day, and (d) that the creation of a lease for one year after a suit and decree on mortgage *is not* affected by the doctrine of *lis pendens* enunciated in section 52 of the Transfer of Property Act (IV of 1882) as such a lease is an ordinary incident of the beneficial enjoyment of a mortgagor allowed to remain in possession

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SUDRA, *illegitimate son of* :—*See* HINDU LAW 136

SUIT, *to eject* :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 6, SUB-SEC. (6) AND SEC. 8.

———, *withdrawal of—Fresh suits, filing of, whether saved by* :—*See* (INDIAN) LIMITATION ACT (IX OF 1908), SEC. 14.

SUITS VALUATION ACT (VII OF 1887) :—*See* MADRAS CIVIL COURTS ACT (III OF 1873), SS. 12 AND 13.

——— ——— ——— ———, SEC. 4 :—*See* COURT FEES ACT (VII OF 1870), SCH. III, ART. 17.

SUMMONS CASE AND WARRANT CASE, *trial—Procedure, that of warrant case* :—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 256.

SURETY, *rights of, against principal debtor—Contract of suretyship, only between surety and creditor* :—*See* NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), SS. 30, 47, 59, 74 AND 94.

SURRENDER, *by widow to nearest reversioners after alienation of her husband's estate, effect of* :—*See* HINDU LAW 1035

TARWAD PROPERTY, *incidentals of* :—*See* MALABAR LAW.

TEMPLE COMMITTEE, *powers of* :—*See* RELIGIOUS ENDOWMENTS ACT (XX of 1863).

TENANT, *acquisition of landholder's right* :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 6, SUB-SEC. (6) AND SEC. 8.

———, *suit to recover immoveable property from* :—*See* COURT FEES ACT (VII OF 1870), SEC. 7, CL. (5), SUB-CL. (xi) (cc).

TENANTS-IN-COMMON—*Co-lessors—Lease by Muhammadan co-heirs—Mining lease—Forfeiture clauses—Lease determined by one lessor—Suit by one tenant-in-common in ejectment, maintainability of—Suit for whole or for share, maintainability of—Penal provisions, strict construction of relief against forfeiture—Covenants in a mining lease, exception to rule—English and American laws, rules of.*] A tenant-in-common is entitled to sue for his share of the property demised, where a forfeiture has been incurred under the terms of the lease *Sri Rajah Simhadri Appa Rao* v. *Prattipati Ramayya* (1906) I.L.R., 29 Mad, 29, *Korapalu* v. *Narayana* (1913) 25 M.L.J., 315 and *Ebrahim Pir Mahomed* v. *Cursetji Sorabji Desitre* (1887) I.L.R, 11 Bom, 644, followed. *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (1908) I.L.R, 35 Calc., 807, dissented from. Though the aim of law generally is in favour of giving relief against forfeiture in the case of leases, in the case of [illegible] strued and [illegible] nerican law [illegible] and *Doed.* [illegible], followed. [illegible] referred to.

Syed Ahmad v. *Magnesite Syndicate, Ltd.* . (1916) I.L.R, 39 Mad., 1049

TESTATOR, *adoption by, subsequent completion of* :—*See* HINDU LAW 107

TIME, *extension of, for paying mortgage amount only upon good cause, non-passing of a foreclosure decree, not a good cause for extension* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIV, RR. 3 AND 8.

——— *for payment in a preliminary mortgage-decree by Appellate Court, power to extend, only for first Court* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIV, R. 8, PRO.

———, *no power to extend under section 148 of the Civil Procedure Code (Act V of 1908)* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIV, R. 8, PRO.

TORTS—*Defamation—Suit for damages—Defamatory statement made and published outside British India—Defendant resident in British India—Suit in British India, if maintainable—Order of excommunication from caste passed by Raja of Cochin—Communication of, to the kariasta of a temple in British India—Transmission by Kariasta to Pattamalas—Publication, meaning of—Justification.*] A Court in British India has jurisdiction to entertain a suit for damages for a personal tort committed by a person beyond the limits of

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Relief Act does not contemplate a suit *for a* declaration that a valid personal contract subsists between the plaintiff and the defendant, as it is not a suit for a declaration of title to a legal character or a right to property. Section 42 of the Specific Relief Act is not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained. *Robert Fischer v The Secretary of State for India in Council* (1894) I.L.R 22 Mad., 270 (P.C.), referred to *Kristnaya v Kasipati* (1880) I.L.R., 9 Mad., 55, referred to But a declaratory relief will not be given in respect of rights arising out of a contract which would affect only the pecuniary relationship between the parties to the contract, unless there are exceptional circumstances in a case to take it out of the ordinary rule. Where the plaintiff, who was the purchaser of the rights of the second defendant who was a subscriber to a half-ticket in a kuri started by the first defendant as its proprietor, sued the latter for a declaration that he was not a defaulter and was entitled to continue to pay the subscriptions to the kuri, *Held*, that the suit for declaration was not maintainable.

Ramakrishna v. Narayana .. ... (1916) I.L.R., 39 Mad., 80

STANI, KARNAVAN *becoming a* —*See* MALABAR TARWAD

STATEMENT AND CONFESSION, *difference between* —*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 164.

SUBORDINATE COURT, *erroneous order of, to pay court fees on total amount payable on redemption above Rs 5,000 —Appeal—No jurisdiction to the High Court but to the District Court* —*See* MADRAS CIVIL COURTS ACT (III OF 1873), SS. 12 AND 13.

———, *gross contempt of, by a second-grade pleader by unjustly attacking its impartiality in the discharge of its duties* —*See* LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 14.

———, *jurisdiction of* —*See* INDIAN CONTRACT ACT (IX OF 1872), SS 69 AND 70

———, *right of District Court to recall a case sent to, for execution* —*See* CIVIL RULES OF PRACTICE, R 161 (a).

SUBORDINATE COURTS, *jurisdiction of, to take proceedings for all cases coming under sectio*[illegible] *not ejusdem generis.* —*See* LEGAL PRACTITIONERS ACT (XVII[illegible]

SUBSTITUTION [illegible] *in Court-auction to* [illegible] (d), 8, 36, [illegible] *of Property Act*) [illegible] who was in possession gave a lease of his [illegible] for one year from July 1907 till July 1908 with a covenant [illegible] the rent on 10th January 1908. In ignorance of this lease and the reservation of a rent the mortgage properties and the crops were brought to sale in November 1907 and plaintiff purchased the lands together with the crops thereon and the sale was confirmed in December 1907. The crops were harvested in January 1908 by the lessee. In a suit by the purchaser for the rent of the whole year from the mortgagor and his lessee, *Held*: (a) that the purchase of the right, title and interest of the mortgagor to the lands and of the standing crops thereon entitled the purchaser to receive the whole rent reserved which was the thing substituted by the mortgagor for the crops, (b) that sections 8 and 36 of the Transfer of Property Act (IV of 1882) were inapplicable as the purchase was in Court-auction, (c) that a stipulation to pay rent of a year's lease at particular date is a contract to the contrary within the meaning of section 36 of the Transfer of Property Act (IV of 1882), which enacts that the right to rent as between the transferor and the transferee ordinarily accrues from day to day, and (d) that the creation of a lease for one year after a suit and decree on mortgage is not affected by the doctrine of *lis pendens* enunciated in section 52 of the Transfer of Property Act (IV of 1882) as such a lease is an ordinary incident of the beneficial enjoyment of a mortgagor allowed to remain in possession

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TRADER *not a banker, money left with, if loan or deposit*:—*See* INDIAN LIMITATION ACT (IX OF 1908), ARTS 59 AND 60.

TRANSFER OF *goods to creditor after intimation to him that his debtor is about to suspend payment but before filing a petition for declaration of insolvency, not a bona fide transfer* *See* PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 57.

———— *Management*:—*See* TRUSTEES *of a temple*

TRANSFER OF PROPERTY ACT (IV of 1882), SS 2 (*d*), 8, 36, 44 AND 52:—*See* SUBSTITUTION OF PROPERTY AND SECURITY.

————, SEC. 6 —*See* EXPECTANCIES.

————, SEC 54—*Agreement to sell land not creating any interest therein—Rule of perpetuities, not offending—Specific Relief Act (I of 1877), sec 27 (b)—Indian Contract Act (IX of 1872), sec. 37.* A contract to convey or reconvey immoveable properties,

Vadhyar (1915) I.L.R., 38 ontract is also enforceable ct (IX of 1872) against the

Charamudi v. *Raghavulu* ... ... (1916) I.L.R., 39 Mad., 462

————, SEC. 55 (4)—*Sale of land—Vendor and purchaser—Vendor's direction to pay purchase money to a third party on his behalf—Existence of vendor's lien, in spite of.*] A contract to forego the vendor's charge for unpaid purchase money is not to be necessarily inferred when the whole or part of the consideration for the purchase of immoveable property is agreed to be paid by the purchaser to a third party on behalf of the vendor. *Abdulla Beary* v. *Mammali Beary* (1910) I.L.R., 33 Mad., 446 and *Sivasubramania Mudaliar* v. *Gnana Sambandha Pandara Sannadhi* (1911) 21 M.L.J., 359, over ruled. *Webb* v. *Macpherson* (1904) I.L.R., 31 Calc., 57 (P.C.), referred to.

Sivasubramania Ayyar v. *Subramania Ayyar* .. (1916) I.L.R., 39 Mad., 997

————, SEC. 57:—*See* MORTGAGES.

————, SS. 58, 60 AND 68—*Possessory mortgage in* ... *payment—A* ... ment of 1894 ... Pattiram" which may be translated as a possessory mortgage deed containing a condition for a period fixed, contained among others, the following terms: "within these limits a house-site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage

37 Mad., 545, distinguished.

Hakeem Patta Muhammad v. *Shaik Dawood* ... (1916) I.L.R., 39 Mad., 10[illegible]

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———, senior, preferential right of, to adopt —See Hindu Law 772

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——— revocation of :—See Hindu Law 107

———, subsequent, making different disposition of property, but not revoking former will :—See Hindu Law . . 107

ZAMINDAR, *Government lands under ryotwari tenant purchased by* :—See (Madras) Estates Land Act (I of 1908), sec. 6, sub-sec. (6) and sec. 8.

ZAMINDARI LANDS —See (Madras) Water-Cess Act (VII of 1865).

——— *acquired by Government under Land Acquisition Act (I of 1894)* :—See (Madras) Estates Land Act (I of 1908), sec. 6, sub-sec. (6) and sec. 8

———, *substitution of ryotwari lands as* :—See (Madras) Estates Land Act (I of 1908), sec. 6, sub-sec. (6) and sec. 8

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1915.
January 8 and 18 and March 3 and 4.

JALDU VENKATASUBBA RAO (PETITIONER, PLAINTIFF), APPELLANT,

v.

THE ASIATIC STEAM NAVIGATION COMPANY OF CALCUTTA (RESPONDENT, DEFENDANT), RESPONDENTS.*

Specific moveable property, the return of, suit for—Specific Relief Act (I of 1877), *sec* 11—*Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 31—*Pleadings—Suit against a carrier—Non-delivery of goods—Compensation—Limitation Act (IX of* 1908), *arts.* 31, 49 *and* 115—*Maxim,* generalia specialibus non-derogant, *application of.*

In order to entitle a plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree so obtained by the stringent methods provided in Order XXI, rule 31 of the Code of Civil Procedure, it is necessary that he should allege and prove facts which entitle him to compel the delivery of specific moveable under the provisions of section 11 of the Specific Relief Act.

Where in a suit against a carrier, the plaint asked for the recovery of one plank of wood that was not delivered to the consignee and also for Rs. 21-12-0 being the loss of interest but contained no allegation that the defendant was in possession of the plank in question and it was obvious from the correspondence that he was not in possession of the same:

Held—

that, in so far as the suit could be regarded as a suit for the return of the specific plank, the case did not come within section 11 of the Specific Relief Act and the suit must be dismissed;

and that if the suit was regarded as one for compensation for failure to deliver the plank in breach of the contract under the bill of lading, it was governed by article 31 and not by article 49 or 115 of the Limitation Act.

By the amendment in 1899 of article 31 of the Limitation Act the legislature clearly indicated its intention that the *article* should apply to a claim against a

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——, *senior, preferential right of, to adopt* —See HINDU LAW 772

WILL:—*See* HINDU LAW 107

—— *revocation of*:—*See* HINDU LAW 107

——, *subsequent, making different disposition of property, but not revoking former will*:—*See* HINDU LAW . . 107

ZAMINDAR, *Government lands under ryotwari tenant purchased by*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 6, SUB-SEC (6) AND SEC. 8.

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The British India Steam Navigation Company v. *Hajee Mahomed Esack & Company* (1881) I.L.R., 3 Mad., 107, *Danmull* v. *British India Steam Navigation Company* (1886) I.L.R., 12 Calc., 477 and *Great Indian Peninsula Railway Company* v. *Raisett Chandmull* (1895) I.L.R., 19 Bom., 165, referred to.

APPEAL under clause 15 of the Letters Patent against the judgment of TYABJI, J., in Civil Revision Petition No. 568 of 1913, presented against the decree of G. G. SOMAYAJULU, the Principal District Munsif of Masulipatam, in Small Cause Suit No. 1257 of 1912.

The facts of the case appear from the Judgment of SESHAGIRI AYYAR, J.

P. Nagabhushanam for the appellant.

D. Chamier for the respondent.

This Letters Patent Appeal came on for hearing before SPENCER and SESHAGIRI AYYAR, JJ., who made the following:—

ORDER OF REFERENCE TO FULL BENCH.

SPENCER, J.

SPENCER, J.—I have had the advantage of perusing the judgment which my learned brother is about to deliver but I regret that I have not been able to come to the same conclusion at which he has arrived.

It is contended that the suit having been brought for the delivery of specific moveable property, viz., a plank, or for its value, the plaintiff had three years within which to file his suit under article 49 of the Limitation Act.

In support of this contention *Murugesa Mudali* v. *Jotharam Davay*(1) is cited.

That was a suit against purchasers at a Court auction to make them restore the goods purchased or their value as compensation.

The present is essentially a suit against a carrier for compensation for non-delivery of goods, and it has been held in *Haji Ajam Goolam Hoosein* v. *Bombay and Persia S. N. Co.*(2) and in *Great Indian Peninsula Railway Coompany* v. *Ganpat Rai*(3) that the article applicable to such suits is article 31,

(1) (1899) I.L.R., 22 Mad., 478. (2) (1902) I.L.R., 26 Bom., 562.
(3) (1911) I.L.R., 33 All., 544.

VENKATASUBBA RAO v. THE ASIATIC STEAM NAVIGATION CO., CALCUTTA.

SPENCER, J.

or if the carrier loses or injures the goods then article 30, *Great Indian Peninsula Railway Company* v. *Raisett Chandmull*(1) the period of limitation under either of these articles in the present Limitation Act being one year.

In *The British India Steam Navigation Company* v. *Hajee Mahomed Esack & Company*(2) it was thought that, while article 30 would apply to suits for compensation for loss or damages to goods carried, article 115 which allows three years' time for suing would apply to suits for breaches of contracts to deliver, but that decision was prior to the enactment of Act X of 1899, section 3 of which inserted the words "non-delivery of or" in article 31. It is not now argued before us that article 115 applies. In *Danmull* v. *British India Steam Navigation Company*(3) which was also prior to Act X of 1899 the defendants denied that plaintiff had entrusted them with the missing goods. It was the case of neither party that the goods had been lost. *Mohansing Ghawan* v. *Henry Conder*(4) was another case of non-delivery of goods prior to the enactment of 1899.

It may be that, when the words "non-delivery of or" were inserted in this article, the grouping of the articles under the heads of suits upon contracts and suits upon torts was not heeded for convenience sake, seeing that non-delivery by a common carrier is first and foremost a tort as observed by GARTH, C.J., in *Moothora Kant Shaw* v. *The India General Steam Navigation Co.* (5) though an action against a common carrier may be founded either on contract or on tort (vide Bullen and Leake on Pleading, 6th edition, page 139). The division between suits on torts and suits on contracts is not strictly observed in the schedule, for articles 48 and 49 include cases of tort, and they are after article 36.

It seems to me that the legislature intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands.

Now the plaintiff cannot be allowed to extend the period of limitation by the dodge of demanding that the very goods

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(5) (1884) I.L.R., 10 Calc., 166 at p. 186.

VENKATA-SUBBA RAO v. THE ASIATIC STEAM NAVIGATION CO., CALCUTTA.

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themselves should be delivered to him, when the defendants have stated in a letter to him [see Exhibit A (1)] that, owing to the *long delay caused by the plaintiff in not producing the invoice* in support of his bill, they find it difficult to check the shortage and have on that account pleaded non-liability to account to him. The mere allegation in the plaint that there was non-delivery implies a breach of the contract to carry although the facts may disclose a tort also on the part of the carrier, but the date within which the plaintiff must file his suit will not depend on the defence set up in written statement. So plaintiff cannot run the risk of waiting till he knows what the defence will be but must come to Court within the period allowed by the legislature for claims based on non-delivery.

It was pointed out in *Murugesa Mudali* v. *Jotharam Davay*(1) that the right to sue for the recovery of specific moveable property is governed by sections 10 and 11 of the Specific Relief Act I of 1877 and that an injustice would be likely to result from giving a decree for the recovery of the goods *in specie*, as such a decree might be enforced by attachment of the judgment-debtor's property and the imprisonment of his person while it might be impossible for him to obey the decree without the assistance of the persons in possession of the goods The same remarks might be made as to carriers of goods who are unable to trace missing goods entrusted to them for delivery.

In the present case the only decree that the plaintiff could have obtained upon the pleadings, if he had sued in time, would have been a decree that the defendants should pay him compensation for non-delivery of the plank in question. Article 48 or 49 cannot be applied since under column 3 of the schedule time has not begun to run and thus there is no cause of action for a suit under either of these articles.

I consider therefore that the learned Judge was right in holding that the suit fell under article 31 of the Limitation Act and that this Letters Patent Appeal should be dismissed with costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I have come to a different conclusion The facts are these:—Sixty-one planks of teakwood were consigned at Moulmein in May 1909 through the defendant company

(1) (1899) I.L.R., 22 Mad., 478.

VENKATÁ-SUBBA RAO v. THE ASIATIC STEAM NAVIGATION CO., CALCUTTA.

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for delivery to the plaintiff at Masulipatam. The defendants delivered only sixty planks on the 28th August 1909. This suit is brought on the 16th June 1912 for the recovery of the one plank of wood undelivered (the Court was closed from the 5th May to the 16th June). The prayer in the plaint is in these terms:—

"(a) directing the defendant to deliver to the plaintiff the plank worth Rs. 60-15-0 as per the copy of the bill filed herewith, as also Rs. 21-12-0 being the loss of interest.

"(b) or else directing the defendant to pay to the plaintiff Rs. 60-15-0, the value of the teak plank, Rs. 21-12-0 for interest, in all, Rs. 82-11-0 together with subsequent interest."

The defendants pleaded the bar of limitation.

The District Munsif held that article 31 of the Limitation Act applied and that as the suit was brought more than a year after the date on which the plank should have been delivered, he decided that the claim was barred by limitation. Mr. Justice TYABJI on revision agreed with this view. This Letters Patent Appeal is against that decision.

Article 31 is among a group of articles dealing with compensation. The word compensation used in articles 17 and 18 has not the same meaning as in the subsequent articles; from articles 19 to 31, the term is used to denote a claim for damages; and in almost all the cases the cause of action is in tort. As was pointed out by GARTH, C.J., in *Moothora Kant Shaw* v. *The India General Steam Navigation Co.*(1), the ordinary liability of a common carrier is founded on custom, and "a common carrier is and always has been liable to be sued for any breach of this common law duty *in an action of tort.*" This accounts for the inclusion of carriers in the category of cases relating to the award of compensation for torts. It was pointed out in *The British India Steam Navigation Company* v. *Hajee Mahomed Esack & Company*(2), that the position of article 31 suggests that it was intended to cover cases of malfeasance, misfeasance and nonfeasance independent of contract. GARTH, C.J., in *Danmull* v. *British India Steam Navigation Company*(3),

(1) (1884) I.L.R., 10 Calc., 166 at p. 186. (2) (1881) I.L.R., 3 Mad., 107.
(3) (1886) I.L.R., 12 Calc., 477.

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points out that the shorter period of limitation provided by the article will not govern breaches of contract. WILSON, J., takes the same view. The fact that other cases relating to compensation from tortious acts are provided with a period of two years' limitation in subsequent articles only shows that in the cases of carriers and in the special cases referred to till article 31 is reached, the legislature wanted the grievances to be earlier dealt with I was at first inclined to think that cases of compensation for breaches of contract would come under article 31. On further consideration I think that the correct view is to hold that in order to affect article 31 the claim must be founded only on tort. Article 36 is the residuary article in cases of torts. Article 49 provides for cases of compensation arising from a breach of contract; and the residuary article in regard to such matters is article 115. Although it is not easy to give a logical explanation for the arrangement of the articles in the Limitation Act, it seems clear from their grouping and from the position of the residuary articles that compensation for torts is provided for separately from compensation for breaches of contract. I feel no hesitation therefore in holding that article 31 does not relate to claims arising from contracts. It is true that the decisions to which I referred were passed before the legislature amended article 31 by inserting the words "or for non-delivery." But this amendment cannot enlarge its scope. The essential characteristic of the original article which must attach to it even after the amendment is that it deals with a claim for damages arising from a tortious act A claim against a common carrier is not always restricted to damages. A carrier may have the consigned article in his possession and yet refuse to deliver it. Such an article may have something more than a commercial value to the consignee. In such cases he is entitled to ask for its delivery. Article 31 cannot cover such cases. The carrier in addition to the common law liability pointed out by GARTH, C.J., may incur contractual obligations. See observations in *Moothora Kant Shaw* v. *The India General Steam Navigation Co.*(1). The enforceability of such obligations will depend on considerations different from those relating to the award of damages. Although a decree for delivery of specific moveable

(1) (1884) I.L R., 10 Calc., 166 at p. 186.

property may by virtue of Order XX, rule 10, provide for the payment of its value in the alternative, the decree-holder can take steps for obtaining possession of the article itself. Mr. Chamier argued that as article 31 is the only provision relating to carriers all cases against them are controlled by that article. I am unable to agree with this contention. Suppose, for instance, an honest carrier intimates to the consignee a year after the date fixed for its delivery that he is unable to trace it; article 31 can give no relief in such cases. It would leave the consignee without any remedy. There are special provisions relating to the recovery of articles *in specie*; and unless the language of these articles excludes claims against carriers, I see no reason for not applying them to the case of carriers as well. I am therefore of opinion that to the claim as laid article 31 does not apply. In *Haji Ajam Goolam Hoosein* v. *Bombay and Persia S. N. Co.*(1), the suit was "for Rs. 750 as damages for the non-delivery of 35 out of 200 cases of oil." In *Great Indian Peninsula Railway Company* v. *Ganpat Rai*(2) also the claim was for damages. There was no relief for the delivery of the specific article in these cases and although to the Allahabad case, [*Great Indian Peninsula Railway Company* v. *Ganpat Rai*(2)], the latter portion of article 49 seems applicable, the point does not seem to have been argued. I do not think these cases are decisive of the point we have to decide in this case.

I think the claim falls under article 49. The language of the first part exactly covers this case. The view taken in *Murugesa Mudali* v. *Jotharam Davay*(3), is in accordance with this conclusion. If article 49 does not apply, article 115 will apply.

In *Moothora Kant Shaw* v. *The General Steam Navigation Co.*(4) already referred to by me GARTH, C.J., points out that "a carrier is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff," and he quotes Bullen and Leake in support of the position. In the forms of pleading given in that treatise, we have first of all statements of claims in contract; then come the statements of claims in tort; then follow forms for defences in

(1) (1902) I.L.R., 26 Bom., 562. (2) (1911) I.L.R, 33 All., 544.
(3) (1899) I.L.R, 22 Mad., 478. (4) (1884) I.L.R., 10 Calc., 166 at p. 186.

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actions of contract and afterwards similar forms for defence in actions in tort. These indicate that it is at the option of the consignee to sue in contract or in tort either for the specific article or for damages. In the present case the plaintiff has chosen to claim the article and he is entitled to choose that remedy.

SPENCER AND SESHAGIRI AYYAR, JJ.

BY COURT.—Having regard to the importance of the question involved and to the difference of judicial opinion that exists, we think it is desirable that the question should be referred for the decision of a Full Bench upon the following points :—

"(1) Whether article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him or in the alternative their value, and for interest upon the amount claimed as the value of the goods?"

"(2) Whether upon the pleadings, this suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods?"

P. M. Srinivasa Ayyangar for *P. Nagabhushanam* for the appellant.

The suit was brought within three years but more than a year after the date on which the plank should have been delivered. My contention is that either article 49 or article 115 applies; articles 30 and 31 are essentially articles which apply when compensation is asked for.

[WALLIS, C.J.—According to you, the suit for the article in question is governed by article 49 and the suit for compensation is governed by article 31.]

My suit is not for compensation but for the plank. Under Order XXI, rule 31, Civil Procedure Code I have to ask for the relief I have claimed in the plaint. I have to state the value of article; sections 10 and 11 of the Specific Relief Act also apply.

[WALLIS, C.J.—These sections apply to cases where the defendant has control or possession. Possession is not alleged in the plaint. The allegations do not amount to a cause of action which will bring your case under section 11, clause (c).]

[AYLING, J.—You do not allege the necessary circumstances which will give you a right of suit under section 11.]

[WALLIS, C.J.—If you sue for the delivery of the specific chattel under article 49 then you must allege that the defendant is in possession. You have not done it.]

[SADASIVA AYYAR, J.—In this case it is proved that they have not got it. Then your action is under article 31.]

Murugesa Mudali v. *Jotharam Davay*(1) decides that a suit for compensation, even if barred, will not *be so held* if the claim is tacked on to the recovery of the property itself.

[WALLIS, C.J.—No authority is cited in *Murugesa Mudali* v. *Jotharam Davay*(1). This case is in your favour. The question is whether it is correctly decided.]

My suit is really for the recovery of property. My second prayer for compensation is put in, because of Order XX, rule 10. From Form No. 32 in Civil Procedure Code, it is clear that the suit should be framed in this form. Because the plaint asks for compensation it should not be construed as one of that nature. See *Appasami Naicken* v. *Jotha Naicken*(2). The principal relief is the recovery of the property.

According to *Mohansing Chawan* v. *Henry Conder*(3) the onus of proving that the article has been lost is on the defendants.

[WALLIS, C.J.—That case cannot help you. That was one for compensation.]

See *The British India Steam Navigation Company* v. *Hajee Mahomed Esack & Company*(4).

[WALLIS, C.J.—That case was before the amendment of article 31.]

There is distinction between suits for compensation on account of negligence in not performing a contract and suits for enforcing the terms of a contract. Article 49 applies to the latter class of suits—*Hassaji* v. *The East India Railway Co.*(5) and *Danmull* v. *British India Steam Navigation Company*(6)—while article 31 applies for suits based on negligence in not performing the contract.

The words "independent of contract" in article 36 make my submission clear. The argument on the other side that article 31 must apply because the words "common carrier" are used

(1) (1899) I.L.R., 22 Mad., 478.
(2) (1899) I.L.R., 22 Mad., 449.
(3) (1883) I.L.R., 7 Bom., 478.
(4) (1881) I.L.R., 3 Mad., 107.
(5) (1882) I.L.R., 5 Mad., 388.
(6) (1886) I.L.R., 12 Calc., 477 at pp. 480 and 481.

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is not right in view of *Kothandarama Chetty* v. *The British India Steam Navigation Co., Ld.*(1), *Great Indian Peninsula Railway Company* v. *Ganpat Rai*(2) holds that article 31 would apply because in that case the suit was for damages for non-delivery; *Haji Ajam Goolam Hoosein* v. *Bombay and Persia S. N. Co.*(3) was also a suit for damages. *Great Indian Peninsula Railway Company* v. *Raisett Chandmull*(4) was a suit for compensation.

[WALLIS, C.J.—FARRAN, J., calls upon the legislature to make it clear that article 31 applies to common carriers and now after the amendment there can be no doubt about it.]

My submission is that this is a suit for the recovery of the property and not for compensation.

[WALLIS, C.J.—In my view the plaint asks for both.]

D. Chamier and *K. Pandalai* for respondent were not called upon.

This reference coming on for hearing before the Full Bench constituted as above, the Court expressed the following

OPINION.

WALLIS, C.J., AYLING AND SADASIVA AYYAR, JJ.

Two questions have been referred to us; and it will be more convenient to deal with the second one first, "Whether upon the pleadings this suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods." If we look at the prayer of the plaint which asks for the return of the plank *and also for* Rs. 21-12-0 being the loss of interest, it may be treated as a suit both for the return of the specific plank and for damages for its detention. But in order to entitle the plaintiff to obtain delivery of specific moveable property by suit and enforce the decree so obtained by the stringent methods provided in Order XXI, rule 31 of the Code of Civil Procedure, it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions of section 11 of the Specific Relief Act, because unless he does so, he cannot have a decree for the return of the specific moveable property. There is no allegation in the plaint that the defendant is in possession

(1) (1911) 9 M.L.T. 169.
(2) (1911) I.L.R., 33 All., 544.
(3) (1902) I.L.R., 26 Bom., 562.
(4) (1895) I.L.R., 19 Bom., 165.

of the plank in question and it is obvious from the correspondence that he is not. That being so, the case does not come within clause (a) of section 11 of the Specific Relief Act, and it certainly does not come within clause (b), (c) or (d). In so far then as the suit can be regarded as a suit for the return of the specific plank the plaint discloses no cause of action, and the suit must be dismissed.

It may, however, as framed be regarded as a suit for compensation for failure to deliver the plank in breach of the contract under the bill of lading. That brings us to the first question in the reference, "Whether articles 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him, or in the alternative their value, and for interest upon the amount claimed as the value, of the goods." As the Limitation Act of 1877 originally stood, there was a good deal of authority for saying that articles 30 and 31 which deal with suits against a carrier for compensation for losing or injuring goods and suits against a carrier for compensation for delay in delivering goods did not apply. We need only refer to the decision of Sir CHARLES TURNER, C.J., and another learned Judge in *The British India Steam Navigation Company* v. *Hajee Mahomed Esack & Company*(1) and the other authorities cited in *Danmull* v. *British India Steam Navigation Company*(2) and *Great Indian Peninsula Railway Company* v. *Raisett Chandmull*(3). This view proceeded largely upon the position of these articles amongst a number of other articles dealing with suits for damages for torts, and in his judgment in *Great Indian Peninsula Railway Company* v. *Raisett Chandmull*(3) Mr. Justice FARRAN (as he then was) expressed the opinion that this was a rather fallacious test and that in these rulings the Courts had not given effect to the intention of the legislature, but stated having regard to the current of decisions it was rather for the legislature to make its meaning more clear if it had been misinterpreted than for the Court to run counter to the decisions of other High Courts. This was in the year 1894 and acting as we cannot doubt on this suggestion the legislature in 1899 amended article 31 by inserting the words

(1) (1881) I L R, 3 Mad, 107. (2) (1886) I.L.R, 12 Calc, 477.
(3) (1895) I.L.R, 19 Bom., 165.

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the deceased left behind her were her own deceased mother's sister and the issue of another sister of her mother. It being contended that the sole heir was the deceased's mother's sister as being the nearest relation to her, to the exclusion of the other members of the branch to which the deceased belonged at the time of her death;

Held, that under the Aliyasantana law all the members of the nearest non-extinct branch to which the issueless deceased belonged at the time of her death (viz., her maternal grandmother's descendants) were entitled to succeed and not only one of them, viz, her mother's sister, who is nearer in degree than the others.

Antamma v. *Kaveri* (1884) I.L.R., 7 Mad., 575, referred to.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of South Canara, in Appeal No. 429 of 1912, preferred against the decree of D RAGHAVENDRA RAO, the Subordinate Judge of South Canara, in Original Suit No. 32 of 1911.

The question of law involved in this case is: "Who is the heir to the self-acquisition of a female member in an Aliyasantana family, who dies issueless, namely, whether her own deceased mother's sister alone or whether all the members of the branch to which the deceased belonged including her mother's sister and the issue of other sisters of her mother?" Both the lower Courts held that the mother's sister alone was entitled to inherit in preference to others, she being nearer in degree to the deceased. This Second Appeal was filed by defendants Nos. 5 and 6, who are the children by another sister of the mother of the deceased. The other facts of the case are given in the judgment of Mr. Justice SADASIVA AYYAR.

J. L. Rosario for the first appellant.

K. P. Madhava Rao and *K. P. Lakshmana Rao* for the other appellants.

K. Yagna Narayana Adiga for respondents Nos. 1, 2 and 5.

H. Balakrishna Rao for the eighth respondent.

B. Sitarama Rao for respondents Nos. 9, 10 and 12.

J. L. Rosario.—The decision of the lower Court that the inheritance devolves upon only the nearest relative by blood to the deceased, and not upon all the members of the branch, to which the deceased belonged, is opposed to the Aliyasantana law, which recognises only group succession. That the succession devolves upon the branch was decided in *Antamma* v. *Kaveri*(1).

(1) (1884) I.L.R., 7 Mad., 575.

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Under that law, when a member dies issueless leaving self-acquired properties, they descend to her mother's branch in the first instance. If there is no member in the mother's branch, the inheritance devolves upon the grandmother's branch.

B. Sitarama Rao.—*Antamma* v. *Kaveri*(1) does not support the appellants, but supports my contention that the nearest relative by blood succeeds in preference to the branch. The judgment of Mr. Justice SANKARAN NAIR, in the Full Bench case of *Krishnan* v. *Damodaran*(2) has decided this point in favour of my contention in the kindred system of Marumakkattayam law. At any rate, the case ought to be sent back for a finding as to what is the custom in South Canara.

SADASIVA AYYAR, J

SADASIVA AYYAR, J.—The defendants Nos. 5 and 6 are the appellants. They and the plaintiffs and the second defendant and the second defendant's son, the fourth defendant, all belong to an Aliyasantana family. The second defendant (mother of the fourth defendant) is the maternal aunt of the plaintiffs and of the defendants Nos. 5 and 6 and she is the senior lady in the tavazhi of the second defendant's mother. As such senior lady in the branch of the second defendant's mother, she was the ejamanathi or manager of the branch. The second defendant was one of four sisters. Of the four sisters, the second defendant is the only one now surviving. One of the other sisters had a daughter Kusmaji and the finding of the lower Courts is that item 1, schedule B, out of the plaint properties (and that is the only item in dispute in this Second Appeal) belonged to Kusmaji as her self-acquired property Kusmaji died issueless. The second defendant, the maternal aunt of Kusmaji, was alleged by the contesting first defendant to be the sole owner of this item (1) of schedule (B) and he attached and brought the property to sale as her exclusive property in execution of a decree obtained by him on a mortgage document executed to him by the second defendant. It has been found by the lower Courts that the mortgage debt contracted by the second defendant and the mortgage decree obtained against the second defendant by the first defendant are not binding on the plaintiffs and on the defendants Nos. 4 to 6 of whose branch the second defendant is the manager.

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(1) (1884) I.L.R., 7 Mad., 575. (2) (1916) I.L.R., 38 Mad., 48 (F.B.).

MANJAPPA AJRI *v.* MARUDEVI HENGSU. — SADASIVA AYYAR, J.

The Subordinate Judge dismissed the plaintiff's suit as regards this item (1) of schedule (B) on the ground that the second defendant, as the maternal aunt of the deceased owner Kusmaji, was the sole heir to Kusmaji's self-acquired properties and that the plaintiffs and the defendants Nos. 4, 5 and 6 (Kusmaji's mother's nephews and nieces) being one degree more remote than the second defendant were excluded by the second defendant. The Subordinate Judge deals with this question in paragraph 18 of his *judgment and seems to assume without any discussion* that when a female member of an Aliyasantana family dies, her heir is her nearest relative (or the nearest relatives standing in an equal distance from her by blood relationship) in the female line and not the nearest branch of the family in the line to which she belonged, including all the members of that branch without regard to the question which of the members of that branch stand nearest in blood to the deceased *inter se.* The District Judge on appeal in a very short and rather unsatisfactory judgment says thus: "As I understand the Aliyasantana law, the nearest relations succeed first, then the tavazhi, and last the tarwad." (I shall avoid the use of the words "tavazhi" and "tarwad" though the word tarwad is used in *Antamma* v. *Kaveri*(1) as they are Malayalam words which are used in respect of persons governed by the Malabar Marumakkattayam law whereas the parties to this suit are followers of the Aliyasantana law. I shall employ the words "branch" and "family" to denote what correspond to "tavazhi" and "tarwad.)"

In *Antamma* v. *Kaveri*(1), TURNER, C.J., and MUTHUSWAMI AYYAR, J., held that, according to the custom obtaining in South Canara, the self-acquisition of a member of the family governed by the Aliyasantana law devolves upon his death, not upon all the members of the larger *family* to which he belonged, but upon the members of his own *branch* in the larger family. Among the members of his own branch themselves no distinction is made between persons nearer in blood to or remoter in blood from the deceased acquirer. I have looked into the original records of that case and the only question argued or considered was whether the members of the deceased's branch alone were his heirs (taking as a class) or whether the members of the larger

(1) (1884) I.L.R., 7 Mad., 575.

MANJAPPA AJRI v. MARCDEVI HENGSU
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SADASIVA AYYAR, J.

family (including members of other branches also) took as a class. It was never suggested that an individual heir or individual heirs standing in the same degree of blood relationship to the deceased was or were the heirs. I think *Antamma* v. *Kaveri*(1) is clear authority for the proposition that all the members of the nearest non-extinct branch are the heirs of the self-acquirer. In the present case Kusmaji's own line and her mother's line are extinct and her heirs must be found among the descendants of Kusmaji's grandmother who all take as a class belonging to that nearest branch. Hence the second defendant though nearer in blood relationship to Kusmaji, must take only as belonging to *Kusmaji's grandmother's branch and she then takes the inheritance* with all the other members of that branch. The view of the lower Courts that the heirship goes to the nearest individual relation or relations by blood and not to all the members of the nearest branch rests on no authority. Mr Sitarama Rao ingeniously contended that in the Full Bench case—*Krishnan* v. *Damodaran*(2)—the question whether the nearer blood relations standing in the same degree to the deceased do not exclude the remoter relations was left an open question. I was one of the Judges who, with SUNDARA AYYAR, J., made the reference to the Full Bench in that case. The question we referred was whether the self-acquisition of a female member of a Marumakkattayam tarwad would on her death lapse to the tarwad of which she died a member or whether they would descend to her nearest heirs or her tavazhi. The language of the referring order was, if I recollect aright, the language of SUNDARA AYYAR, J. But I am reasonably clear that we had in contemplation only two alternatives, namely inheritance by all the members of the larger tarwad or inheritance by all the members of the smaller tavazhi and not a third alternative, namely inheritance by those members only of the smaller tavazhi who were nearest in blood relationship to the deceased. SANKARAN NAIR, J., however, at page 53, says: "The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the tavazhi, may raise another question." He however did not deem it necessary to decide that question and his answer to the reference is "that the self-acquisitions of a female

(1) (1884) I.L.R., 7 Mad., 575.
(2) (1915) I.L.R., 38 Mad., 48, at pp. 53 and 57 (F.B.)

do not lapse to her tarwad but they descend to her tavazhi; if she has issue, the tavazhi is composed of that issue; if she has no issue, her mother and her descendants form her tavazhi." SUNDARA AYYAR and BENSON, JJ., did not understand the referring order as raising any third question and SUNDARA AYYAR, J., uses the expression "nearest heirs" and "tavazhi" indiscriminately to mean the same thing. The decrees of the lower Courts therefore so far as item 1 of schedule B is concerned, must be reversed and the case remanded to the lower Appellate Court for a fresh decision in Appeal No. 429 of 1912 on the other questions arising in the case with reference to the above property. Costs will abide.

NAPIER, J.

NAPIER, J.—I agree. The decision in *Antamma* v. *Kaveri*(1) has remained unchallenged for thirty years as representing the custom of the district of South Canara and I think that it would be most mischievous to reopen this question and institute a fresh enquiry as to custom after the elapse of such a period.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1914. July 22.

VIJAYABHUSHANAMMAL AND TWO OTHERS (DEFENDANTS Nos. 1, 2 AND 13), APPELLANTS,

v.

C. N. EVALAPPA MUDALIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Mortgage—Decree of Court splitting up mortgagee's rights—Transfer of Property Act (IV of 1882), sec. 67, cl. (d), analogy of.

The principle of the rule embodied in section 67, clause (*d*) of the Transfer of Property Act enabling one of several mortgagees to enforce by suit the payment of his portion of the mortgage money, when the mortgagees sever their interests with the consent of the mortgagor, is applicable to a case where the severance is effected by a decree of Court binding on the mortgagor.

SECOND APPEALS against the decrees of P. A. BOOTY, the acting District Judge of Chingleput, in Appeals Nos. 428 and

(1) (1884) I.L.R., 7 Mad., 575.

* Second Appeals Nos. 2601 and 2118 of 1912.

VIJAYA-BHUSHA-NAMMAL v. EYALAPPA MUDALIAR.

499 of 1911, preferred against the decrees of K. KRISHNAMA-ACHARIYAR, the District Munsif of Poonamallee, in Original Suits Nos. 693 and 695 of 1910, respectively.

The facts of the case appear from the judgment of the lower Appellate Court a portion of which is extracted below:—

"This was a suit to recover on a mortgage deed and the lower Court has decreed in part.

"The plaint mortgage was executed by the first defendant's late father on the 14th November 1870, to two undivided cousins, Kandaswami Mudali and Giribalu Mudali, these two cousins apparently representing their respective branches. In Original Suit No. 4 of 1886 on the file of this (District Judge of Chingleput) Court, it was decided that the two branches were each entitled to a half share of the mortgage amount. The plaintiff in this suit is an undivided brother of Kandaswāmi Mudali now deceased. In Original Suit No 456 of 1894 on the file of the District Munsif of Poonamallee, the representative of Giribalu Mudali sued to recover his half share of the mortgage debt without joining the representative of the other branch as a party and his suit was dismissed. That suit was of course not sustainable in view of section 85 of the Transfer of Property Act. The defendants in this suit have pleaded discharge together with other pleas. The District Munsif has allowed certain items of payment and has decreed for half share of what he finds to be due. The plaintiff has appealed in Appeal No. 474 of 1911 in respect of the portions disallowed and the first and the second defendants have appealed in Appeal No. 449 of 1911 against the portion allowed. Both appeals have been heard together . . . .

"The second objection is that the plaintiff cannot sue for a part only of the mortgage money, but that he should have joined the other sharer and sued for the whole. Also that the effect of the previous suit which failed, namely, Original Suit No. 456 of 1894, is to bar the present suit. There can be no doubt that Original Suit No. 456 of 1894 will operate as *res judicata* against Giribalu's branch, even though it was an irregular suit unsustainable in law. What ought to have been done in 1894 was of course to amend the plaint by joining the other branch as co-plaintiffs and to sue for the whole, or else to have obtained permission then to file a fresh suit and have done so. Plaintiff

VIJAYA BHUSHANAMMAL *v.* EYLLAPPA MUDALIAR.

or his branch was not a party to that suit and he is not bound by it. He cannot lose his rights because some independent person does something wrong; should then the two branches have sued now for the whole while admitting that one half was not recoverable? I do not think Giribalu's branch could be expected to act in such a futile manner. The plaintiff has made the present representative of Giribalu's branch a party to the suit as fourteenth defendant, so that the whole mortgage may be adjudicated upon. It is further objected that a suit for a half share is not sustainable and various rulings such as *Parsotam Saran* v. *Mulu*(1), *Kalidas Kevuldas* v. *Nathu Bhagvan*(2) and *Ramsebuk* v. *Ramlall Koondoo*(3) have been cited. I have perused all these and can find no parallel to the present case. I consider the objection is answered by saying that the plaintiff has sued for everything that is legally recoverable under the mortgage, and that when this suit is decided nothing will remain which might form the subject of another suit. I therefore agree with the District Munsif in answering the issues on this point in the negative."

In the result the District Judge dismissed the appeal of the plaintiff and allowed the appeal of the defendants in part by disallowing Rs. 140 out of the amount claimed by the plaintiff.

The defendants Nos. 1 and 2 preferred this Second Appeal.

S. T. Srinivasagopalachariyar for the appellants.

T. Narasimha Ayyangar for the respondents.

SADASIVA AYYAR AND TYABJI, JJ.

JUDGMENT.—There are no merits in this Second Appeal. Some technical objections are raised but the only arguable objection is that section 67 (*d*) of the Transfer of Property Act prohibits a suit by one of several co-mortgagees who is interested in part only of the mortgage money from suing for sale of a corresponding portion of the mortgaged property, "unless the mortgagees have with the consent of the mortgagor severed their interests under the mortgage" and that the present suit is such a suit.

The rather unhappy wording of the section no doubt lends some colour to this contention; but we do not think that the legislature intended to enact that if the severance of the interests of the mortgagees has taken place in any other lawful

(1) (1887) I.L.R., 9 All., 68 (F.B.). (2) (1883) I.L.R., 7 Bom., 217.
(3) (1881) I.L.R., 6 Calc., 815.

mode legally binding on the mortgagor (as for instance by the decree of a Court of justice in a suit to which the mortgagor is a party and which has become binding on him, though he has not given his consent to the passing of the decree which has the legal effect of causing the severance) the mortgagor may still resist a suit for sale for recovery of a portion of the mortgage money on the basis of such severance. The legislature merely intended to protect the mortgagor from being harassed by a multiplicity of suits where the severance of the interests of the mortgagees has taken place without his consent. The decision of a Court of justice effecting such a severance if binding on the mortgagor must be at least as effective legally as the mortgagor's consent to the severance. In the present case, there was a decree in a suit brought by the plaintiff's co-mortgagee to which suit the mortgagor was a party and it was declared that there had been a severance of the mortgage binding on the mortgagor. That decree might be erroneous but it was not appealed against and has become final. The plaintiff's claim for recovery of his share of the mortgage money on the basis of such severance cannot therefore be resisted by the mortgagor.

This Second Appeal fails and is dismissed with costs. The connected Second Appeal No. 2118 of 1912 follows.

As regards the memorandum of objections in Second Appeal No. 2601, the District Judge was right in crediting the amount paid by the sale of a portion of the mortgaged property towards the principal of the mortgage debt, in the absence of any specific appropriation by either party. The principal amount is the earlier debt and though by indication from circumstances a payment might in some cases more appropriately be credited towards interest in the first instance. See section 60 of the Indian Contract Act and section 76, clause (*b*) of the Transfer of Property Act IV of 1882. There might be circumstances indicating the other way; and we think that the learned District Judge was right in holding that there were such circumstances in this case.

The memorandum of objections is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Napier.

SRIMATH KADAMBI JAGANNATHA CHARYULU AYYAVARLU (PLAINTIFF), APPELLANT,

1914. July 22 and 29.

v.

PIDIKITI KUTUMBARAYUDU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Courts—Jurisdiction, ouster of—Onus—Inam, grant of—Kudivaram right, ownership of

A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so

Indety China Nagadu v. *Potu Konchi Venkatasubbayya* (1910) 1 M W.N., 639 and *Virabhadrayya* v. *Sonti Venkanna* (1913) 24 M L J, 659, followed.

There is no presumption that an inamdar to whom an inam was granted was not owner of the kudivaram right at the date of the grant

Venkata Sastrulu v. *Divi Sitaramudu* (1914) 26 M L J., 585 and *Ponnusamy Padayachi* v *Karuppudayan* (1914) 26 M L J., 285, referred to.

APPEAL against the order of G. KODANDARAMANJULU, the temporary Subordinate Judge of Masulipatam, in Appeal No. 172 of 1912, preferred against the decree of S. NILAKANTAM, the Additional District Munsif of Masulipatam, in Original Suit No. 479 of 1910.

The plaintiff sued for ejectment of defendants from the suit-land and for recovery of profits, past and future ; the defendants set up rights of occupancy and pleaded that Civil Courts had no jurisdiction. The District Munsif found that the plaintiff was an agraharamdar and had both melvaram and kudivaram rights in the land and passed a decree as prayed for. The lower Appellate Court held that the "agraharam" fell under sub-clause (*d*) of section 3 of Estates Land Act and that the plaintiff's suit for ejectment or rent did not lie in a Civil Court and ordered the return of the plaint with the necessary endorsement for presentation to the proper Court. The plaintiff preferred this Civil Miscellaneous Appeal against the said order.

P. Nagabhushanam for the appellants.

P. Somasundaram for the respondents.

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* Appeal against Order No. 294 of 1913.

SRIMATH JAGANNATHA CHARYULU v. KUTUMBARAYUDU.

OLDFIELD AND NAPIER, JJ.

JUDGMENT.—The learned Subordinate Judge has held that the plaintiff, an agraharamdar, should have sued to eject his tenant the defendants, in a Revenue Court, not before the District Munsif, on the ground that the suit village is an estate. The appeal has been argued on the grounds that (1) the burden of proof regarding the character of the suit village was imposed on the plaintiff wrongly, (2) there was, in any case, a failure to consider material evidence.

The plaintiff does not rely on section 8, Estates Land Act; and the question therefore is only whether his village is an estate within the meaning of section 3 (2) (*d*), that is whether (1) the land revenue alone has been granted in inam, (2) the grantee was a person not owning the kudivaram. Now, if the nature of his tenure were under consideration with direct reference *only* to his right to sue in ejectment, there is no doubt that the authorities cited by the lower Court would have been in point and its conclusion correct. But the dispute at present is as to jurisdiction and as to it the first rule is that the party seeking to oust the jurisdiction of the ordinary Civil Courts must establish his right to do so. This is recognised in *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya*(1) a case closely resembling the present and *Virabhadrayya* v. *Sonti Venkanna*(2). This rule is founded on clear and general considerations, and distinct reason must be required to justify departure from it. Of course, as observed in the second decision referred to, "an anomaly seems apparently to exist in the *onus* being placed on different parties in the same suit for the purpose of deciding the question of jurisdiction and for deciding the question of the landlord's right to eject." And this led one of the learned Judges in *Suryanarayana* v. *Potanna*(3) to describe this distribution as "a little too fine and far-fetched," whilst the other thought it necessary to explain it. In doing so he first, as I understand him, accepted the validity of the general rule, as above stated; but he then referred to the presumption "which Courts have recognised about grants from the Crown being grants of the revenue only" as sufficient to turn the scale in the defendant's favour in the absence of other ground for an affirmative

(1) (1910) 1 M.W.N., 639.

(2) (1913) 24 M.L.J., 659.

(3) (1914) 26 M.L.J., 93.

conclusion. If this means only that proof or an admission of the inam character of the village will raise a presumption that the first requirement of section 3 (2) (*d*) has been complied with, i.e., that the grant was of the land revenue alone, it may be accepted. And it is probable that this interpretation is correct, since such a presumption was a sufficient ground of decision in the case then under disposal, one in which plaintiff relied only on pleas that his grant included both *melvaram* and *kudivaram* or in the alternative that he had subsequently acquired the latter. These alternatives alone were considered in *Venkata Sastrulu* v. *Sitaramudu*(1), and only the second of them in *Ponnusamy Padayachi* v. *Karuppudayan*(2), the judgment of MILLER, J., stating expressly that the first of them as well as the alternative relied on in the present case, and the plaintiff's ownership of the kudivaram prior to the grant, were negatived by the circumstances. All these cases in fact differed from the present because the question in them was only of the extent of the grant or the plaintiff's subsequent acquisition of the *kudivaram* not of its ownership at the date of the grant, regarding which plaintiff here admits nothing, arguing that it is for the defendant to prove that it was not his.

The reply attempted to this argument is that he point is covered by a presumption which must be drawn in the defendant's favour. But it has not been shown how such a presumption can be justified on its merits or supported by authority. On the merits it is not clear that there is any necessary or probable connection between the grant of an agraharam and the grantee's possession prior to it of any right in the land; and if it is contended that the reasons against presuming a grant of the *kudivaram* to non-resident Brahmans are valid also against a presumption that they did not own the kudivaram at its date, the answer is that in the present case the non-residence of the plaintiff's ancestor, the grantee, has yet to be proved and that, when the defendants have proved it, it will no doubt afford a ground of decision. As regards authority no recognition of the presumption proposed is to be found or is to be expected in the majority of the cases already referred to, since it was unnecessary for their decision. On the other hand the learned Judges

(1) (1914) 26 M.L.J., 585. (2) (1914) 26 M.L.J., 285.

responsible for *Virabhadrayya* v. *Sonti Venkanna*(1) said : "It is not easy to hold that such a presumption is justifiable." And its legitimacy was negatived directly in *Indely China Nagadu* v. *Potu Konchi Venkatasubbayya*(2). Adequate reason for dissent from these two decisions has not been shown. The conclusion entailed is in accordance with *Indely China Nagadu* v. *Potu Konchi Venkatasubbayya*(2) that the lower Court erred in imposing the burden of proof on the plaintiff in respect of the second question arising under section 3 (2) (*d*), that relating to the ownerships of the kudivaram at the date of the grant of the inam.

The lower Court's decision must therefore be set a side. It must readmit the appeal and dispose of it in the light of the foregoing observations. Provision for costs in this Court will be made in its final decree in accordance with the result. In these circumstances it is unnecessary to deal with the other ground argued in this Court, that material evidence was not considered.

S V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1912 September 16, 17 and 26. 1913 April 4 and 1914 September 23 and 24 and October 6.

S VEERARAGHAVA AYYAR (DEFENDANT), APPELLANT,

v

J D. MUGA SAIT (PLAINTIFF), RESPONDENT.*

Foreign decree, execution of, in British India—Competency of British Indian Courts to question the jurisdiction—Appearance to save property from seizure—Denial of jurisdiction and claim—Jurisdiction, submission to, whether voluntary

It is competent to the executing Court to refuse execution of a foreign decree sought to be executed in British India under section 44 of the Code of Civil Procedure on the ground that such decree was passed without jurisdiction.

Submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign tribunal

Voinet v. *Barrett* (1885) 55 L.J.,Q.B D., 39, *Guiard* v. *De Clermont and Donner* (1914) 30 T.L.R., 511 and *Boissiere and Co.* v. *Brockner and Co.* (1889) 6 T L R., 85, followed.

Parry & Co. v. *Appasami Pillai* (1880) I L.R., 2 Mad., 407, doubted.

(1) (1913) 24 M L.J., 659. (2) (1910) 1 M W.N., 639.

* Letters Patent Appeal No 71 of 1913.

VEERA-RAGHAVA AYYAR v. MUGA SAIT.

Per WALLIS, OFFG. C.J.—Whether submission was for the purpose of saving property or voluntary is a question of fact in each case.

Per SESHAGIRI AYYAR, J.—The change in the language between section 225 of the Civil Procedure Code (Act XIV of 1882) and Order XXI, rule 7 of the Code of 1908, does not warrant the conclusion that in regard to decrees obtained within British India the executing Court has no jurisdiction to question the jurisdiction of the Court which passed the decree.

The words "As if they have been passed by the Courts in British India" relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court.

[*Appeal against Appellate Order No.* 53 *of* 1911.]

1912. September 16, 17 and 26 and 1913. April 4 and 25

APPEAL against the order of T.V. ANANTAN NAYAR, the Subordinate Judge of South Malabar, in Appeal No. 874 of 1910, presented against the order of A. NARAYANA NAMBIYAR, the District Munsif of Palghat, in Execution Petition No. 967 of 1910, in Original Suit No. 82 of 1083 (1907–1908) on the file of N. SUBBARAMA AYYAR, the District Judge of Trichur.

Dr. S. Swaminadhan for the appellant.

C. V. Ananthakrishna Ayyar for the respondent.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

ORDER.—Before disposing of this appeal we think it necessary to ask the Subordinate Judge to submit a finding whether the defendant in Original Suit No. 82 of 1083 on the file of the District Court of Trichur submitted to the jurisdiction of that Court so as to make the judgment in that suit binding on him in proceedings taken to enforce it in a Court in British India. Both parties will be at liberty to adduce fresh evidence. The finding will be submitted within two months from the date of the receipt of this order and seven days will be allowed for filing objections.

In *compliance with the above order, the Subordinate Judge* of Palghat submitted the following

FINDING.—The High Court has directed me to submit a finding on the question "Whether the defendant in Original Suit No. 82 of 1083 on the file of the District Court of Trichur submitted to the jurisdiction of that Court so as to make the judgment in that suit binding on him in proceedings taken to enforce it in a Court in British India."

The parties were given the liberty to adduce fresh evidence. On the plaintiff's side, Exhibits A to D were filed, while, on the defendant's side, Exhibits II to VI were filed. No oral evidence was adduced on the point on either side.

VEERA-RAGHAVA AYYAR v. MUGA SAIT.

The defendant filed his written statement protesting against the jurisdiction of the Trichur District Court on 30-10-1083 (12th June 1908). If he had not appeared previously in certain interlocutory proceedings and conducted the same, then, it could be held that he did not voluntarily submit himself to the jurisdiction of the Trichur Court. See *Parry & Co.* v. *Appasami Pillai*(1) wherein it was held that if a party sued in a foreign tribunal submits under protest to the jurisdiction of the Court, his submission to the jurisdiction is not voluntary, and the judgment of the foreign tribunal does not constitute a valid cause of action in a Court of British India. But in this case, the defendant had appeared in some injunction proceedings by a pleader, put in objection petition therein as well as an affidavit, as will be seen from Exhibits A to D. Exhibit A is the petition of the plaintiff for injunction against the defendant and it was filed on 27th Medom 1083. Exhibit B is the plaintiff's affidavit in support of his application for injunction. On this petition, notice was ordered to the defendant fixing 30-10-1083 (12th June 1908), for hearing and an *interim* injunction was also ordered. On 29-10-1083 (11th June 1908), the defendant swore to an affidavit, Exhibit D, and also prepared a counter-petition, Exhibit C, on the same date. It was signed by a pleader as well as by the defendant on the said date. But the counter-petition with the affidavit was filed in the Trichur Court only on 30-10-1083 (12th June 1908), the date fixed for the hearing of the petition, Exhibit A, and for settlement of issues. Presumably, both the written statement, Exhibit VI, and the counter-petition, Exhibit C, were filed at one and the same time. It was contended on the plaintiff's behalf that, as no exception to the jurisdiction of the Trichur Court was made in the counter-petition, Exhibit C, and the affidavit, Exhibit D, it must be taken that the defendant did not protest against the jurisdiction and voluntarily submitted to it. In my opinion, this contention cannot stand. If the counter-petition had been filed some day previously to 30-10-1083 (12th June 1908), when the written statement was filed, the objection may perhaps be valid. But as it was filed on the same date as the written statement, both the papers must be read together and it must be held that the defendant did protest

(1) (1880) I.L.R., 2 Mad., 407.

against the jurisdiction at the earliest possible opportunity afforded to him, viz., 30-10-1083 (12th June 1908). The documents filed on the defendant's side are not of much value, in that those papers were filed subsequent to the filing of written statement on 30-10-1083 (12th June 1908). These papers simply show that the defendant was anxious to have the question of jurisdiction decided first. The principle, therefore, of *Nallatambi Mudaliar* v. *Ponusami Pillai*(1), relied on by the plaintiff's pleader, cannot apply to this case, in that it is not one where the defendants sued in a foreign tribunal took no exception to the jurisdiction. This is a case to which *Parry & Co.* v. *Appasami Pillai*(2) would apply, as the defendant submitted to the jurisdiction under protest, and his submission was not, therefore, voluntary. The defendant's subsequent conduct in defending the suit was simply to avoid inconvenience.

I would, therefore, hold that the decree of the Trichur Court is not valid for international purposes and that the order of the District Munsif dismissing the execution petition with costs is right and that the remand order of my predecessor, Mr. Anantan Nayar, is wrong.

This appeal coming on for final hearing, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, and having stood over for consideration, the Court delivered the following JUDGMENT :—

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The important question of law argued in this Second Appeal is whether the holder of a decree for money passed by a Court in the Native State of Cochin against a British subject not resident within that State is entitled to obtain execution of it in a British Court under section 44 of the Civil Procedure Code irrespective of the question whether the Cochin Court had jurisdiction to make the decree according to the principles laid down by the Privy Council in *Gurdyal Singh* v. *Raja of Faridkot*(3). The decree in this case was passed by the District Court of Trichur in the Cochin State and was sent for execution to the District Munsif's Court of Palghat. It awarded damages to the plaintiff against the defendant for a breach of contract. The defendant who is a native of Palghat in the district of Malabar objected to the jurisdiction of the Trichur

(1) (1879) I.L.R., 2 Mad., 400. (2) (1880) I.L.R., 2 Mad., 407.
(3) (1895) I.L.R., 22 Calc., 222 (P.C.).

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(1) (1880) I.L.R., 2 Mad., 407.

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(1) (1870) I.L.R., 2 Mad., 400. (2) (1880) I.L.R., 2 Mad., 407.
(3) (1895) I.L.R., 22 Calc., 222 (P.C.).

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Court, but the objection was overruled. The District Munsif of Palghat refused to grant execution on the ground that the Trichur Court had no jurisdiction to pass the decree according *to Gurdyal Singh v. Raja of Faridkot*(1) and *Shaik Atham Sahib* v. *Daud Sahib*(2). On appeal the Subordinate Judge held that the Trichur Court had jurisdiction to try the suit as the contract was entered into at Trichur and was to be performed there, the principle laid down in *Gurdyal Singh* v. *Raja of Faridkot*(1) being in his opinion applicable only when a suit is instituted on the decree of a Native State and not when an application is made for execution by virtue of section 44 of the Civil Procedure Code.

When the appeal to this Court first came on for hearing, it was contended that the defendant had submitted to the jurisdiction of the Trichur Court by appearing and objecting to the attachment before judgment of certain property. A finding was accordingly called for on the question whether there was submission by the defendant to the jurisdiction of the Trichur Court. The Subordinate Judge has submitted a finding in the negative.

There is no valid objection to this finding and the learned vakil for the respondent has properly abstained from attempting to impeach it. It is quite clear that, if a suit were instituted in a British Court on the judgment of the Trichur Court, it would not be maintainable inasmuch as, according to the law laid down by the Privy Council, the judgment of the Cochin Court was void for want of jurisdiction so far as its enforceability in a British Court is concerned. The respondent maintains that as section 44 of the *Civil Procedure Code* lays down that "the Governor-General in Council may, by notification in the *Gazette of India,* declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India;" and as a notification has been issued under that section declaring that the decrees of the Cochin Courts may be executed in British India, the

(1) (1895) I.L.R., 22 Calc., 222. (2) (1909) I.L.R., 32 Mad., 469.

decree cannot be impeached on the ground that the Court which had passed it had no jurisdiction to try the suit, this being the rule applicable to decrees passed by Courts in British India itself. Stress is laid on the words "as if they had been passed by the Courts in British India." Attention is also drawn to Order XXI, rule 7, which enacts that, when a decree is sent by one Court in British India to another for execution the latter Court shall cause the copy of the decree and the certificate of the transmitting Court to be filed without any further proof of the decree or order for execution, or of the copies thereof, omitting the provision to section 225 of Act XIV of 1882 that further proof should not be required of the jurisdiction of the Court which passed the decree. I abstain from expressing any opinion on the effect of the omission of the words referred to, as Order XXI, rule 7, is obviously applicable only where a decree is transferred by one British Court to another for execution and does not apply to foreign decrees transmitted to a British Court for execution. There is nothing in section 44 to make it applicable to the latter class of decrees, though the ordinary rules of evidence may allow the decree or order for execution or copies thereof to be proved in much the same manner as similar documents relating to Courts in British India. Section 47 of the Civil Procedure Code has also been referred to in support of the argument that the jurisdiction of a Native Court passing a decree sought to be executed in British India cannot be impeached in execution proceedings in the British Court in the same manner as the jurisdiction of a British Court which passed the decree cannot be impeached in execution proceedings. I am not prepared to assume that in no case can the validity of a decree be impeached in execution proceedings when it is passed by a British Court. Can a decree which directs an act expressly forbidden by the legislature on grounds of public policy without any question being raised whether such a direction could be made or not, be said to be unimpeachable in execution? It is, however, unnecessary in my opinion to decide in this case whether the rule contended for is one of universal application as I think that section 47 is not in terms applicable to a decree of a foreign Court. I agree with the opinion of FARRAN, J., in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(1), that section 44 ha

(1) (1891) I.L.R., 15 Bom., 216.

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not the effect of converting a foreign decree into a decree of a British Court but merely sanctions a new procedure for the enforcement of such a decree. The decree still remains a foreign decree. Section 47 is not a provision relating merely to the procedure to be observed in the execution of a decree. It lays down a rule of jurisdiction and forbids any question relating to the execution, discharge or satisfaction of a decree being determined otherwise than in execution proceedings. Except for this section, there would be nothing to prevent the enforcement of a decree by instituting a suit on it. The section also empowers and requires the executing Court to decide every question relating to the execution of a decree and is in this aspect also one relating to the jurisdiction of the executing Court. On the other hand, section 44 of the Evidence Act, as pointed out by FARRAN, J., lays down the general principle that a party to a suit or other proceeding may impeach the validity of a judgment or decree on the ground that it was obtained by fraud, no exception being made of cases in which the judgment or decree is relied on for the purpose of execution. There can be no doubt, I think, that on general principles there are some cases where a judgment or decree even of a British Court may be impeached on the ground of absence of jurisdiction in the Court which passed it. There seems to be no reason why, on general principles, where a foreign decree is sought to be executed in a British Court, any proper exception should not be taken to it. Section 47 is in my opinion not applicable to such a case, and there is nothing else to prevent an objection to jurisdiction from being raised. I am of opinion that the language of section 44, Civil Procedure Code, does not compel a British Court to grant execution of a decree of a Native Court. The language of the section is permissive in form; it does not empower the Governor-General in Council to direct that such a decree shall in all cases be executed by British Courts.

It is contended that it is obligatory on the Courts to exercise the power when a notification has been made by the Governor-General in Council and that the word "may" should be read as meaning "shall." This question was also considered by FARRAN, J., in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(1), and I

(1) (1891) I.L.R., 15 Bom., 216.

agree in the conclusion arrived at by the learned Judge. As pointed out in *Julius* v. *Lord Bishop of Oxford*(1) the word "may" in reality always imports only permission and confers only a discretionary power on the Court to exercise the jurisdiction conferred on it. According to Lord CAIRNS it does not of itself do more, but the discretion conferred on a Court is not an arbitrary one. The intention of the legislature must be taken to be that the power should be exercised if certain facts exist or certain conditions are satisfied. These facts and conditions are not always expressed in the statute itself. Where they are not expressed, they have to be ascertained by the Court invested with the power. Lord CAIRNS observes: "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." If the Court fails to exercise the power when the conditions for its exercise exist, a superior Court may set aside its order, if it comes to the conclusion that the facts or conditions making the exercise of the discretion proper in reality exist in the case. Sometimes the ascertainment of the facts or conditions is left to the Court on which the power is conferred, appropriate language being used for the purpose. Even then it would be obligatory upon the Court to form its judgment on the question whether the facts or conditions exist and not arbitrarily to refuse to exercise its discretion; and if it fails to do so, it may be corrected by a superior tribunal. If the conditions for the exercise of the power are laid down in the statute itself, then the Court has to do nothing more than to ascertain whether they have been fulfilled, and, if it comes to the conclusion that they have been, it is bound to exercise the power. Lord PENZANCE observes: "It is surely not enough that the thing empowered to be done should be for the public benefit, in order to make it imperative to exercise that power on all occasions falling within the statute. It may be assumed that all powers conferred by statute on individuals in general

(1) (1880) 5 A.C. 214

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public Acts are for the public benefit, or they would not have been conferred." The learned Judge was of opinion that there was no authority for the proposition that such words as "it shall be lawful" in a certain class of statutes import prima facie not permission but obligation, and that the effect of the cases in which the exercise of the power conferred was held to be obligatory was that, though "the statute in terms had only conferred a power, the circumstances were such as to create a duty" and to show the exercise of any discretion by the person empowered could not have been intended in the particular circumstances of the case Lord SELBORNE expressed the same view and observed that "the question whether a Judge, or a public officer, is bound to exercise a power conferred on him upon any particular occasion or in any particular manner, must be solved apart from the use of the word 'shall,' or words, 'it shall be lawful' and, in general it is to be solved from the context, from the particular provisions or from the general scope, of the enactment conferring the power." Lord BLACKBURN stated that the enabling words gave a power which prima facie might be exercised or not, "but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it." But he could not agree with the view that, whenever the statute is for the public good, and of general interest and concern, powers conferred by enabling words are, prima facie, to be considered powers which must be exercised

In re Baker : Nichols v. *Baker*(1) and *In re Johannesberg Land and Gold Trust Company*(2), the same view was taken. No doubt, when a power is conferred on a Court for the benefit of those who wish to enforce their rights against others, it cannot refuse to exercise it without good grounds; adequate reasons must be found for holding that it is not bound to exercise it. The reason is sometimes to be found in the pre-existing state of the law.

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(1) (1890) 44 Ch. D., 262. (2) (1892) 1 Ch., 583.

See *The Queen* v. *Bishop of Oxford*(1) In *Re Newport Bridge*(2), where the question was whether the Court of Quarter Sessions was bound to direct the widening of a bridge, it was held that, having regard to the nature of the Court entrusted with the power and subject-matter which involved other considerations besides the width of the bridge such as the cost of the proposed work and its possible disproportion to any public benefit likely to be derived from it, it was discretionary to make the order or not.

Now, section 44 does not itself lay down any rule for the guidance of the Court to decide in what cases the decree of a Native Court should be allowed to be executed in a British Court. In arriving at a conclusion on the question whether the right to obtain execution of such a decree is an absolute one and whether no discretion was intended to be exercised by a British Court called upon to allow execution, it is proper and necessary to consider the nature of the right obtained by a litigant by virtue of a judgment of a foreign Court. Such a right, so far as its enforceability in a British Court is concerned, is not an absolute one. It cannot be doubted that, if a suit were instituted on the judgment, it could be impeached on various grounds set out in section 13 of the Civil Procedure Code. According to Act XIV of 1882, even the conclusion in the judgment of an Asiatic or African Court on the merits could be attacked. But the provision has been abrogated in the present Code. I have no doubt that a suit is still maintainable on the judgment of a Native Court. See *Sama* v. *Annamalai*(3), *Gurdyal Singh* v. *Raja of Faridkot*(4), *The Collector of Moradabad* v. *Harbans Singh*(5) and *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(6). The Bombay High Court no doubt held in *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(7), and *Himmatlal* v. *Shivajirav*(8), that no suit could be maintained on the judgment of a Native State in India even where no provision was made for its enforceability by execution. In *Mayaram* v. *Ravji*(9), however, that Court has held that this view could no longer

(1) (1879) 4 Q B D., 525
(2) (1859) 2 E & E, 377
(3) (1884) I L.R, 7 Mad, 164
(4) (1895) I L R, 22 Calc, 222.
(5) (1899) I L.R., 21 All, 17
(6) (1891) I L R, 15 Bom, 216.
(7) (1882) I.L.R., 6 Bom., 292.
(8) (1884) I.L R, 8. Bom., 593.
(9) (1900) I.L.R, 24 Bom., 86

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be maintained, whatever room for doubt might have existed before the enactment of section 14 of Act VII of 1888. The jurisdiction to entertain a suit on a judgment of a Native State is in my opinion in no way affected by allowing the judgment to be enforced by execution in British Courts. Such jurisdiction cannot be affected by an enactment of a permissive character such as that laid down in section 44. The period of limitation provided for a suit on a foreign judgment is six years according to article 117 of schedule I to the Limitation Act, while the limitation applicable for taking out execution would be different. I have already stated that section 47 of the Code cannot have the effect of barring such a suit. I can see no reason for considering that the legislature intended to confer a greater virtue on a foreign judgment when it is sought to be enforced by execution than when a suit is instituted to enforce it. Whatever objections may be raised to it in the one case should be equally available in the other. It would not be reasonable to hold that it was intended to empower the Governor-General in Council by an executive act to give a larger obligatory force to a foreign judgment than it would ordinarily possess. If such were the intention, provision would have been made to enable that authority to do so, whether the judgment is sought to be enforced by a suit or by execution. Taking the previous state of the law and the language of section 44 into consideration, I am of opinion that the object of section 44 was merely to provide a more expeditious method of enforcing the judgment of a Native State and not to enhance its value or obligatory force. What then is the proper course, when an application is made for the execution of a decree of a Native State open to one or the other of the objections mentioned in section 13 of the Civil Procedure Code? Having regard to the language of section 13, it appears to me that it might be open to the Court simply to refuse execution without deciding whether the party would be entitled to enforce the judgment by a suit or not. This was the course adopted by FARRAN, J., in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(1). I think it is also open to the Court to consider whether any good ground for the non-exercise of the discretion exists by examining the question whether any

(1) (1891) I.L.R., 15 Bom., 216.

of the objections stated in section 13 makes the judgment invalid and to determine finally whether it is enforceable in a British Court or not; at any rate it is clear to my mind that it is not open to the Court to grant execution when it finds that a valid objection to the decree is made out. Inasmuch as in this case the Cochin Court had no jurisdiction to pass the decree sought to be executed, I am of opinion that the District Munsif was right in refusing to allow execution and that the Subordinate Judge's order reversing it cannot be supported. I would, therefore, set aside his order and restore that of the District Munsif with costs here and in the lower Appellate Court.

As my learned brother is of a different opinion, the Appeal is dismissed with costs.

SADASIVA AYYAR, J.—The question of law argued in this case is no doubt of great importance It is unnecessary for me to set out the facts as they have been fully mentioned in the judgment of my learned brother. The District Court of Trichur in the Native State of Cochin passed a decree for money. The Governor-General in Council had under section 229 (*b*) of the old Civil Procedure Code (present section 44) declared by notification in the *Gazette of India* that the decrees of the Cochin Courts may be executed in British India as if they had been passed by the Courts of British India The decree-holder (respondent) had a decree of the Cochin Court transferred to the Palghat District Munsif for execution with necessary papers, viz., copy of the decree and certificate of non-satisfaction. The Palghat Munsif instead of executing the decree went into the question of the jurisdiction of the Trichur Court and refused execution. The short question for disposal therefore is whether a Court in British India to which a decree of the Civil Court of a Native State is sent for execution can go into the question of the jurisdiction of the Court of the Native State passing the decree, when the Governor-General in Council has, by notification, declared that the decree of the Native State Court may be executed as if it had been passed by a Court in British India

In the decision of this question, the consideration of the point whether a suit can be brought in a Court in British India, on the judgment passed by a Court of a Native State is probably not of much use. I shall, however, consider that question, as it was argued at the bar, but I wish to state that my present

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opinion on this question is not held very strongly. In *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(1), it was laid down very broadly that such a suit will not lie, whether the decree passed by the Native State was executable in British India by reason of the notification of the Governor-General or whether it was not so executable by reason of the absence of such a notification. So far as that judgment lays down that a suit will not lie on the judgment of the Court of a Native State even where the decree is not executable by a British Indian Court owing to the absence of a notification by the Governor-General in Council, that opinion must be held to be erroneous as the Privy Council have held in *Gurdyal Singh* v *Raja of Faridkot*(2), that an action can be brought in the British Indian Courts upon a judgment of a Native State Where, however, the British Indian Courts could execute a decree of the Court of a Native State as if it had been passed by a Court in British India, can a decree-holder bring also a suit upon that judgment in British India and obtain another decree in British India? Can he be allowed to have two decrees executable in British India, one passed by the Court of the Native State and the other passed in British India upon the judgment of the Court of the Native State? I am inclined to think that when by a notification of the Governor-General in Council, the decrees of the Courts of particular Native States are made executable in British India as if they had been passed by the Courts in British India itself, a separate suit cannot be brought in British India upon the judgment of the Court of such a Native State. It is clear that upon the judgment of a Court in British India, a fresh suit could not be brought in British India, the only course for the decree-holder being to execute the decree he has obtained. That the judgment of the Court of a Native State should be put upon a better footing than the judgment of a British Indian Court could not have been the intention of the legislature. I shall quote a few sentences from the judgment in *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(1): "Some Courts in Native States may be sufficiently well constituted, and their proceedings sufficiently well conducted, to entitle their judgments to respect; but this is notoriously not so in regard to other States, and indeed must

(1) (1882) I.L.R., 6 Bom., 292. (2) (1895) I.L.R., 22 Calc., 222 at p. 237.

be regarded as the exception rather than the rule. Our Courts are not in a position to draw distinctions, which would necessarily be invidious, and not necessarily correct, between the Courts of different Native States. Section 434 of the Code of Civil Procedure" (the old Code of 1877) "imposes this duty upon the Governor-General in Council, *who is certainly the best informed and therefore the fittest authority to discharge it* . . . . We think that it was clearly the intention of the legislature that the decrees of the privileged Native Courts should occupy the same position as the decrees of British Courts, and *should not carry with them any greater advantages*" "If therefore a suit would not lie upon the judgment of one of our own Courts" (in the same Court or in another British Indian Court) "neither is there reason to suppose that it will lie upon the judgment of one privileged Native Courts." As regards non-privileged Native State Courts, as section 13 of the Civil Procedure Code allows a British Indian Court to go into the question of jurisdiction and the question of conformity to natural justice, of equity and so on, there can be no objection to allow a suit in the Courts of British India upon the judgments of Courts of *non-privileged Native States.* So far as the privileged Native States are concerned, their judgments and decrees were clearly intended by the legislature to be put on the same footing as the judgments and decrees of Courts of British India. In *Sama* v. *Annamalai*(1), HUTCHINS, J., said: "It is a greater privilege to be able to execute a decree than to be able to enforce it by another suit; and section 14" (present section 13) "seems to show that there are many grounds upon which a foreign judgment may be impeached in a suit, which could not be pleaded in execution proceedings." It is well known that the British Residents appointed to Cochin, Travancore and other States have got large powers of effective advice, that the Courts established in Cochin and Travancore are presided over almost wholly by Bachelors of Laws of the Madras University, that their laws relating to civil rights and procedure cannot be said to be appreciately less enlightened (taking them as a whole) than those obtaining in British India and as regards the Mysore State it is well known that very many of the laws passed and being

(1) (1884) I.L.R., 7 Mad., 164.

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opinion on this question is not held very strongly. In *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(1), it was laid down very broadly that such a suit will not lie, whether the decree passed by the Native State was executable in British India by reason of the notification of the Governor-General or whether it was not so executable by reason of the absence of such a notification. So far as that judgment lays down that a suit will not lie on the judgment of the Court of a Native State even where the decree is not executable by a British Indian Court owing to the absence of a notification by the Governor-General in Council, that opinion must be held to be erroneous as the Privy Council have held in *Gurdyal Singh* v *Raja of Faridkot*(2), that an action can be brought in the British Indian Courts upon a judgment of a Native State. Where, however, the British Indian Courts could execute a decree of the Court of a Native State as if it had been passed by a Court in British India, can a decree-holder bring also a suit upon that judgment in British India and obtain another decree in British India? Can he be allowed to have two decrees executable in British India, one passed by the Court of the Native State and the other passed in British India upon the judgment of the Court of the Native State? I am inclined to think that when by a notification of the Governor-General in Council, the decrees of the Courts of particular Native States are made executable in British India as if they had been passed by the Courts in British India itself, a separate suit cannot be brought in British India upon the judgment of the Court of such a Native State. It is clear that upon the judgment of a Court in British India, a fresh suit could not be brought in British India, the only course for the decree-holder being to execute the decree he has obtained That the judgment of the Court of a Native State should be put upon a better footing than the judgment of a British Indian Court could not have been the intention of the legislature. I shall quote a few sentences from the judgment in *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(1): "Some Courts in Native States may be sufficiently well constituted, and their proceedings sufficiently well conducted, to entitle their judgments to respect, but this is notoriously not so in regard to other States, and indeed must

(1) (1882) I.L.R., 6 Bom., 292. (2) (1895) I.L.R., 22 Calc., 222 at p. 237.

are *practically* British, as well as the coinage. However, as Lee Warner says, it must be admitted that there are dangers in "*inconvenient precision*" and in "*premature inferences*," and it is wiser to "leave undefined" the precise position of Native States, which position, though not expedient to clearly explain, is practically understood. When the Mysore State was regranted to an Indian Ruler, there were the following among numerous other stipulations. "The Maharaja shall at all times conform to such advice as the Governor-General in Council may offer him with a view to the management of his finances, settlement and collection of his revenues, the imposition of taxes, the administration of justice, the extension of commerce, the management of trade, agriculture and industry and any other objects connected with the advancement of His Highness's interests, the happiness of his subjects and his relations to the British Government." All the Native States are subject to restrictions as to the strength of their armies, as to recruitments and as to equipments and are subject to the exercise of British rights of occupation and cantonment, to assist in procuring supplies for armies, to extradite deserters and to submit to imperial control over railways, telegraphs and postal communications. In fact, they have lost their international life and they cannot negotiate with each other. I would put it thus (using the language of other writers without acknowledgment): The great settlements made by Lord Hastings with several Native States created a constitutional tie between them and the British Government. The position of King and Nobles in early English history presents incidents in common to that of the supreme Sovereign in India in relation to the Rulers of Native states. Such powers as *the Chiefs exercise, they owe to British* Policy, although the courts have been declared to be beyond British India. The Manipur case established "that both Native Rulers and their subjects owe allegiance to the King-Emperor." When the *Governor-General in Council chooses to give the* Courts of a privileged Native State, the high and coveted status of equality with the Courts established in British India owing to the enlightenment of the Native States and the reputation for dealing out equal justice *acquired by such Courts, why should* courts in British India be astute to defeat the policy of the legislature by refusing to give as much privileges to the decrees

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of the Courts of such a privileged Native State (so far as execution is concerned) as the legislature clearly intended to give them?

We could entertain very little doubt that the policy and the object of our Government is to bring up the laws and the rules of procedure in the dispensation of justice in Native States to the level of the laws and legal procedure obtaining in British India and to gradually unite the subjects of Native States (who are also subjects of the King-Emperor) and the subjects of the British Emperor in British India in ever closer bonds of fraternal union. The British Government protects and gives passports to subjects of Native States abroad as if they were subjects living in British India (see paragraphs 99 and 100 of Lee Warner on The Protected Princes of India, chapter 9). It would, in my opinion, be going clearly against the beneficent policy and the clearly expressed wish of the Government if any narrow construction were put upon the duty of British Indian Courts to execute the decrees of the Courts of privileged Native States.

Then it was argued that section 44 merely says that the decrees of the Courts of such privileged Native States may be executed in British India as if they had been passed by the Courts of British India, but the section does not say that such decrees shall be so executed, and reliance is placed on *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(1), the judgment of a single Judge. With the greatest deference, however, I am unable to agree that after the Governor-General has made a notification under section 229 (*b*) of the old Code (present section 44), a Court in British India is at liberty to refuse to execute the decree of the Court of a privileged Native State on any grounds *other than those for which it can refuse to execute a decree of a Court in British India itself transferred to it for execution.* The word "may" is sometimes used to give a discretion to Courts, but it is also sometimes used merely to show that the Courts are given the jurisdiction to exercise a power and not to give them a discretion to decline to exercise the jurisdiction granted to them. As said in *Julius* v. *Lord Bishop of Oxford*(2), by Lord BLACKBURN, enabling words are always compulsory where they are words to effectuate a legal right.

(1) (1891) I.L.R., 15 Bom., 216. (2) (1880) 5 A.C., 214

Maxwell in his interpretation of Statutes quotes the following instances :—

(a) A statute enacted that churchwardens and overseers shall have " power and authority " to make a rate to reimburse parish constables certain expenses, the Court held that it was obligatory on them to make it when the expenses had been incurred.

(b) Where a statute enacted that justices shall, if they shall so think fit, examine accounts delivered to them, it was held that the justices could not decline to enter upon the examination.

(c) The Weights and Measures Act, 1889, provided that an inspector "*may* take in respect of the verification, etc. . . . . fees specified," it was held that the inspector was bound to take the fees in all cases.

(d) 11 & 12 Vict., c. 42, enacted that justices *may* issue a summons on an information laid before them, *only if they shall think fit.* It was held that they were not at liberty to refuse it on the mere consideration that the law would operate unjustly in the particular case.

(e) A charter which granted to the steward and suitors of a manor " power and authority " to hold a Court to hear civil suits, was held to make it obligatory to hold it when necessary

(f) A statute which enacted that the Chancellor " should have 'full power " to issue a commission of bankruptcy against a bankrupt trader on the petition of his creditors was held to imperatively require the issue of such a commission and it was held that " may " was in effect " must."

(g) Under the County Court Act, it was enacted that the Superior Court may give the plaintiff the costs of his action if he lived more than 20 miles from the defendant. It was held that the Court was bound to give them *in every case in which the plaintiff and* defendant dwelt more than that distance apart

(h) So where the Arbitration Act of 1889 held that the Court may on the application of a party appoint an

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arbitrator, it was held that it was obligatory on the Court to make an appointment if applied to.

I think it is unnecessary to multiply instances and the principle seems to be clear that, where a Court is empowered to do an act for the benefit of a party on application, it is bound to act on such application, unless it is expressly stated in the enactment that for some particular reasons or under particular circumstances, the Court may refuse to exercise its jurisdiction and power. I am, therefore, clear, notwithstanding the high authority of FARRAN, J., in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(1), that the word "may" in section 229 (*b*) has the same force as the word "shall." I might further add that, even if the Court is held to have a discretion to execute the decree or not, if that discretion has been exercised by the Appellate Court (as in his case) in favour of the decree-holder, I do not think it necessary or advisable that we should interfere in second appeal with the exercise of that discretion. If it had *refused* to exercise that discretion, we might, in the interests of the decree-holder, who is intended to be favoured by the statute, properly interfere, but I do not think that it is advisable to interfere to the prejudice of the decree-holder in whose favour the lower Court in its discretion had allowed execution.

The question therefore is now narrowed to this. Can a Court in British India to which a decree of another Court in British India has been transferred for execution refuse to execute the decree on the ground that the Court which passed the decree had no jurisdiction? Under the old section 225, there was a conflict of opinion on this point. But the new Order XXI, rule 7, omitted the words "or of the jurisdiction of the Court which passed it" which were found in the old section 225 and the presence of which words in the old section gave rise to a conflict of decisions. Why were these words omitted? The learned commentators, Woodroffe and Ameer Ali, who have commented upon the Civil Procedure Code, say that those words were omitted "as it was considered that another Court ought not to go into any question as to the jurisdiction of any Court which passed a decree." The same view is enunciated in Cowdell's Code in the commentaries to Order XXI, rule 7.

(1) (1891) I.L.R., 15 Bom., 216.

O'Kinealy and Rampini in their very short notes ignore the significant omission of the words referring to jurisdiction and have fallen into the error of saying that Order XXI, rule 7, recognises the right of the executing Court to inquire into the jurisdiction of the Court which passed the decree, and quote in support of their view some of the cases decided under the old code.

I think the matter is made absolutely clear by the unanimous report of the Select Committee (which included H. E. Richards, Rashbehary Ghose, Madho Lal, and S. Ismay) dated the 14th February 1908 and published in page 39 *et seq.* at Part III of the *Fort St. George Gazette* of the 3rd March 1908. At page 41, the Select Committee states as follows :—

"*Order XXI, rule* 7.—The words 'or of the jurisdiction of the Court which passed it' have been omitted. In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it."

It being thus clear from the new Code that the Court to which a decree is sent for execution cannot go into the question of the jurisdiction of the Court which passed the decree, if the decree of the privileged Native State Court is on the same footing as if it had been passed by a British Indian Court so far it is executable by a Court in British India, it is clear to my mind, that the executing Court in British India cannot go into the question of jurisdiction There is no greater hardship to the judgment-debtor in the adoption of this view as regards the decree of a privileged Native State Court than in the case of the decree of a British Indian Court. The judgment-debtor against whom a decree has been passed by a British Indian Court without jurisdiction can have it set aside by proceedings in appeal, review and so on. The judgment-debtor under the decree of a privileged Native State Court could have it set aside by similar proceedings in appeal, review, etc, and in the same way. He has got exactly similar remedies which he can pursue in the Courts of that State.

For all the above reasons I am of opinion that this civil miscellaneous second appeal should be dismissed with costs.

The necessary facts for the report of this case appear from the judgment of SESHAGIRI AYYAR, J.

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WALLIS, OFFG. C.J.

Letters Patent Appeal against the judgment of SADASIVA AYYAR, J., in *Veeraraghava Ayyar* v. *Muga Sait*(1).

Dr. K. Pandalai for *S. Swaminadhan* for the appellant.

C. V. Anantakrishna Ayyar for the respondent.

WALLIS, OFFG. C.J.—The learned Judges have differed on the question whether the District Munsif was right in refusing to execute the decree of the Cochin Court, as to which a notification has been issued pursuant to section 44, Civil Procedure Code, on the ground that it was passed without jurisdiction. It was not disputed that in the circumstances which were similar to those in the Faridkote case the Cochin Court must be considered to have had no jurisdiction, but it was contended that a British Court was bound under the terms of the section to execute it, as if it had been passed by a Court of British India, and that it would not now be open to a Court in British India to refuse to execute the decree of another Court in British India for want of jurisdiction. I do not think it necessary to consider the second proposition because I agree generally with the judgment of SUNDARA AYYAR, J., that section 44 has not the effect contended for, and that a British Court ought not to execute a decree of the Cochin Court passed without jurisdiction. That judgment is a judgment of foreign Court within the meaning of section 13, Civil Procedure Code, and it would in my opinion require much plainer words than are to be found in section 44 to show that it was the intention of the legislature that decrees of foreign Courts to which section 44 applies should be enforced in British Courts without regard to the provisions of that section. Full effect may be given to section 44 by holding that it was merely intended to alter the procedure by which such foreign judgment can have effect given to it in British India. This was decided by FARRAN, J., more than twenty years ago in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(2) which apparently has not been questioned in our Courts until the present case, and was known to the legislature when the provisions of the last Code were revised and present Code was enacted. The suggestion that the legislature intended all decrees of Courts, in the position of the Cochin Court to be executed in British India without any question seems to me

(1) (1916) I.L.R., 39 Mad., 25. (2) (1891) I.L.R., 15 Bom., 216.

altogether inadmissible having regard to the way in which the question has been dealt with as regards the Superior Courts in the United Kingdom. The judgments of a Superior Court can only be executed in the Superior Court of another part of the United Kingdom under the Judgments Extension Act, 1868, when they are judgments for "any debt, damage or costs." Such judgments are, it is expressly provided, to have the same *force and effect after registration in the executing Court* as if they were judgments of that Court, words which are not to be found in section 44, Civil Procedure Code. Further section 8 makes a significant exception in the case of decrees of the Court of Session "pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland." In countries such as Scotland whose jurisprudence is based on the Roman Law, jurisdiction against a foreigner may be founded on seizure of his property within the territorial limits, but English law does not recognize such a procedure except in the case of the custom of foreign attachment in the City of London as to which see *Wadsworth* v *The Queen of Spain*(1) and the legislature has therefore thought proper to except Scotch decrees founded on such an arrestment and obtained in *absentia* from the operation of the Act. The inferior Courts Jurisdiction Act, 1882, is also confined to judgments for any debt, damages and costs and only allows execution of judgments obtained in one part of the United Kingdom against defendants domiciled in another part subject to the restrictions as to cause of action and service contained in section 10 of the Act. It cannot, I think, have been the intention of the Indian legislature in section 44 to ignore all these restrictions.

The next question is whether the defendant submitted to the jurisdiction of the Cochin Court. The lower Appellate Court returned a finding that he did not and the respondent filed a memorandum of objections to the finding. SUNDARA AYYAR, J., observes that no attempt was made to impeach the finding at the hearing, but the learned vakil who appeared on both occasions assured us that this was a mistake and has addressed us an elaborate argument on the point. The law on this question cannot perhaps be considered to be fully settled. The decision in

(1) (1851) 17 Q.B., 171, s.c., 117 E.R., 1246

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Parry & Co. v. *Appasami Pillai*(1) that it is enough merely to object to the jurisdiction is probably no longer law. See *Boissiere and Co.* v. *Brockner and Co.*(2) and *Guiard* v. *De Clermont and Donner*(3). There is however the high authority of Lord ESHER, M.R. and BOWEN, L.J. in *Voinet* v. *Barrett*(4), that submission is not voluntary in the language of BOWEN, L.J. in a case where goods belonging to the defendant have been seized by a foreign tribunal so that he only appears to get them released. In the recent case of *Guiard* v. *De Clermont and Donner*(3) where judgment had been given against the defendants in default of appearance and a small sum about £4 in a Paris bank had been attached in execution, the defendant sought to set aside the default decree without any reference to the seizure of this comparatively trifling sum, and LAWRENCE, J., held that it was not a submission for the purpose of saving property and held the judgment of the French Court was binding. Whether the submission was for the purpose of saving property or voluntary, is apparently a question of fact in each case. In the present case it is found that the plaintiff in May 1908 obtained an *interim* injunction restraining the defendant from disposing of the timber belonging to him in the Cochin State, and that in the following July the defendant filed a counter-petition for the removal of the injunction and a written statement denying the jurisdiction and raising a defence on the merits on the same day. On the above facts I think there was evidence to support the finding and am not prepared to interfere with it in Second Appeal. This appeal is allowed, the order of the lower Appellate Court is set aside and the order of the District Munsif restored with costs throughout.

AYLING, J.

AYLING, J.—I agree.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. In order to decide the questions of law arising in this appeal, it is necessary to set out the facts which have been either found or proved. A suit was instituted in the District Court of the Cochin State against the appellant for damages for breach of contract. On the institution of the suit and before defendant appeared, an application was made for an injunction restraining the defendant from alienating certain logs of timber owned by the

(1) (1880) I.L.R. 2 Mad., 407.
(2) (1889) 6 T.L.R., 85.
(3) (1914) 30 T.L.R., 511.
(4) (1885) 55 L.J. (Q.B.D.), 39.

appellant and which were within the jurisdiction of the District Court. The order was issued and notice of it was served on the appellant. It is not clear from the records whether this notice and the summons in the suit were served at the same time or on different dates. I find from the printed records that the appellant applied to have this injunction order vacated. There is nothing to show whether this application was prior to the filing of the written statement or after. Unfortunately, the written statement has not been filed in the case. We have to gather its terms from the judgment of the Cochin Court. The summary of it in paragraph 2 of that judgment shows that the appellant took exception to the jurisdiction of the Court on the ground that he was permanently residing in British India, and also pleaded that he was not liable to the suit claim. The District Judge of Cochin overruled both the contentions and passed a decree against the appellant. This decree was sent to the District Munsif's Court of Palghat (in British India) for execution under section 44 of the Code of Civil Procedure. Appellant contended before that Court that the decree of the District Court of Cochin was a nullity as it was passed without jurisdiction. The District Munsif upheld that plea. On appeal, the Subordinate Judge reversed this decision holding that it was not competent to the District Munsif to consider the question of jurisdiction. A Civil Miscellaneous Appeal was preferred against the order and the two learned Judges who heard it have differed.

The main contention of the appellant is that the decree of the District Court of Cochin does not by transfer to a British Court become a decree of the latter Court for all purposes. Mr. Pandalai contends that the words "as if they had been passed by the Courts in British India" relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court. I agree with this contention. In my opinion section 44 of the Civil Procedure Code is subject to the same limitations as are contained in section 13 regarding foreign judgments. Under this latter section the recognition of foreign judgments is not absolute but is subject to certain reservations. Section 44 introduces an exception in favour of certain Native States The Governor-General-in-Council is empowered by that section to give the privilege of execution to the judgments obtained in these

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States, without compelling the party to institute suits on them as is required in the case of other foreign judgments. The privilege is not an illusory one as Mr. Anantakrishna Ayyar suggests. The favoured decree-holder need not pay fresh court fees for a suit. He need not go through the process of establishing his claim, provided the conditions mentioned in section 13 are complied with; and he can, on production of the decree, take out execution. These are substantial advantages which the legislature has secured to the decrees of States which are included in the notification issued under section 44 of the Code. I do not think that the legislature intended to obliterate the distinction between judgments of Native States and those of British India by the operation of section 44. I think there is force in the contention of the learned counsel for the appellant that the language of section 44 does not prima facie import equality between the two classes of judgments. As Lord HALSBURY points out in *Cox* v. *Hakes*(1), "it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy." Lord HERSCHELL also says "that for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation." This principle has been accepted and acted upon in *Darlington Wagon Company* v. *Harding and Trouville Pier and Steamboat Company*(2) and *Ex parte Blain, In re Sawers*(3). In the present case, we cannot impute to the legislature an intention to do away with the distinction between judgments of Native States and those obtained in British India, thereby taking them out of the category of foreign judgments altogether. I have already indicated that substantial advantages would be secured even on the footing that section 44 is controlled by section 13.

It is not necessary for emphasizing this position to hold that suits on the judgments of favoured Native States are not

(1) (1890) 15 A.C., 506. (2) (1891) 1 Q.B., 245.
(3) (1879) 12 Ch. D., 522.

permissible under the Code. There have been conflicting views on this question. I am inclined to think that both the remedies are open to persons who have obtained judgment in these States. However, this question has not been fully argued. I prefer not to express any decided opinion on it. Assuming that only execution is contemplated and not suits, still a judgment from the Native States included in the notification already referred to must not be obnoxious to the qualifications contained in section 13.

Another question which might be more decisive on the matter we have to decide was not also fully argued, and although I hardly feel any doubt upon it, I shall not base my decision on it. Mr. Anantakrishna Ayyar contended that in regard to decrees obtained within British India, the executing Court will have no power to go into the question whether the Court which passed the decree had jurisdiction to decide it. He relied on the change in the language between section 225 of the old Code and Order XXI, rule 7 of the new Code, and quoted the recent decision of the Bombay High Court in *Hari Govind* v. *Narsingrao Konherrao*(1) in support of his contention. I am not satisfied that the change is in favour of depriving the executing Court of the power to enquire into the jurisdiction of the Court which passed the decree. The words omitted suggest that the Court is not *suo moto* to require proof of jurisdiction. In my opinion the omission does not lead to the conclusion that it is not open to the contesting party to challenge the jurisdiction of the decree Court. I agree with Mr. Justice SUNDARA AYYAR that this conclusion is not warranted by the change in the language The learned Judges of Bombay in the recent case do not refer to *Bhagwantappa* v. *Vishwanath*(2). If jurisdiction can be questioned regarding judgments of British Courts, it would *a fortiori* follow that judgments of Native States are not exempt from this infirmity. However, as I said before, I shall not base my judgment on this conclusion.

I feel no hesitation in holding that the words "as if they had been passed by the Courts of British India" have not the effect of giving foreign judgments the character of the judgments of our Courts. In *Ramachandra* v. *Pitchaikannu*(3), it was held that

(1) (1914) I.L.R., 38 Bom., 194. (2) (1904) I.L.R., 28 Bom., 378
(3) (1914) I.L.R., 37 Mad., 434.

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similar words in the Abkāri Act had not the effect of giving arrears due under it the characteristics of arrears of revenue under Act XI of 1864. This was followed in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(1) regarding income-tax where the language used is strikingly similar to the words in section 44. The learned Judges held that the words "as if it were an arrear of revenue" only related to the process of enforcing the income-tax dues. In *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(2) the words in question were understood as relating only to the mode of execution. These decisions are directly in point. Mr. Anantakrishna Ayyar drew our attention to the language employed in sections 1 and 2 of 31 & 32 Vict., c. 54 (The Judgment Extension Act of 1868) and contended that the words of section 44 are similar to those words and should be given the same meaning as in that Act To my mind the language employed appears to be totally different. Section 1 speaks of the registry of Scotch judgments in the English Courts and proceeds to say that they "shall from the date of such registration be of the *same force and effect* (the italics are mine), and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is registered." These words are very different from the language employed in section 44 of our Code.

On the other hand, the language of section 5 of 45 & 46 Vict., c. 31, bears a close resemblance to the words used in section 44. The Act is known as the Inferior Courts Judgments Extension Act. Under this Act, "process of execution may issue thereon out of the Court in which the same shall have been so registered against any goods or chattels of the person against whom such judgment shall have been obtained, which are within the jurisdiction of such last-mentioned Court, in the same or the like manner as if the judgment to be executed had been obtained in the Court in which such certificate shall be so registered as *aforesaid.*" Then *follows section 10 which exempts from the* operation of section 5 all judgments obtained against persons not domiciled within the jurisdiction of the Court which passed it

(1) (1903) I.L.R., 26 Mad., 230. (2) (1891) I.L.R., 15 Bom., 216.

and against whom the whole cause of action has not arisen within its limits. This Act gives the clue to the meaning to be attributed to section 44 of the Code of Civil Procedure and the limitation contained in section 10 of that Act seems applicable to the Code.

Mr. Anantakrishna Ayyar argued a further question which has not been considered by the learned Judges who heard the Civil Miscellaneous Appeal. The learned vakil contends that, as the appellant voluntarily submitted to the jurisdiction of the Cochin Court, he is estopped from questioning it in execution. The facts necessary for deciding this point have not been clearly elicited The Subordinate Judge on remand found that there was no voluntary submission and Mr. Justice SUNDARA AYYAR says: "The learned vakil for the respondent properly abstained from attempting to impeach it." Mr. Justice SADASIVA AYYAR does not refer to the question at all.

I have stated in the opening of my judgment the facts in so far as they are gatherable from the records. The question for consideration on these materials is, did the appellant voluntarily submit himself to the jurisdiction of the Cochin Court? It has been held in Madras that where a defendant demurs to the jurisdiction of a Court and at the same time submits an alternative plea for a judgment on the merits in his favour, he should not be deemed to have voluntarily submitted to jurisdiction; *Parry & Co.* v. *Appasami Pillai*(1). This is also implied by the decision in *Sivaraman Chetti* v. *Iburam Saheb*(2). In a very recent case it was held in Bombay—*Harchand* v. *Gulabchand*(3)—that if in addition to challenging jurisdiction, the defendant takes the chance of a judgment being given in his favour, the submission is voluntary. The basis for this pronouncement is the decision of CAVE, J, in *Boissiere and Co.* v. *Brockner and Co.*(4). The learned Judge says: "where however he appears voluntarily and submits to the jurisdiction of the foreign Court there arises a legal obligation to obey the judgment. The question I have to decide in this case is what is meant by the word voluntarily. For the plaintiffs it is contended that every appearance is voluntary which is not made under duress. For the defendants it is submitted

(1) (1880) I L R., 2 Mad., 407.
(2) (1895) I L R, 18 Mad, 327.
(3) (1914) 16 Bom. L.R., 620
(4) (1889) 6 T L.R, 85.

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that as the foundation for the legal obligation is consent an appearance under protest affords no indication of consent to the jurisdiction, or, in other words, is not voluntary. Now, no one supposes that when a man appears voluntarily as a defendant in an action before a foreign Court he does so because he likes it; he appears because on the whole he deems it his interest to submit to have the dispute decided by the foreign tribunal and to take his chance of winning the suit; and if he enters into the litigation from those motives, intending to take advantage of the judgment if he wins, there is obviously a moral obligation on him to pay if he loses, and this moral obligation is recognised by our law as sufficient under the circumstances to constitute a legal obligation If this is the true source of the obligation why should it not extend to the case of a man who appears, without duress, and therefore voluntarily in one sense; but who accompanies his appearance with a protest and appears, not because he is compelled to do so, but because he judges it to be for his interest to do so. That is, he intends to take all the advantage he hopes to gain by appearing and by a protest to relieve himself from the disadvantage. He wishes to have the benefit without the burden," and after discussing some of the authorities bearing on the question, the learned Judge comes to the conclusion that the appearance of the defendant was voluntary notwithstanding the protest Dicey (Conflict of Laws) accepts this as good law See case 2 in page 370. See also Foote on Private International Jurisprudence, pages 552 and 553. I am not sure from the remarks of Westlake in his book on "Private International Law" that he is satisfied with the decision of CAVE, J. (see remarks at page 378). If the decision of this appeal however depended entirely upon this question, I would hesitate to follow the decision in *Farry & Co.* v. *Appasami Pillai*(1). It may be that the conditions of existence in this country may not justify the application of the principle enunciated by CAVE, J. There are circumstances in this case which render it unnecessary to decide which of the two decisions *Farry & Co.* v. *Appasami Pillai*(1), *Boissiere and Co.* v. *Brockner and Co.*(2) should be followed. There was an order against the appellant prohibiting him from alienating his properties which were within

(1) (1830) I.L.R., 3 Mad., 407. (2) (1859) 6 T.L.R., 85.

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the jurisdiction of the Cochin Court. It was to protect himself from this order that he made his appearance although he filed a statement on the merits as well. This amounts according to all accepted authorities to appearing under duress. Lord ESHER referring to the dictum of BLACKBURN, J., in an earlier judgment says in *Voinet* v. *Barrett*(1): "This sentence clearly means that an appearance which would otherwise be voluntary is not treated as voluntary if it is only made in order to save property which is in the hands of a foreign tribunal; that is to say, if the appearance is made in a case in which property of the party so appearing is already in the foreign country and has been seized by the foreign tribunal before appearance has been entered, so that the party appears in order to save property so seized, and in order to get it out of the hands of the foreign tribunal. Such an appearance is not treated as voluntary, because it is made in order to save property which is already in jeopardy in the hands of a foreign tribunal but if a defendant enters an appearance before any property has been seized, such an appearance may be a voluntary appearance." BOWLEN, L.J., is equally clear on the question. "It is true that a defendant does not do so in a case in which goods belonging to him have already been seized by a foreign tribunal, so that he only appears in order to get them released; but if his appearance is not a compulsory appearance, but is voluntary, then the matter stands in a different position." CAVE, J., in the case already referred to makes a reservation in favour of the defendant appearing under duress. Westlake says that this position is unassailable. He pleads for an extension of the doctrine to all cases where the defendant appears to protect his property in a foreign Court, although there is no order for attachment or seizure of the same (see page 377). To the same effect are the opinions of other writers—Foote on Private International Jurisprudence, page 552, Pigott on Foreign Judgments, volume I, page 349; Dicey on the Conflict of Laws [case 3 in page 372 *Voinet* v. *Barrett*(1)]. The facts elicited in this case show that it was in order to protect his property that the appellant appeared before the Court, and the fact that he subsequently invoked the opinion of the Court on the merits should not preclude him from pleading that the Cochin Court had no jurisdiction over him.

(1) (1885) 55 L.J., (Q.B.D.), 39.

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that as the foundation for the legal obligation is consent an appearance under protest affords no indication of consent to the jurisdiction, or, in other words, is not voluntary. Now, no one supposes that when a man appears voluntarily as a defendant in an action before a foreign Court he does so because he likes it, he appears because on the whole he deems it his interest to submit to have the dispute decided by the foreign tribunal and to take his chance of winning the suit; and if he enters into the litigation from those motives, intending to take advantage of the judgment if he wins, there is obviously a moral obligation on him to pay if he loses, and this moral obligation is recognised by our law as sufficient under the circumstances to constitute a legal obligation If this is the true source of the obligation why should it not extend to the case of a man who appears, without duress, and therefore voluntarily in one sense; but who accompanies his appearance with a protest and appears, not because he is compelled to do so, but because he judges it to be for his interest to do so. That is, he intends to take all the advantage he hopes to gain by appearing and by a protest to relieve himself from the disadvantage. He wishes to have the benefit without the burden," and after discussing some of the authorities bearing on the question, the learned Judge comes to the conclusion that the appearance of the defendant was voluntary notwithstanding the protest. Dicey (Conflict of Laws) accepts this as good law See case 2 in page 370. See also Foote on Private International Jurisprudence, pages 552 and 553. I am not sure from the remarks of Westlake in his book on "Private International Law" that he is satisfied with the decision of CAVE, J. (see remarks at page 378). If the decision of this appeal however depended entirely upon this question, I would hesitate to follow the decision in *Parry & Co.* v. *Appasami Pillai*(1). It may be that the conditions of existence in this country may not justify the application of the principle enunciated by CAVE, J. There are circumstances in this case which render it unnecessary to decide which of the two decisions *Parry & Co.* v. *Appasami Pillai*(1), *Boissiere and Co.* v. *Brockner and Co.*(2) should be followed. There was an order against the appellant prohibiting him from alienating his properties which were within

(1) (1839) I.L.R., 2 Mad., 407. (2) (1889) 6 T.L.R., 85.

Quære.—Whether the fiction of tenancy by sufferance should be kept up after the passing of the Transfer of Property Act.

Subhraveti Ramiah v. *Gundala Ramanna* (1910) 1 M W.N., 145, referred to.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the Subordinate Judge of Coimbatore, in Appeal No. 105 of 1911, preferred against the decree of R. V. KRISHNAN, the Acting District Munsif of Erode, in Original Suit No. 1883 of 1909.

The facts of the case appear from the judgment of AYLING, J.

T. R. Venkatarama Sastriyar for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *A. Viswanatha Ayyar* for the respondents Nos. 1, 2 and 4.

AYLING AND HANNAY, JJ.

JUDGMENT.—The plaintiffs and defendants are co-owners of the suit-house. The defendants in 1896 bought an undivided moiety of the house from the father of plaintiffs Nos. 1 to 7, and later in the same year executed a lease to him in respect of the other moiety for a period of three years. That lease expired in 1899 and since that time the defendants have been in possession of the whole house without executing any fresh lease to the plaintiffs or paying them rent. The plaintiffs' suit is for possession of their half of the house after partition and for recovery of arrears of rent and rent subsequent to suit. They have succeeded in both the lower Courts and have been given a decree for partition and possession of a moiety of the house and for rent for six years before suit under article 120 of the Limitation Act. The only question for determination in this second appeal is whether the lower Courts were right in according arrears of rent for six years. For the appellants it is contended that either article 110 or 115 should have been applied and that the claim for the period prior to three years before suit is barred.

The lower Courts in applying article 120 have followed the decision in *Robert Watson & Co., Ld.* v. *Ram Chand Dutt*(1). It is argued for the appellants that that case is distinguishable from the present on the facts, because on the facts there found, there was no contract between the parties so as to bring the case within either article 110 or 115 of the Limitation Act, whereas in the present case there was a lease between the parties, and an implied contract to pay rent after expiry of that

(1) (1896) I.L.R., 23 Calc., 799.

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lease. In support of the contention that the defendants in this case are in the position of tenants holding over and as such liable for rent at the rate reserved in the lease of 1896, *Leigh* v. *Dickeson*(1) is cited and the judgment of COTTON, L.J., and LINDLEY, J., appear to support that view. That also was a case where one tenant-in-common had possession of a house by virtue of a lease from the other tenant-in-common and the fact that there was such a lease was evidently the basis of the conclusion that the lessee tenant-in-common was bound to pay rent at the rate reserved, though the lease had expired and notwithstanding the existence of the tenancy in common.

In this case, as in the English case above referred to, the defendants may be said to have continued in possession of the house as tenants on sufferance from the expiry of the lease in 1899 as there is nothing to show that the plaintiffs assented to their remaining in possession as lessees (their possession might in the circumstances be referable to their rights as co-owners) and it is not the plaintiffs' case that any rent was paid. But as pointed out in the decision in *Subhraveti Ramiah* v. *Gundala Ramanna*(2) it is doubtful whether in this country the fiction of tenancy by sufferance should be kept up after the Transfer of Property Act.

In these circumstances the decision of the question whether article 110, 115 or 120 is to be applied to this case depends in our opinion on the answer to the question whether the relationship between the parties after the expiry of the lease in 1899 was based on a contract, express or implied. Articles 110 and 115 both presuppose the existence of such a contract. If the suit is in reality a suit for rent or for damages for use and occupation then article 110 or 115 may apply, but if not then the remaining article 120 would be properly applied.

In this connection, the respondents rely upon sections 111 and 116 of the Transfer of Property Act. Under section 111, the lease of 1896 was determined by efflux of time in 1899, and as the plaintiffs did not accept rent from the defendants after that or otherwise assent to the defendants continuing in possession as lessees, it cannot be said that there was any renewal of the lease as provided in section 116 of the Transfer of Property Act.

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(1) (1884) L.R., 15 Q.B.D., 60. (2) (1910) 1 M.W.N., 145.

In these circumstances and having regard to the fact that the defendants are co-owners of the suit-house, we think there is much force in the contention for the respondents that they cannot be regarded as tenants holding over or that there was any relationship of landlord and tenant subsisting between them and the appellants subsequent to 1899 so as to bring the case within either article 110 or 115. The respondents' possession after 1899 may reasonably be referred to their rights as co-owners and in that view the decision in *Robert Watson & Co., Ld.,* v. *Ram Chand Dutt*(1) was in our opinion rightly applied to the case notwithstanding the difference in the facts which has been referred to above.

The decree of the lower Court is confirmed and this Second Appeal is dismissed with costs.

S.V

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar

Re DHARMALINGA MUDALY AND FIFTEEN OTHERS (ACCUSED), PETITIONERS.*

1914.
October
9 and 15.

Indian Penal Code (Act XLV of 1860), ss. 147, 426 and 447—Obstruction to public way by building a wall—Pulling down the wall in bona fide exercise of the right of public way, no offence.

The complainant built a wall obstructing a public way Immediately after this, the accused, who were members of the public, in the bona fide exercise of their right of way, pulled down the wall.

Held, that the accused were not guilty either of rioting or of mischief or of criminal trespass (sections, 147, 426 and 447 of the Indian Penal Code).

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of P. C. DUTT, the District Magistrate of North Arcot, in Criminal Revision Case No. 19 of 1914, preferred against the order of T. S. VENKATRAMAYYA, the Second-class Magistrate of Arkonam, in Calendar Cases Nos 78 and 79 of 1914.

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(1) (1896) I L R, 23 Calc., 799

* Criminal Revision Case No 457 of 1914 (Criminal Revision Proceedings No. 385 of 1914)

MADAR v. KADER MOIDEEN. AYLING AND HANNAY, JJ.

lease. In support of the contention that the defendants in this case are in the position of tenants holding over and as such liable for rent at the rate reserved in the lease of 1896, *Leigh* v. *Dickeson*(1) is cited and the judgment of COTTON, L.J., and LINDLEY, J., appear to support that view. That also was a case where one tenant-in-common had possession of a house by virtue of a lease from the other tenant-in-common and the fact that there was such a lease was evidently the basis of the conclusion that the lessee tenant-in-common was bound to pay rent at the rate reserved, though the lease had expired and notwithstanding the existence of the tenancy in common.

In this case, as in the English case above referred to, the defendants may be said to have continued in possession of the house as tenants on sufferance from the expiry of the lease in 1899 as there is nothing to show that the plaintiffs assented to their remaining in possession as lessees (their possession might in the circumstances be referable to their rights as co-owners) and it is not the plaintiffs' case that any rent was paid. But as pointed out in the decision in *Subhraveti Ramiah* v. *Gundala Ramanna*(2) it is doubtful whether in this country the fiction of tenancy by sufferance should be kept up after the Transfer of Property Act.

In these circumstances the decision of the question whether article 110, 115 or 120 is to be applied to this case depends in our opinion on the answer to the question whether the relationship between the parties after the expiry of the lease in 1899 was based on a contract, express or implied. Articles 110 and 115 both presuppose the existence of such a contract. If the suit is in reality a suit for rent or for damages for use and occupation then article 110 or 115 may apply, but if not then the remaining article 120 would be properly applied.

In this connection, the respondents rely upon sections 111 and 116 of the Transfer of Property Act. Under section 111, the lease of 1896 was determined by efflux of time in 1899, and as the plaintiffs did not accept rent from the defendants after that or otherwise assent to the defendants continuing in possession as lessees, it cannot be said that there was any renewal of the lease as provided in section 116 of the Transfer of Property Act.

(1) (1884) L.R., 15 Q.B.D., 60. (2) (1910) 1 M.W.N., 145.

In these circumstances and having regard to the fact that the defendants are co-owners of the suit-house, we think there is much force in the contention for the respondents that they cannot be regarded as tenants holding over or that there was any relationship of landlord and tenant subsisting between them and the appellants subsequent to 1899 so as to bring the case within either article 110 or 115. The respondents' possession after 1899 may reasonably be referred to their rights as co-owners and in that view the decision in *Robert Watson & Co., Ld.,* v. *Ram Chand Dutt*(1) was in our opinion rightly applied to the case notwithstanding the difference in the facts which has been referred to above.

The decree of the lower Court is confirmed and this Second Appeal is dismissed with costs.

S.V

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar.

Re DHARMALINGA MUDALY AND FIFTEEN OTHERS (ACCUSED), PETITIONERS.*

1914. October 9 and 15.

Indian Penal Code (Act XLV of 1860), ss. 147, 426 and 447—Obstruction to public way by building a wall—Pulling down the wall in bona fide exercise of the right of public way, no offence.

The complainant built a wall obstructing a public way. Immediately after this, the accused, who were members of the public, in the bona fide exercise of their right of way, pulled down the wall:

Held, that the accused were not guilty either of rioting or of mischief or of criminal trespass (sections, 147, 426 and 447 of the Indian Penal Code).

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of P. C. DUTT, the District Magistrate of North Arcot, in Criminal Revision Case No. 19 of 1914, preferred against the order of T. S. VENKATRAMAYYA, the Second-class Magistrate of Arkonam, in Calendar Cases Nos. 78 and 79 of 1914.

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(1) (1896) I.L.R., 23 Calc., 799.

* Criminal Revision Case No. 457 of 1914 (Criminal Revision Proceedings No. 385 of 1914).

Re DHARMALINGA MUDALY.

The facts of the case appear from the ORDER below.

A. Sundram for the petitioners.

The *Acting Public Prosecutor* for the Crown.

SADASIVA AYYAR, J.

ORDER—The Sub-Magistrate discharged the accused because he held that in pulling down the wall built by the complainant the accused acted in the assertion of a bona fide public right to the site on which the wall was built, that site being a public way.

The accused was charged under sections 147, 426 and 447, Indian Penal Code. Section 426 relates to mischief and mischief *includes an intent to cause wrongful loss. If the site* was a public path and if the complainant obstructed it wrongfully by a wall, the loss caused to him by the members of the public who pull it down in order to exercise their right of way through the site cannot be considered wrongful loss. As regards section 447, that again depends on the question whether the site was a public path and even if it was not, whether it was in complainant's effective possession. As soon as the complainant began to build and obstruct the path, the accused remonstrated and took steps to have the obstruction removed and it cannot be held that, in these circumstances, the complainant had taken such effective possession as would make the act of the public who pulled down the obstruction (caused by the accused) to constitute *criminal* trespass. In *Browne* v. *Dawson*(1), Lord DENMAN, C.J., said: "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects." As Mr. MAYNE says: "A mere trespasser cannot obtain what is known in law as possession, by the act of entry, or even by the continuance of that act, so long as the act is disputed and resisted." It is on this ground that in section 145, Criminal Procedure Code, clause 4, proviso (1), it is stated that possession within two months before the date of the Magistrate's order might be treated as continuing peaceable and juridical possession even though there was a subsequent and very recent forcible dispossession by the opposite party. This shows that the legislature held that a mere trespasser need not

(1) (1840) 12 A. & E., 624; s.c., 113 E.R., 950.

be considered as having acquired peaceable and juridical possession till his possession is acquiesced in for two months. A person who takes possession of the site of a public road and builds upon it to the obstruction of the public cannot by his very act of creating a public nuisance be held to have acquired peaceable and effective possession of that site so as to prevent a member of the public from pulling down that obstruction and exercising his right of way. If, of course, peaceable and effective possession had been acquired by the wrongful act and has been in a manner acquiesced in for a reasonable period, private persons cannot afterwards be allowed to assemble in force and cannot trespass upon the site so effectively and peaceably taken possession of by the person, without their being guilty of the offence of being members of an unlawful assembly though the person who had obstructed the road might be liable to punishment on criminal indictment and may be dispossessed by the public authorities under section 133 of the Criminal Procedure Code and under section 6 of the Madras Land Encroachment Act III of 1905. But it is only where a trespasser's possession has been acquiesced in and hence he has acquired juridical possession that the person entitled to possession cannot dispossess him by force without making himself liable under the criminal law. See *Kailash Ghose* v. *Jugal Lohar*(1).

In the present case, the accused had been exercising their right of way through the site in question till the complainant began to build upon it. Before he could acquire effective peaceable and juridical possession and without acquiescing in his possession they dispossessed him and removed the obstruction caused by him. Hence I think that the Sub-Magistrate was justified in discharging them and the learned District Magistrate ought not to have ordered further enquiry. The District Magistrate's order is set aside and the proceedings against th accused (petitioners) will be dropped.

N.R.

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(1) (1905) 1 C.L.J., 104.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

1914.
October
16 and 20.

V. R. M. RAMANATHAN CHETTY AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

U. A. U. R. RAMASWAMI CHETTY (DEFENDANT), RESPONDENT.*

(Madras) Estates Land Act (I of 1908), sec. 189 and clause (12) of Part A of schedule—Suit to recover lands under the Act for non-payment of rent, non-maintainability of, in Civil Courts.

Section 189 and clause (12) of Part A of schedule to the Madras Estates Land Act (I of 1908) preclude a Civil Court from taking cognizance of a suit by a ryot, to recover possession of a holding sold under the Madras Estates Land Act, for non-payment of rent, on the ground that the landholder had no right to sell the holding. Clause (12) is not confined to a suit to question an intended sale of the holding.

Gouse Moideen Saib v. *Muthialu Chettiar* (1914) 26 M.L.J., 36, distinguished.

APPEAL against the decree of S. MAHADEVA SASTRIYAR, the acting temporary Subordinate Judge of Ramnad, in Original Suit No. 91 of 1911.

This is a suit brought by a ryot in a Civil Court (Sub-Court of Ramnad) to recover a holding sold under the Estates Land Act (I of 1908) for non-payment of rent. The defendant, the landholder, contended, inter alia that the Civil Court had no jurisdiction to entertain the suit and that the plantiff had no *locus standi* to maintain the suit as his interest in the land was sold to one Sundararaja Aiyar in execution of a Civil Court's decree. The lower Court dismissed the suit upholding these two pleas of the defendant. The plaintiffs appealed.

T. R. Ramachandra Ayyar and *S. Sundararaja Ayyangar* for the appellants.

S. Gopalaswami Ayyangar for the respondent.

SANKARAN NAIR AND SPENCER, JJ.

JUDGMENT.—This is a suit in ejectment. The Subordinate Judge dismissed the suit on the grounds that the plaintiffs' title to the property had passed to one Sundararaja Aiyangar and also on the ground that they cannot dispute the validity of

* Appeal No. 150 of 1912.

the sale under the Estates Land Act under which the property was sold to the defendant and possession was delivered to him by the Collector. The plaintiffs appeal.

The plaintiffs were occupancy tenants. The defendant, the landholder, served notice of his intention to sell the holding on the plaintiffs through the Collector under section 112 of the Estates Land Act. Intimation of the date of service was given by the Collector to the landholder under section 113 and the property was sold and the defendant was placed in possession by the Collector. It was open to the plaintiffs to bring a suit under section 112 to contest the defendant's right of sale within thirty days of the date of service on him. Clause 12 of Part A of the schedule and section 189 preclude a Civil Court from taking cognizance of any dispute in respect of which a suit might be brought before a Collector. The plaintiffs are not therefore entitled in a civil suit to question the right of sale. Mr. Ramachandra Ayyar argues that the plaintiffs are only precluded from bringing a suit before the sale but the section is not a bar to a suit which may be brought for the same purpose after the sale. The words of section 189 do not support this contention. It renders the section practically nugatory. It is not likely that the legislature would allow the validity of a sale to be impeached after the sale while prohibiting a suit for a declaration that no valid sale can be effected. *Gouse Moideen Saib* v. *Muthialu Chettiar*(1) has no application. There a sale was sought to be set aside on the ground of fraud Cases relating to fraud stand on a different footing. The defendant is not a wrongdoer and was lawfully placed in possession in proceedings to which the plaintiffs were parties. He is therefore also entitled to show that the plaintiffs had no title to possession. We think the Subordinate Judge is right and dismiss the appeal with costs.

N R.

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(1) (1914) 26 M L J , 36.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Hannay.

1914.
October 13
and 21.

BAIZNATH LALA (PLAINTIFF), APPELLANT,

v.

RAMADOSS (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), arts. 62 and 120—Suit for money on the ground of wrongful rateable distribution, governed by article 62 and not by article 120 of the Limitation Act—Section 14 of the Limitation Act—Time taken to file and to prosecute a revision petition against order of wrongful distribution not to be deducted under section 14.

A suit for money under section 73, clause (2), Civil Procedure Code, on the ground that the plaintiff and not the defendant was entitled to receive the same in proceedings in execution of a decree for rateable distribution is governed by article 62 and not by article 120 of the Limitation Act (IX of 1908), the cause of action arising on the date of wrongful payment to the defendant.

In computing the period of limitation for the filing of such a suit the plaintiff is not entitled to deduct under section 14 of the Limitation Act the period of time taken by him to file a revision petition in the High Court or the time during which he was prosecuting the revision petition against the order of wrongful distribution.

Vishnu Bhikaji Phadke v. *Achut Jagannath Ghate* (1891) I.L.R., 15 Bom., 438, followed.

Ramaswamy Chetty v. *Harikrishna Chettyar* (1911) 21 M.L.J., 705, not followed.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of North Arcot, in Appeal No. 255 of 1911, preferred against the decree of P. AYYASWAMI MUDALIYAR, the District Munsif of Tirupati, in Original Suit No. 402 of 1910.

The facts of the case appear from the judgment.

C. V. Anantakrishna Ayyar for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondent.

AYLING AND HANNAY, JJ.

JUDGMENT.—The questions for decision in the second appeal are (1) whether the lower Courts are right in holding that article 62 and not article 120 of the schedule to the Limitation Act applies to the facts of this case, (2) whether even if article 62 applies the suit is still in time by virtue of a deduction to which the plaintiff claims to be entitled with reference to section

* Second Appeal No. 2026 of 1912.

BAIZNATH LALA *v* RAMADOSS.

AYLING AND HANNAY, JJ.

14 of the Limitation Act, and (3) whether the lower Courts should have allowed the plaint to be amended so as to enable plaintiff to raise the second point.

The plaintiff, who is the appellant before us, brought the suit from which this second appeal arises under section 73 of the Code of Civil Procedure, his application for rateable distribution as against the defendant in respect of certain assets in Court deposited by a third party against whom both plaintiff and defendant had obtained decrees having been refused by the District Court of North Arcot on 18th October 1905. The defendant drew the money in question from Court on 19th October 1905. The plaintiff filed a revision petition in the High Court to set aside the order of the District Court on 21st December 1905. That petition was dismissed on 12th December 1906. The present suit was filed on 11th December 1909. If article 120 applies to the case the suit is in time in any view but if article 62 is to be applied it will be barred unless the plaintiff can show he is entitled to deduct the excess period by virtue of section 14 of the Limitation Act.

Now, article 120 can only be applied when there is no other article of the Limitation Act applicable. In support of the view that article 62 is the proper one to apply, *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*(1), *Shankar Sarup* v. *Mejo Mal*(2), *Mahomed Wahib* v. *Mahomed Ameer*(3) and *Shanmuga Pillai* v. *Minor Govindasami*(4) have been relied on both here and in the lower Court. The first case is direct authority on the point. The suit in that case was brought under section 295 of the Code of 1882, which corresponds to section 73 of the present Code and it was held that such a suit falls under article 62, *Moses* v. *Macferlan*(5) being referred to evidently as authority for the position that the suit was one for money received for the plaintiff's use. The decision in *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*(1) is referred to with approval by the Privy Council in *Shankar Sarup* v. *Mejo Mal*(2), upon the question whether a suit under section 295 is a suit to set aside the order of the Court, passed under that section and

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(1) (1891) I.L.R., 15 Bom., 438. (2) (1901) I.L.R., 23 All., 313 at p. 322.
(3) (1905) I.L.R., 32 Calc., 527 at p. 531. (4) (1907) I.L.R., 30 Mad., 459.
(5) (1760) 97 E.R., 676.

BAIZNATH LALA v RAMADOSS.

AYLING AND HANNAY, JJ.

it was held that it was not such a suit and that therefore article 13 of the Limitation Act would not apply. It was only upon that point that the case was referred to and the decision of that point was sufficient for the purposes of the case. Their Lordships expressed no opinion as to whether the proper article to apply was article 62 or article 120 and the case (though so far as it goes it supports the lower Court's view) cannot be regarded as direct authority upon that point. *Mahomed Wahib* v. *Mahomed Ameer*(1) and *Shanmuga Pillai* v. *Minor Govindasami*(2) were not cases of suits under section 73 of the Code. But the true nature of the class of suits described in article 62 of the Limitation Act is considered in the former decision and Sir SUBRAHMANYA AYYAR, J., in the latter case expresses his agreement with the views laid down by the learned Judges of the Calcutta High Court. The conclusion arrived at in the Calcutta case was that the description of the suits mentioned in article 62 as suits for money received by the defendant for the plaintiff's use pointed to the well-known English action in that form and that consequently the article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff. This view has been followed by the Allahabad High Court in *Baghwan Das* v. *Karam Husain*(3) and by this Court in *Sankunni Menon* v. *Govinda Menon* (4). We agree with the opinion of Mr. Justice MUKHERJI in the Calcutta case that the intention of the defendant at the time of receipt of the money to receive it for himself and not for the plaintiff is not the test by which the question whether the money was in fact received for the plaintiff's use has to be decided. As observed by the Privy Council in *Shankar Sarup* v. *Mejo Mal*(5) "the scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the rights of the parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by such a suit as the present." If on such a readjustment being made the plaintiff in a suit under section 73 is found to be entitled to a portion of the

(1) (1915) I.L.R., 32 Calc., 527 at p. 531. (2) (1907) I.L.R., 30 Mad., 459.
(3) (1911) I.L.R., 33 All., 708 at p. 726. (4) (1912) 23 M.L.J., 455.
(5) (1901) I.L.R., 23 All., 313 at p. 322 (P.C.).

assets which have been paid to the defendant, we are of opinion that the latter must be regarded as having received the portion so paid to him "for the use of the plaintiff." In this connection we may refer to the extract from Blackstone's commentaries cited by Mr. Justice HARRINGTON in *Mahomed Wahib* v. *Mahomed Ameer*(1): "This species of action lies when one has had and received money belonging to another without any valuable consideration given on the receiver's part, for the law construes this to be money had and received for the use of the owner only." We think these words fitly apply to the facts of the present case.

The appellant relies upon *Gurudas Pyne* v. *Ram Narain Sahu*(2) and *Ramaswamy Chetty* v. *Harikrishna Chettyar*(3). As regards the former it has been pointed out both in *Mahomed Wahib* v. *Mahomed Ameer*(1) and *Bhagwan Das* v. *Karam Husain*(4) that the money received by the defendant in that case did not belong to the plaintiff but a third party and that the plaintiff had a mere equitable claim to follow that money in the hands of the defendant It was in these circumstances that article 62 was held inapplicable by the Privy Council. It is plain that the facts of that case were quite different from the present, therefore In the second case—*Ramaswamy Chetty* v. *Harikrishna Chettyar*(3)—the plaintiff claimed as assignee of a decree but at the time when the money claimed by him was realized by the defendant, the plaintiff's suit to establish his rights as assignee had been dismissed. The Court in these circumstances held that as at the time when the defendant realized the money, the plaintiff could not himself have collected the amount by reason of the dismissal of his suit to establish his title as assignee, the defendant could not be said to have received the money for his use in any sense. With all respect we are unable to follow that decision. The plaintiff in the case was eventually found entitled to share in the assets realized by the defendant and that being so, we do not see why the mere fact that the plaintiff's suit to establish his rights as assignee had been dismissed at the time when the money was realized by the defendant should suffice to take the case out of the purview of article 62.

(1) (1905) I.L.R., 32 Calc., 527 at p. 531.
(2) (1884) I.L.R., 10 Calc., 860 (P.C.) (3) (1911) 21 M.L.J., 705.
(4) (1911) I.L.R., 33 All., 708 at p. 720.

BAIZNATH LALA v. RAMADOSS.

AYLING AND HANNAY, JJ.

In the result, therefore, we think the lower Court was right in holding that article 62 should be applied to the facts of the present case

The second point depends upon the question whether the plaintiff would be entitled by virtue of section 14 of the Limitation Act to deduct the time between the order of the District Court disallowing his petition for rateable distribution and the disposal of his Revision Petition by the High Court (i.e., from 19th October 1905 till 12th December 1906) or only the time from the presentation of the Revision Petition until its disposal (i.e., from 21st December 1905 till 12th December 1906) The plaintiff relies upon the decision in *Raj Krishto Roy* v. *Beer Chunder Joobraj*(1) in support of the first alternative. We think that case is not in point here. It was a case where the plaintiff's suit was dismissed for want of jurisdiction and the plaintiff then tried unsuccessfully to remedy his failure by appeal In these circumstances it was held that as the law allows a fixed time for appeal in order to allow the unsuccessful party to consider whether he will appeal or no, if a party appeals within the time so fixed, he ought to be considered as proceeding with due diligence between the decision of the suit and the filing of the appeal. Here there was no question of appeal. Though the plaintiff had a right of suit under section 73 of the Code, he elected to proceed by revision in the High Court and the law does not fix any period within which petitions for revision are required to be brought. In these circumstances it seems to us that the case cited is not in point and that it cannot be said that the plaintiff was prosecuting a proceeding at all while he was merely making up his mind to apply for revision In this view the time which expired between the order of the District Court and the filing of the Revision Petition in the High Court (viz., from 19th October 1905 till 21st December 1905) cannot be excluded, as the plaintiff contends, under section 14 of the Limitation Act. It is conceded that if this period be not excluded, the suit is still out of time. We think, further, that the respondent is entitled to rely upon the contention that in any event plaintiff cannot be said to have prosecuted the Revision Petition in good faith within the meaning of section 14 of the Limitation Act inasmuch as it has

(1) (1866) 6 W.R., 303.

been frequently held by this and other High Courts that the High Court will not exercise its revisional powers when there is any other remedy open. Here the plaintiff had his remedy by suit.

It is unnecessary in these circumstances to consider the third point raised regarding amendment of the plaint.

The second appeal is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

1914. October 8, 9 and 23

SRI RAJAH VATASAVAYA VENKATA SIMHADRI JAGHAPATHI RAJU BAHADUR GARU, DYING SUBSEQUENT TO THE SUIT—HIS WIFE SRI RAJA VATASAVAYA VENKATA SUBHADRAYAMMA JAGHAPATHI BAHADUR GARU (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM), RESPONDENTS.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM, FIRST DEFENDANT), APPELLANT,

v.

SRI CHINTALAPATHI CHINA RAYAPARAJU GARU *et al*, RESPONDENTS. †

Madras Water-Cess Act (VII of 1865)—Water-cess—Zamindari lands—Excess area, whether liable to pay water cess—(Madras) Land Encroachment Act (III of 1905), effect of.

Where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an engagement under Act VII of 1865 will be implied and no cess can be levied.

Per SANKARAN NAIR, J.—Act III of 1905 did not take away any rights that existed at the time the Act was passed and the Government are not by reason of that Act coupled with Act VII of 1865 entitled to impose any cess upon those landholders who were before the Act not liable to pay cess for their using the water.

Kandukuri Mahalakshmamma Garu v. *The Secretary of State for India* (1911) I.L.R., 34 Mad., 295 and *Venkataratnammah* v. *Secretary of State* (1914) I.L.R., 37 Mad., 366, followed.

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* Appeal No. 2 of 1912. † Appeals Nos. 22, etc., of 1912, etc.

BAIJNATH LALA v. RAMADOSS.

AYLING AND HANNAY, JJ.

In the result, therefore, we think the lower Court was right in holding that article 62 should be applied to the facts of the present case.

The second point depends upon the question whether the plaintiff would be entitled by virtue of section 14 of the Limitation Act to deduct the time between the order of the District Court disallowing his petition for rateable distribution and the disposal of his Revision Petition by the High Court (i.e., from 19th October 1905 till 12th December 1906) or only the time from the presentation of the Revision Petition until its disposal (i.e., from 21st December 1905 till 12th December 1906). The plaintiff relies upon the decision in *Raj Krishto Roy* v. *Beer Chunder Joobraj*(1) in support of the first alternative. We think that case is not in point here. It was a case where the plaintiff's suit was dismissed for want of jurisdiction and the plaintiff then tried unsuccessfully to remedy his failure by appeal. In these circumstances it was held that as the law allows a fixed time for appeal in order to allow the unsuccessful party to consider whether he will appeal or no, if a party appeals within the time so fixed, he ought to be considered as proceeding with due diligence between the decision of the suit and the filing of the appeal. Here there was no question of appeal. Though the plaintiff had a right of suit under section 73 of the Code, he elected to proceed by revision in the High Court and the law does not fix any period within which petitions for revision are required to be brought. In these circumstances it seems to us that the case cited is not in point and that it cannot be said that the plaintiff was prosecuting a proceeding at all while he was merely making up his mind to apply for revision. In this view the time which expired between the order of the District Court and the filing of the Revision Petition in the High Court (viz., from 19th October 1905 till 21st December 1905) cannot be excluded, as the plaintiff contends, under section 14 of the Limitation Act. It is conceded that if this period be not excluded, the suit is still out of time. We think, further, that the respondent is entitled to rely upon the contention that in any event plaintiff cannot be said to have prosecuted the Revision Petition in good faith within the meaning of section 14 of the Limitation Act inasmuch as it has

(1) (1866) 6 W.R., 308.

been frequently held by this and other High Courts that the High Court will not exercise its revisional powers when there is any other remedy open. Here the plaintiff had his remedy by suit.

BAIZNATH LALA v RAMADOSS.

AYLING AND HANNAY, JJ.

It is unnecessary in these circumstances to consider the third point raised regarding amendment of the plaint.

The second appeal is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

1914. October 8, 9 and 23.

SRI RAJAH VATASAVAYA VENKATA SIMHADRI JAGHAPATHI RAJU BAHADUR GARU, DYING SUBSEQUENT TO THE SUIT—HIS WIFE SRI RAJA VATASAVAYA VENKATA SUBHADRAYAMMA JAGHAPATHI BAHADUR GARU (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM), RESPONDENTS.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM, FIRST DEFENDANT), APPELLANT,

v

SRI CHINTALAPATHI CHINA RAYAPARAJU GARU *et al*, RESPONDENTS. †

Madras Water-Cess Act (VII of 1865)—Water-cess—Zamindari lands—Excess area, whether liable to pay water cess—(Madras) Land Encroachment Act (III of 1905), effect of

Where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an engagement under Act VII of 1865 will be implied and no cess can be levied

Per SANKARAN NAIR, J.—Act III of 1905 did not take away any rights that existed at the time the Act was passed and the Government are not by reason of that Act coupled with Act VII of 1865 entitled to impose any cess upon those landholders who were before the Act not liable to pay cess for their using the water.

Kandukuri Mahalakshmamma Garu v *The Secretary of State for India* (1911) I L R, 34 Mad, 295 and *Venkataratnammah* v. *Secretary of State* (1914) I.L.R., 37 Mad., 300, followed

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* Appeal No 2 of 1912

† Appeals Nos 22, etc, of 1912, etc.

SRI RAJAH SIMHADRI RAJU v. SECRETARY OF STATE

APPEALS against the decrees of D. RAGHAVENDRA RAO, the temporary Subordinate Judge of Vizagapatam, in Original Suits Nos. 19 and 16 of 1910 and Nos 10 and 11 of 1911 respectively.

The necessary facts appear from the judgment of SPENCER, J.

Appeal No. 2 *of* 1912.

V Ramesam for the appellants.

The *Government Pleader* for the respondent.

Appeals Nos. 22, *etc., of* 1912, *etc.*

The *Government Pleader* for the appellant.

The Honourable Mr *B. N Sarma* and *V Ramesam* for the respondents Nos. 5 to 10.

SPENCER, J

SPENCER, J.—The simple question in these appeals is whether the respondents are liable to pay water-cess to Government for irrigating lands in excess of the area classed as wet at the inam settlement with the water of the Eti Koppaka channel. Similar questions arose in *Appasami Aiyar* v. *The Secretary of State*(1) and in *Kesari Venkatasubbiah* v. *The Secretary of State for India*(2), the latter decision having been published after the filing of these appeals, and if those cases were rightly decided, as I think they were, these appeals must be dismissed.

Prior to the present suit, there has been litigation between the parties In Original Suit No. 545 of 1885 on the file of the District Munsif's Court of Elamanchili, it was decided that two sluices should be constructed at the entrance of the Koppaka channel, two feet in height, one being one and a half yards wide for the use of the Koppaka mokhasadars, and the other, three yards in width, for the use of the Government ryots and the ryots of the Darlapudi proprietor The right of Koppaka mokhasadars was thereby recognised of arresting the whole water of the river, giving two-thirds of it to Government and taking one-third of it for themselves; and thus their title to one-third of the water of the river was established But in the settlement statement, Exhibit H, only 10 acres 12 cents of land were registered as wet in this mokhasa It is contended on behalf of the Government the Inam Commissioner only allowed the above-said area to be

(1) (1910) 1 M.W.N., 107. (2) (1913) 14 M.L.T., 131.

registered as wet land in spite of the mokhasa's claim in that settlement to one-third of the water. Exhibit G is a letter from the Tahsildar of Sarvasiddhi, dated 1st October 1848, recognizing the mokhasadars' rights for a flow of water in one turn through the Eti Koppaka channel as against two turns through the Pulaparthi channel and this latter is referred to as one of the documents mentioned in Exhibit H, as being in the possession of the mokhasadar. It is, therefore, argued that, though the mokhasadars are entitled to take one-third of the water, the Government is nevertheless entitled to impose a cess on the extent irrigated in excess of the registered wet area, as the arrangement come to at the inam settlement was a condition precedent.

The proviso to section 1 of Act VII of 1855 declares that, where an inamdar is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess will be imposed under this Act for water supplied to the extent of such right The question for our decision, therefore, resolves itself into the further question, what is the scope of the judgment in Original Suit No. 545 of 1885 which undoubtedly binds the parties Is the right recognized in that suit limited by the prior settlement which fixed a definite area of land as entitled to water free of charge? And does the decree operate as an engagement, within the meaning of the Act?

In Appeal No. 188 of 1911, it was recently held by WALLIS, C.J., and SESHAGIRI AYYAR, J, that the inam settlement did not override a previous arrangement with the Government by which an inamdar was entitled to water free of separate charge. If the arrangement is one subsequent to the settlement, I should be inclined to hold that it governed the relations between the parties even more decidedly than an engagement prior to the settlement. In *Kesari Venkatasubbiah* v. *The Secretary of State for India*(1) a decree of Court passed after the inam settlement was treated as sufficient to establish an engagement of the kind referred to in the proviso to section I of Act VII of 1865.

If the Government had a right by virtue of the inam settlement to restrict the respondents to the area of irrigated land

(1) (1913) 14 M.L.T., 131.

SRI RAJAH SIMHADRI RAJU v. SECRETARY OF STATE.

SPENCER, J.

allotted to them under the settlement a demand might have been made when *Original Suit No. 515 of 1885 was decided, to have* inserted in the decree a stipulation that the taking of one-third of the whole water of the river should be subject to the payment of assessment on the portion irrigated in excess of the registered area. But not only did Government recognize the mokhasadars' unrestricted right to one-third of the water in this suit, but from time to time Government officials made similar unqualified admission in Exhibits G, L, M, P and O. I am, therefore, of opinion that the Subordinate Judge was right in his view that the plaintiffs are not liable to pay water-cess so long as they do not take more than their one-third share of the water in the stream.

The respondent's pleader *has attempted to base his claim also* on the position that the bed of the stream belongs to the mokhasadars. It is unnecessary for us to deal with this question as there was no finding in the lower Court as to the ownership of the entire bed of the stream. The Sub-Judge has found that the river belongs to the Government and is under its control and I find no evidence to lead me to a different conclusion. In Original Suit No. 515 it was only found that the dam itself was situated in that part of the bed of the river which belonged to the mokhasadars. Such being the findings of fact in the present case a very few words are necessary to distinguish the decisions cited in support of the respondent's contentions. *Secretary of State* v. *Janakiramayya*(1) and *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(2), turned on a question whether the ownership of the bed of channels which take off from the Vamsadhara river claimed by Government to belong to them carried with it a right to use the water of the channel free of charge. *Secretary of State for India* v. *Swami Naratheeswarar*(3) and *Secretary of State for India* v *Ambalavana Pandara Sannadhi*(4) are cases depending on the question whether the main source of supply was a Government source—a question it is unnecessary to consider in detail in the present appeals, as the attention of the parties was not directed to it in the lower Court. In *Kesari Venkatasubbiah*

(1) (1914) I.L.R., 37 Mad., 322. (2) (1911) I.L.R., 34 Mad., 295.
(3) (1911) I.L.R., 34 Mad., 21 at p. 24. (4) (1911) I.L.R., 34 Mad., 860.

v. *The Secretary of State for India*(1), SADASIVA AYYAR, J., has distinguished the case in *Secretary of State for India* v. *Swami Naratheeswarar*(2) from the facts of the case before him and the same reasons may be used against applying that decisions to the facts of the case before us.

In Appeals Nos. 22 and 23, the respondents have filed objection petitions in which they seek to have it further declared that they have a right to dispose of their one-third share for any purpose and in any manner they think fit, subject to any rights that any other riparian owners, except the Government, may have; in other words, they claim an absolute right over the one-third of the water that they appropriate and keep in their control, to utilise it in any way they may choose, and in support of this they rely on certain expressions in the judgment of BRAMWELL, B, in *Nuttall* v. *Bracewell*(3) and on the observations in *Holker* v. *Porritt*(4), where it was stated as regards the diversion of a portion of a certain stream into a separate course "The water "which came down to him at the farm was his own to use it as "he pleased There was no one entitled to share with him in "its use, and no one who could call him to account for any use "which he chose to make of it there. In this respect his "position was different from that of a riparian owner, who only "shares the use of the water in common with other riparian "owners." In *Maria Susai Mudaliar* v. *The Secretary of State for India in Council*(5), there is a similar observation following the remarks of SIR G. MELLISH, L.J. in *Watts* v. *Kelson*(6), that when the water arrived in the plaintiff's tanks he could do what he liked with it.

The question of ownership in running water, never a simple one, is here beset with such uncertainty about the source and course of the stream owing to the want of full evidence on these points that it would be dangerous to make a wide pronouncement about the mokhasadars' right to exercise absolute ownership over the water. On the point whether water in a stream can be owned, in *Chockalingam Pillai* v. *Emperor*(7), SUNDARA AYYAR, J., observed. "In England, water flowing in a river is

(1) (1913) 14 M.L.T., 131
(2) (1911) I.L.R., 34 Mad., 21.
(3) (1866) L.R., 2 Ex., 1 at p. 11.
(4) (1875) L.R., 10 Ex., 59.
(5) (1904) 14 M.L.J., 34.
(6) (1870) L.R., 7 Ch. Ap., 166.
(7) (1912) 2 M.W.N., 119.

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allotted to them under the settlement a demand might have been made when Original Suit No. 545 of 1885 was decided, to have inserted in the decree a stipulation that the taking of one-third of the whole water of the river should be subject to the payment of assessment on the portion irrigated in excess of the registered area. But not only did Government recognize the mokhasadars unrestricted right to one-third of the water in this suit, but from time to time Government officials made similar unqualified admission in Exhibits G, L, M, P and O. I am, therefore, of opinion that the Subordinate Judge was right in his view that the plaintiffs are not liable to pay water-cess so long as they do not take more than their one-third share of the water in the stream.

The respondent's pleader has attempted to base his claim also on the position that the bed of the stream belongs to the mokhasadars. It is unnecessary for us to deal with this question as there was no finding in the lower Court as to the ownership of the entire bed of the stream. The Sub-Judge has found that the river belongs to the Government and is under its control and I find no evidence to lead me to a different conclusion. In Original Suit No. 515 it was only found that the dam itself was situated in that part of the bed of the river which belonged to the mokhasadars. Such being the findings of fact in the present case a very few words are necessary to distinguish the decisions cited in support of the respondent's contentions. *Secretary of State* v. *Janakiramayya*(1) and *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(2), turned on a question whether the ownership of the bed of channels which take off from the Vamsadhara river claimed by Government to belong to them carried with it a right to use the water of the channel free of charge. *Secretary of State for India* v. *Swami Nerathaeswarar*(3) and *Secretary of State for India* v *Ambalavana Pandara Sannadhi*(4) are cases depending on the question whether the main source of supply was a Government source—a question it is unnecessary to consider in detail in the present appeals, as the attention of the parties was not directed to it in the lower Court. In *Kesari Venkatasubbiah*

(1) (1914) I.L.R., 37 Mad., 322. (2) (1911) I.L.R., 34 Mad., 295.
(3) (1911) I.L.R., 34 Mad., 21 at p. 24. (4) (1911) I.L.R., 34 Mad., 960.

which a person could not have got his water but for some work constructed by Government, in all other cases the decisions are uniform that where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an *engagement under Act VII of 1865 will be* implied and no cess can be levied [*Lutchmee Doss* v. *Secretary of State for India*(1)—the CHIEF JUSTICE and MILLER, J., *Appasami Ayyar* v. *The Secretary of State*(2)—BENSON and KRISHNASWAMI AYYAR, JJ.; *Kesari Venkatasubbiah* v. *The Secretary of State for India*(3)—SUNDARA AYYAR and SADASIVA AYYAR, JJ.; *Secretary of State* v. *Ambalavana Pandara Sannadhi*(4)—RAHIM, J., and myself, subsequently followed by MILLER and RAHIM, JJ.; *Secretary of State for India in Council* v. *Perumal Pillai*(5) and *Ritraj Koer* v. *Sarfaraz Koer*(6)] In the cases of zamindars and inamdars some of the decisions put it on the ground that when the zamindari or inam was granted, an agreement will be implied against the Government, to allow the natural facilities for rights of irrigation which the landholder then had—*Secretary of State for India* v. *Swami Naratheeswarar*(7): others put it also on the ground that as the owner of the bed of the river, the zamindar had a right to use the water.

There is a conflict of judicial opinion on the effect of Act III of 1905. I am of opinion that it did not take away any rights which existed at the time the Act was passed and the Government were not by reason of that Act coupled with Act VII of 1865 entitled to impose a cess upon those landholders who were before that Act not liable to pay cess for their using the water. See *Kanduhuri Mahalakshmamma Garu* v. *The Secretary of State for India*(8)—Urlam judgment, BENSON and SUNDARA AYYAR, JJ., also before whom this Act was pressed declined to hold the landholder liable; *Venkataratnammah* v. *Secretary of State*(9). On the other hand MILLER and MUNRO, JJ., in the Urlam judgment approved by the CHIEF JUSTICE and AYLING, J., in *Secretary of State* v. *Ambalavana Pandara Sannadhi*(4) held that the Act makes the river Government property and

(1) (1909) I.L.R., 32 Mad., 456 at p. 460. (2) (1910) I.M.W.N., 107.
(3) (1913) 14 M.L.T., 131. (4) (1914) I.L.R., 37 Mad., 362
(5) (1901) I.L.R., 24 Mad., 279 (6) (1905) 15 M.L.J., 349.
(7) (1911) I.L.R., 34 Mad., 21 at p. 24
(8) (1911) I.L.R., 34 Mad., 295 at p. 300 (9) (1914) I.L.R., 37 Mad., 366.

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SANKARAN NAIR, J.

entitles the Government to apply Act VII of 1865. In this case it is true the river is found to belong to Government and under its control. The Government may therefore possibly regulate the supply of water without prejudice to the respondents, by constructing sluices, etc. But as the right to the supply of water without liability to pay any charge existed already, it is not dependent on the work constructed by Government and no cess under Act VII of 1865 may be levied The respondent's right to the water has been declared by a judicial decision. No cess is therefore leviable. He cannot get anything more.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914 October 23

TRASI DEVA RAO *alias* ANANTHAYA (CREDITOR), APPELLANT,

v.

PANDIT PARAMESHWARAYA AND ANOTHER (PETITIONER AND RESPONDENT), RESPONDENTS.*

Insolvency, proceedings in—Application to a wrong Court—Limitation Act (IX of 1908), sec. 14, inapplicability of, to insolvency proceedings—Appeal, notice of, only to interested parties.

Section 14 of the Limitation Act does not apply to proceedings under the Provincial Insolvency Act. Hence an application filed in a wrong Court to declare a debtor an insolvent and re-presented to a right Court can be said to be presented only on the date of its re-presentation, and if on such date of its re-presentation the application is not maintainable for any reason such as that the act of fraudulent preference, as in this case, having occurred more than three months before the date of re-presentation it is liable to be rejected.

In an appeal by a creditor in insolvency proceedings it is sufficient if notice is given of the appeal only to the parties directly affected by the order of the lower Court, and not to all creditors who may have any remote or possible interest in the result of the appeal

APPEAL against the order of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Insolvency Petition No. 3 of 1912.

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* Civil Miscellaneous Appeal No. 819 of 1913.

TRASI DEVA RAO v PARAMESHWARAYA.

One of the creditors of an alleged insolvent filed a petition on 26th September 1912 in the Subordinate Judge's Court of Mangalore to declare the debtor an insolvent on the ground that he committed an act of insolvency in that he fraudulently preferred one of his creditors by creating a mortgage in his favour on 31st July 1912, thus leaving the unsecured creditors without sufficient means of realizing their debts. The petition was *returned* by the Subordinate Judge on 23rd December 1912 for presentation to the District Court on the ground that the liabilities exceeded the limit of his jurisdiction, namely, Rs. 5,000. After re-presentation to the District Court the mortgagee took objection to the petition, in his written statement to the effect that his mortgage was not a fraudulent preference and that as the petition was filed in the District Court more than three months after the alleged act of insolvency it ought not to be entertained according to section 6, clause 4 (*c*) of the Provincial Insolvency Act. The District Judge holding that the period of three months did not apply to this petition on the ground that no prayer was made to declare the mortgage fraudulent, adjudged the debtor an insolvent. The District Judge refrained from deciding whether there was a fraudulent preference in favour of the mortgagee. Against the order of adjudication the mortgagee preferred this appeal making the insolvent and the petitioning creditor alone respondents to the Appeal.

B. Sitarama Rao for the appellant.

H. Balakrishna Rao for the respondent.

OLDFIELD AND TYABJI, JJ.

JUDGMENT.—A preliminary objection has been taken by the respondent that the hearing cannot proceed, because no notice of the appeal has been given to the creditors, other than himself. Section 46 of the Provincial Insolvency Act specifies the class of persons entitled to appeal. But no provision specifies those entitled to be made, or whom the appellant is obliged to make respondents; and we can obtain no indirect guidance on the point by inference from other parts of the Act For it is not possible to hold that all other creditors of the insolvent, whether named or not named in the petition and whether they have appeared at the adjudication proceedings or not, are necessarily parties, to whom general or special notice of the Appeal should issue We decide to follow the English procedure, stated in the English Order LVIII, rule 2 (1)—*vide* also *In re*

TRASI DEVA RAO v. PARAMESHWARAYA.

OLDFIELD AND TYABJI, JJ.

A Debtor(1) and to hold that only parties directly affected by the appeal are entitled to notice. It has not been shown that any special circumstances exist, in consequence of which other creditors than those already on the record can be supposed to be so affected. We therefore disallow the preliminary objection.

On the merits the learned District Judge was wrong in holding, as we understand him to have done, that the date of presentation of the petition was the date on which it was erroneously filed in the Subordinate Court before it was filed in the District Court. He could do so only with reference to section 14 of the Limitation Act; and it has been decided by this Court in *Duraiswami Iyengar* v. *Meenakshi Sundara Iyer*(2) that the Limitation Act is not applicable to proceedings under the Act. As the petition can be treated as having been presented on the date of its presentation in the District Court, it has not been presented in conformity with section 6 of the Provincial Insolvency Act within three months of the act of Insolvency alleged in it. It is therefore liable to dismissal. The Appeal is accordingly allowed, the petition being dismissed with costs as between the appellant and the first respondent in both Courts. The second respondent, the insolvent, will bear his own costs throughout.

N.R.

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(1) (1901) 2 K.B., 354. (2) (1914) 16 M.L.T., 246.

[NOTE.—Order LVIII, rule 2 of the English Supreme Court Rules of Practice:—"The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties."]

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

KALLEPALLE VENKATARAMA RAJU (PLAINTIFF), APPELLANT,

1914. October 21 and 28.

v.

KALLEPALLE PAPAMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption—Consent of sapindas—Refusal of consent by nearest sapinda on personal grounds, improper—Consent of remoter sapindas—Adoption, validity of.

Where the nearest sapinda refused to give his consent to an adoption by a widow on the ground that he would forfeit the right to property which he would otherwise get, and the widow made the adoption with the consent of remoter sapindas

Held, that the refusal of the nearest sapinda was based on improper grounds and that the adoption made with the consent of the remoter sapindas was valid

APPEAL against the decree of G. KODANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Kistna at Masulipatam, in Original Suit No 12 of 1910.

The material facts appear from the judgment of SPENCER, J.

T. Prakasam for the appellant.

V. Ramadoss for the second respondent

SPENCER, J.

SPENCER, J.—This is a suit to set aside an adoption. Two questions arise for decision. (1) whether the alleged adoption of the second defendant is true, and (2) whether the refusal of the plaintiff to give his consent to the adoption invalidated any adoption made by the first defendant as the widow of the deceased Lakshmipatiraju

Although the adoptive mother, the first defendant, has, in this suit, taken the part of the plaintiff and denied the factum of the adoption, I have no doubt that the Subordinate Judge was correct in finding that the second defendant was adopted All the documents produced in the case from 1906 onwards describe him as an adopted son. Exhibit III is a promissory note executed by the first defendant as guardian of her adopted son, the second defendant, which purports to have been attested by the plaintiff. Defendant's witness No 5 proved the fact that

* Appeal No 61 of 1912.

VENKATA-RAMA RAJU v. PAPAMMA

SPENCER, J

the plaintiff attested this promissory note executed in his (witness's) favour. The plaintiff, in the witness-box, professed himself unable to say whether the signature in Exhibit III was his or not. The first defendant made several statements before the public authorities acknowledging that she had adopted the second defendant, and when her attention was drawn to these statements in her examination, she flatly denied having made the statements. It is unnecessary to refer to the oral evidence, as, in our opinion, there is overwhelming proof that the adoption is true.

On the second point, the plaintiff is the divided brother of the late Lakshmipatiraju and, as such, is the nearest reversioner entitled to succeed to his properties after his death. He states that he was not asked by the first defendant to give his consent to the adoption of a boy. On the evidence of plaintiff's witness No 5 and defendant's witness No 4, I must take it that this denial is not true. Defendant's witness No. 4 states that the plaintiff was asked to give his son in adoption and that he refused, as the son was his only son. Plaintiff's Witness No. 5 states that the reason for the plaintiff's refusing his consent was that he said that he would forfeit the right to property which he would otherwise get. The Subordinate Judge treats this as a refusal based on " an evil intention to usurp the property after the death of the first defendant." Without using such language to characterise the refusal, we may see whether the refusal was based on improper grounds.

In *Venkatakrishnamma* v. *Annapurnamma*(1), it was held that, if a sapinda refused to consent, but withheld his grounds for such refusal, the refusal would not affect the adoption; and also if the assent was withheld from improper considerations, such dissent would be of no avail to the party relying on it. In *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar*(2), the Privy Council held that the consent of a sapinda given on the ground that by consenting he gained some material profit from the adoption was improper. On the same principle, it would appear that a refusal on similar grounds might equally be condemned as an improper refusal. In *Parasara Bhattar* v. *Rangaraja Bhattar*(3),

(1) (1900) I.L.R., 23 Mad., 486. (2) (1880) I.L.R., 2 Mad., 270 (P.C.).
(3) (1880) I.L.R., 2 Mad., 202 at p. 207.

the test applied was whether the refusal was "from interested or improper motives or without a fair exercise of discretion." The object of getting the consent of sapindas to adoption is declared in *Venkamma* v. *Subramaniam*(1) as being to get an independent judgment on the expediency of the proposed adoption. This being so, there can be no doubt that a sapinda who is called upon to exercise his discretion ought to be guided not by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family especially that part of it which the widow represents.

Applying such principles to the facts of this case, it is immaterial that the plaintiff did not give his consent to the adoption.

Other sapindas executed a document (Exhibit X) which fully authorised the first defendant to adopt the second defendant. Only Chinna Bapi Raju was not a party to this document; his brother Peda Bapi Raju signed it, and there are indications that these two brothers were undivided at the time, the elder, Peda Bapi Raju, being the natural father of the boy.

I am of opinion that the Subordinate Judge rightly found that the adoption set up by the second defendant was valid. The appeal is dismissed with costs.

SANKARAN NAIR, J.—I agree.

K R

(1) (1907) I.L.R. 30 Mad, 50 (P C.)

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1914 October 20 and 28.

K. P. RAMAKRISHNA PATTAR (FIRST DEFENDANT), APPELLANT,

v

K. P. NARAYANA PATTAR AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Specific Relief Act (I of 1877) sec. 42—Declaration, suit for—Legal character or right to property, meaning of—Rights under a contract, declaration as to, if maintainable—Section 42 not exhaustive—Ordinary rule—Exception—Kuri, subscriber to—Assignee from subscriber—Right of, to continue payment—Suit for declaration, by, if maintainable

Section 42 of the Specific Relief Act does not contemplate a suit for a declaration that a valid personal contract subsists between the plaintiff and the defendant, as it is not a suit for a declaration of title to a legal character or a right to property.

Section 42 of the Specific Relief Act is not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained.

Robert Fischer v The Secretary of State for India in Council (1899) I.L.R., 22 Mad., 270 (P.C.), referred to

Kristaya v Kasipati (1880) I L R, 9 Mad., 55, referred to

But a declaratory relief will not be given in respect of rights arising out of a contract which would affect only the pecuniary relationship between the parties to the contract, unless there are exceptional circumstances in a case to take it out of the ordinary rule

Where the plaintiff, who was the purchaser of the rights of the second defendant who was a subscriber to a half-ticket in a kuri started by the first defendant as its proprietor, sued the latter for a declaration that he was not a defaulter and was entitled to continue to pay the subscriptions to the kuri;

Held, that the suit for declaration was not maintainable.

SECOND APPEAL against the decree of V. K. DESIKACHARIYAR, the Subordinate Judge of Palghat, in Appeal No. 721 of 1912, preferred against the decree of A. NARAYANAN NAMBIYAR, the District Munsif of Palghat, in Original Suit No 360 of 1911.

The material facts appear from the judgment.

C. V. Anantakrishna Ayyar for the appellant.

A. Narayana Sarma for the first respondent.

K. R. Subrahmanya Sastriyar for the second respondent.

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* Second Appeal No. 693 of 1913

JUDGMENT.—The first defendant is the appellant. He is the karaiswan (or proprietor) of a *kuri* which he started in August 1906. There were 11 tickets in the *kuri* and the first defendant induced other persons to enter into contracts with himself on certain terms which included the payment of subscriptions by them to the *kuri* at the rate of Rs. 250 yearly for each ticket-holder. The first defendant allowed also each ticket-holder to assign his rights under each contract to third persons subject to certain conditions.

The plaintiff became the assignee of half of a ticket from the second defendant who had entered into one of the several contracts with the first defendant. The sixth subscription to the chit had to be paid on the 17th August 1911. The plaintiff had to send Rs. 125 to the first defendant as subscription towards the chit due on that date. He sent the Rs. 125 but the first defendant refused to receive it. Hence the plaintiff brought the suit on the 31st August 1911 for two reliefs, namely, (*a*) that the first defendant be compelled "to receive the amount due by the plaintiff for the sixth drawing after declaring that the plaintiff has right to pay subscriptions for the said *kuri*," (*b*) "that the first defendant do give to the plaintiff the due receipt of the *kuri* for the sixth drawing."

The District Munsif disbelieved the first defendant's story that Rs. 125 was not tendered before noon on the 17th August 1911, and believed the plaintiff's evidence that the money was tendered in proper time, but following *Kristaya* v. *Kasipati*(1) he refused to give a decree compelling the first defendant to accept the Rs. 125. He, however, gave the plaintiff a decree declaring that the plaintiff is entitled to continue payment of subscriptions to the *kuri* conducted by the first defendant as the plaintiff was not a defaulter. His decree was confirmed by the learned Subordinate Judge.

The contentions argued on behalf of the first defendant in the Second Appeal are found in the grounds 2 and 4 of the memorandum of Second Appeal. Those two grounds are as below:—

"(2) The plaint does not disclose any cause of action.

(1) (1886) I.L.R., 9 Mad., 55.

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"(4) The suit for a mere declaration is not maintainable according to the section 42 of the Specific Relief Act, the plaintiff having the right to claim consequential relief."

Though in the fourth ground, it is contended that section 42 of the Specific Relief Act bars the suit because the plaintiff had the right to claim consequential relief, the argument at the hearing was somewhat different The contention was that only a person entitled to any "legal character" or to "any right to property" can institute a suit for a declaratory relief in respect of his title to such legal character or right to property and that the plaintiff's suit to declare that he has contractual rights as against the first defendant does not come within the class of suits to declare a right to a legal character or a right to property. We think that the contention must be upheld, to this extent, namely, that section 42 of the Specific Relief Act does not contemplate a suit like the present. We take it that a man's "legal character" is the same thing as a man's status "A man's status or 'legal character' is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general." According to Holland, the chief varieties of status among natural persons may be referred to the following causes —(1) sex, (2) minority, (3) '*patria potestas*' and '*manus*', (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect, (8) rank, caste and official position, (9) slavery, (10) profession, (11) civil death, (12) illegitimacy, (13) heresy, (14) foreign nationality, and (15) hostile nationality (See Banerjee's Lectures on Specific Relief). We think that a declaration that a valid personal contract still subsists between the plaintiff and the first defendant is not a right to declare a title to a legal character or a title to right to property.

Section 42 of the Specific Relief Act is no doubt not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained. In *Robert Fischer* v. *The Secretary of State for India in Council*(1) the judgment of their Lordships of the Privy Council contains the following sentences in page 282, "Now in the first place it is at least open to doubt

(1) (1899) I.L.R., 22 Mad., 270 (P.C.).

whether the present suit is within the purview of section 42 of the Specific Relief Act. . . . It is, in substance, a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect." "That is not the sort of declaratory decree which the framers of the Act had in their mind." This seems to show that declaratory decrees can be passed though they may not come under section 42 of the Specific Relief Act. In *Kristaya v. Kasipati*(1) the learned Judges say (at page 57) "it is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default and that it continues to subsist." (The right in question in that case was the right to pay a debt by instalments.) "But the suit before us is not one of that kind and it is not necessary for us to express an opinion on the question whether, under certain circumstances, a declaratory suit may not be brought." This only shows that the learned Judges were not prepared to say without hesitation that such a suit would not lie in exceptional cases. But we have not been referred to any case in which any of the High Courts in India has given a declaratory relief in respect of rights arising out of a contract which would affect only the pecuniary relationship between the parties to the contract and we do not think that there are exceptional circumstances in this case to take it out of the ordinary rule.

In the result, we reverse the decrees of the lower Courts and dismiss the suit in its entirety. Under the circumstances the parties will bear their respective costs throughout.

K.R.

(1) (1880) I.L.R., 9 Mad., 55.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastriyar
(on a reference from SADASIVA AYYAR and NAPIER, JJ.).

1914. September 21 and 30 and October 30.

VENKATA PERUMAL RAJA DEVA MAHARAJULUNGARU (MINOR BY GUARDIAN W. A. VARADACHARIYAR) (DEFENDANT), APPELLANT IN ALL THE SUITS

v.

RAMUDU AND NINETEEN OTHERS (PLAINTIFFS), RESPONDENTS.*

(Madras) Estates Land Act (I of 1908), sec. 13, cl. (3), not retrospective—Improvements at tenants' sole expense—Payment of higher rent therefor for sixty years—Presumption of a binding contract to pay at a higher rate under the Rent Recovery Act—(Madras) Estates Land Act (I of 1908), sec. 28— Sadalwar *and* Mathiri Kasuvu, *not illegal cesses within section 143 of the Act.*

Held, by NAPIER and KUMARASWAMI SASTRIYAR, JJ. (SADASIVA AYYAR, J., dissenting) that—

(i) section 13, clause 3 (Madras Estates Land Act), does not enable a tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenants' sole expense where the improvements had been effected before the Act came into force and where there had been a binding *contract* entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent,

(ii) the section applies only to contracts and improvements made after the Madras Estates Land Act came into force,

(iii) the right to levy increased assessment in consequence of improvements effected before the Act being a vested right in the landholder, the section cannot be construed so as to operate retrospectively and to defeat the same especially when there is no indication in the section that it is to operate retrospectively, and

(iv) the rule embodied in section 28 of the Act applies to the increased assessment and makes it binding between the parties.

Per SADASIVA AYYAR and NAPIER, JJ.—Where the higher rate was regularly paid for sixty years even in respect of the improvements effected at the tenants' sole expense, the Courts could presume a lawful origin for a *contract* to pay like that under the Rent Recovery Act (Madras Act VIII of 1865)

Per SADASIVA AYYAR, J.—*Sadalwar* (charge for stationery) and *Mathiri Kasuvu* (straw rent) which were being customarily paid along with the rent for a long number of years form part of the rent and are not additional illegal cesses within section 143 of the Madras Estates Land Act.

SECOND APPEALS against the decrees of L. G. MOORE, the District Judge of North Arcot, in Appeals Nos. 429 to 445, 454, 494 and

* Second Appeals Nos. 1058 to 1077 of 1913.

495 of 1912, preferred against the decrees of A. G. LEACH, the Revenue Divisional Officer of Chendragiri, in Suits Nos. 1210, 1211, 1213 to 1219, 1221 to 1228, 1212, 1209 and 1220 of 1912.

The facts appear from the judgment of SADASIVA AYYAR, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *L. S. Viraraghava Ayyar* for the appellant.

S. T. Srinivasagopala Achariyar for the respondent.

SADASIVA AYYAR, J. SADASIVA AYYAR, J.—The appellant is the minor Raja of Karvetnagar. He was the defendant in the twenty suits out of which these twenty Second Appeals have arisen. The suits were brought under section 55 of the Madras Estates Land Act by several tenants in the estate, who are the plantiffs in the suits for obtaining pattas for fasli 1321. The Revenue Divisional Officer of Chendragiri division, in whose Court the suits were brought, passed a decree directing the defendant to grant pattas containing certain terms which that officer found to be proper and legal. The learned District Judge on appeal modified the decrees of the Court of First Instance in one important respect and confirmed the decrees in other respects. In nineteen of the twenty Second Appeals before us, the tenants (the plaintiffs) have filed Memoranda of Objections as regards the points decided against them. In the appeals by the minor Raja, the questions for decision are—

(*a*) Whether the Appellate Court's finding that the wells on the lands of the tenants were sunk at their own expense is correct?

(*b*) Whether the Zamindar is entitled to charge rent on dry lands on which garden crops are raised with the aid of the water in such wells at the higher rate claimable for lands classed as wet, that is, a rate higher than is charged per gunta on dry lands cultivated with dry crops without the aid of well water.

As regards the question (*a*) I do not see sufficient reason not to accept the concurrent findings of the lower Courts that the wells were excavated at the sole expense of the tenants. Though the direct evidence is not very satisfactory, the lower Courts were justified in finding the wells to have been dug at tenants' sole expense having regard to all the circumstances and especially seeing that the defendant in his written statement did not deny that the plaintiffs dug the wells but merely said that it was not at their sole expense that the wells were dug.

VENKATA PERUMAL RAJA v. RAMUDU. — SADASIVA AYYAR, J.

The answer to question (b) depends upon the answers made to the following subsidiary questions :—

(b1) Whether under the law before the Estates Land Act came into force the condition in the patta to pay the higher wet assessment *for garden crops* raised on dry lands with the aid of the tenants' well water was a lawfully enforceable term ?

(b2) Whether after the enactment of section 13, clause (3) of *the Estates Land Act, such* a term in the patta would be valid ?

(b3) Whether section 13, clause (3), applies to a case where the improvement *at his sole expense* relied on by the tenant was effected before the Madras Estates Land Act came into force.

In *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1), Mr Justice SUBRAHMANYA AYYAR *held that a custom* to pay enhanced rent for lands improved by the improvements effected by a tenant at his own cost is illegal as opposed to the provisions of the Rent Recovery Act, *that it made no difference* whether the tenant constructed the well (at his own cost) prior to or after the passing of the Act of 1865, that in either case, a higher *rent cannot* be *claimed* by the landlord and *that* payment for a number of years of the enhanced rent may be *evidence* of an *agreement* to pay at that rate ; but that it will not be binding as a *contract* unless supported *by consideration.* The learned Judge left open the question whether if payments at the higher rents had continued to be made for a great many years, so as to make it unfair to the landlord on account of such lapse of time to be compelled to prove the existence of some consideration when the payment commenced, whether under those circumstances, the Court should not presume a lawful origin for the payment at the higher rate on the analogy of the lost grant principle availed of to support long possession and enjoyment. In that particular case, *Arumugam Chetti* v. *Raja-Jagaveera Rama Venkateswara Ettappa*(1), the learned Judge found that in that suit and *the connected suits,* the payment at the higher rate had begun only from between 1 and 18 years before the date of the suits and that hence the passing of consideration *for the agreement to pay at the higher rate cannot* be presumed.

(1) (1905) I.L.R., 28 Mad., 444.

In the case now before us, the payments at the higher rate had gone on from about 1846 for more than sixty years and I think that consideration for the agreement to pay at the higher rate can be presumed in these cases. If so, under clause (1), section 11 of the Rent Recovery Act of 1865, all contracts for rent between the landlord and the tenant should be enforced and I would answer the question (*b*1) in the affirmative.

As regards the question (*b*2), section 13, clause (3) of the Estates Land Act, begins with the words "Notwithstanding any usage or contract to the contrary" and hence under the new law even a contract (that is, an agreement supported by consideration) to pay at the higher rate for lands improved at the sole expense of the tenants cannot avail the landlord.

We have lastly the question (*b*3) whether the tenant can claim the greater protection given by the Estates Land Act in cases where the improvements had been effected before the passing of the Act.

I am free to admit that I have found it very difficult to arrive at a satisfactory answer to this last question. Section 13 of the Madras Estates Land Act contains three clauses. Under the first clause, neither the ryot nor the landlord can prevent the other party from making an improvement to the holding. Under the second clause, the ryot has ordinarily the prior right to make the improvement, but the landlord has the prior right if the improvement affects not only the holding of the ryot who wishes to make it but also the holding of another ryot. Then the third clause says "a ryot shall not, by reason of making an improvement at his sole expense, become liable to pay a higher rate of rent on account of any increase of production as a consequence of such improvement." Under the first two clauses, it may be fairly argued that the legislature has enacted those provisions in respect of improvements contemplated to be made by the landholder or the ryot after the passing of the Act as it is almost useless for the legislature to legislate about their respective rights to make the improvements which had already been made. Pursuing the same argument, it might be contended that the third clause about the ryot not being liable to pay a higher rate of rent on account of improvement effected at his sole expense also contemplates the raising of rent in future in respect of improvements to be made in future.

VENKATA PERUMAL RAJA v. RAMUDU. — SADASIVA AYYAR, J.

After the best consideration which I was able to give, however, to these three clauses, I have come to the conclusion that the third clause is intended to give a right to the tenant to claim exemption from payment of enhanced rent from the date the Act came into force even in cases where the improvements had been effected by him before the Act came into force. Clauses 1 and 2 of section 13, in my opinion, merely declared the law which existed even prior to the passing of this Act. Sir S. SUBRAHMANYA AYYAR, J. says in *Arumugam Chetti v. Raja Jagaveera Rama Venkateswara Ettappa*(1): "It is impossible to understand why the landlord's permission for the sinking of the well was necessary." "And even supposing that a custom supporting the averment can be shown, such custom must be held to be bad, if not for its unreasonableness, at least on account of its utter inconsistency with the policy of the proviso to section 11 of the Rent Recovery Act which expressly admits the tenants' unqualified right to make improvements free from any liability to make any payment to the landholder in respect of the benefit accruing therefrom." . . . "It is scarcely necessary to add that the tenant's right to relinquish the whole or any part of his holding in no way detracts from the tenant's right to make such an improvement as the sinking of a well during the subsistence of the tenancy." If then clauses 1 and 2 do not create new rights as regards the making of improvements, it is unnecessary to hold that clause 3 contemplates only the effect of future improvements on the right of the tenant to claim exemption from enhancement of rent. If Sir S. SUBRAHMANYA AYYAR, J.'s view in *Arumugam Chetti v. Raja Jagaveera Rama Venkateswara Ettappa*(1) that whether the wells were constructed before or after the passing of the Act VIII of 1865, no additional rent can be claimed unless there was a contract is correct law, it seems to me that clause 3 of section 13 was intended only to further benefit the tenant, that is, further than even Sir S. SUBRAHMANYA AYYAR, J.'s dictum by taking away the restriction imposed by the old Rent Recovery Act that if there was a contract to pay the higher rate (as opposed to an agreement without consideration), the tenant ought to pay the higher rate. In other words, it seems to me that the opening words of

(1) (1905) I.L.R., 28 Mad., 444 at pp. 450 and 451.

section 13, clause (3), "Notwithstanding any contract or usage to the contrary" were specifically intended to favour the tenant even further than the old law and not to take away the right already vested in him under SIR S. SUBRAHMANYA AYYAR, J.'s decision to claim exemption whether the improvements were made before or after the passing of the Act VIII of 1865, that is, it was not intended to take away his right to claim exemption from enhancement in some cases on the mere ground that the improvements had been effected before the Estates Land Act. In *The Maharajah of Venkatagiri* v. *Sheik Mohadeen*(1), it was held that the tenant was not liable to pay enhanced rent when he had improved his holding by digging a well at his own cost. It appears from the facts of that case that the wells were dug in that case and the connected cases by the tenants or their ancestors before the Estates Land Act came into force. That decision, however, is not a direct authority on the question whether section 13, clause (3), affected the improvements made before the Act came into force and it can only be said that the appellant's learned vakil in that case did not put forward any argument that section 13, clause(3), would not affect the landlord's right to enhance where the improvements had been made before the Act came into force.

It is, no doubt, hard upon the landlord that where he had been obtaining the enhanced rent on account of a contract from long before the Act came into force it should be held that notwithstanding that contract he should lose his right to the enhanced rent owing to the passing of the Act. But the Estates Land Act does favour the tenant notwithstanding "contracts to the contrary" and whether the contracts were made *before the passing of the Act or after it* in numerous other respects [see section 187, clauses (1) (*a*) to (*g*) and section 188]. When rights under contracts entered into before the passing of the Act are *not* intended to be taken away but only rights under contracts made after the passing of the Act, apt words are used to so conserve the rights created under prior contracts (see section 12). I am, therefore, of opinion that after the passing of the Act the landlord cannot claim enhanced rent on account of the enhanced outturn of the crops due to the improvements made by the ryot

(1) (1914) 1 M.L.W 592.

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whether the improvements were made before or after the passing of the Act and whether or not there was a contract to the contrary and whether such contract was made before or after the passing of the Act.

In the result, I would dismiss the appeals preferred by the landlord but under the circumstances without costs.

Coming to the memoranda of objections by the tenants, the questions raised by them are :—

(a) that the lower Appellate Court ought to have allowed only the lowest manavari dry rates, that is, Rs. 15-12-0 per 100 guntas and not the higher dry rate of Rs. 26-4-0 per 100 guntas ,

(b) that the District Judge erred in holding that the landholder was entitled to charge for second crop raised with the aid of improvements by the ryot ;

(c) that the District Judge ought to have held that Sadalwar and Mathiri Kasuvu are illegal cesses not payable by the ryot.

As regards contention (a), as the landholder is entitled to charge for the best dry crop that can be grown on a dry land there is no force in the contention.

As regards contention (b), I would follow the decision in *The Maharajah of Venkatagiri* v *Sheik Mohadeen*(1) and hold that the landlord is not entitled to increase the annual assessment by the addition of a second dry crop assessment.

On the contention (c), I am prepared to follow the decision in *Munisami Nayudu* v. *Irusappa Reddi*(2) and to hold that Sadalwar and Mathiri Kasuvu form part of the rent of the lands and are not additional illegal cesses. In the result, the lower Courts' decrees will be modified by disallowing the direction to enter second crop assessments in the pattas. There will be no order as to costs in these memoranda of objections.

NAPIER, J.

NAPIER, J.—I regret that I am unable to concur in the conclusion arrived at by my learned brother. I accept with some hesitation the finding that the wells were excavated at the sole expense of the tenants, though it is a little difficult to see on what evidence this finding is arrived at : and I agree with him in applying the decision in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(3) to the facts of this case that

(1) (1914) M.L.W., 592. (2) Second Appeal No 57 of 1896.
(3) (1905) I.L.R., 28 Mad., 444.

consideration for the agreement to pay a higher rate should be presumed in the circumstances of this case. I differ from him, however, on the construction of clause (3) of section 13 of the Estates Land Act. I cannot apply the words "shall not, by reason of making an improvement . . . . become liable" to anything but improvements after the Act, in view of the fact that the rest of the section obviously applies to improvements after the Act. It is clear that the rate of rent was lawfully payable at the date of this Act and I cannot hold that this clause was intended to tear up contracts lawfully made and give a claim for a *reduction* by reason of words forbidding the *imposition* of a higher rate. In my opinion, section 28 applies and the rent payable at the time being lawfully payable, it should be presumed to be fair and equitable until the contrary is proved. I would therefore allow these appeals.

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NAPIER, J.

BY THE COURT.—Under section 98 of the Code of Civil Procedure, we refer to a third Judge for decision the question of law on which we differ, namely, whether section 13, clause (3) of the Estates Land Act enables the tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense where the improvements had been effected before the Act came into force and where there had been a contract entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent.

These Second Appeals and the Memoranda of Objections coming on for hearing under section 98 of the Code of Civil Procedure, before KUMARASWAMI SASTRIYAR, J., who expressed the following

KUMARASWAMI SASTRIYAR, J.

OPINION.—The question for decision is whether section 13, clause (3) of the Estates Land Act enables the tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense where the improvements had been effected before the Act came into force and where there had been a *contract* entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent.

The facts found by the learned Judges are—

(1) that the rent claimed by the zamindar has been paid by the tenants for over sixty years,

VENKATA PERUMAL RAJA v. RAMUDU. —— KUMARASWAMI SASTRIYAR, J.

the enactment is expressed in language which is fairly capable of either interpretation, it should be construed as prospective only." As observed by Maxwell the rules laid down in *Lauri* v. *Renad*(1), *Reid* v. *Reid*(2), and *West* v. *Gwynne*(3), have special operation "where the enactment would prejudicially affect vested rights or the legal character of past transactions or impair contracts."

Section 6, clause (*c*) of the General Clauses Act and section 8, clause (*d*) of Madras Act I of 1891 also provide that the repeal of an Act shall not affect any rights accrued under the enactment repealed.

Applying these well-known rules to the construction to section 13 of the Estates Land Act, it seems to me that a retrospective operation cannot be given to clause (3) of the section. Clauses (1) and (2) to the section can only refer to improvements to be effected in future and if the legislature intended clause (3) to be retrospective it would have given some indication of such intention. On the contrary the use of the words "shall not by reason of making an improvement *become* liable" indicate that only future improvements are intended.

It appears from other sections of the Act that where the legislature intended any provision to be retrospective it used words "whether before or after the commencement (or passing) of this Act" A reference to sections 8, 37, 187 and 188 makes this clear.

So far as rent is concerned section 28 provides that in all proceedings under the Act, the rent *or rate of rent* for the time being lawfully payable by the ryot shall be presumed to be fair and equitable until the contrary is proved. Under the law as it stood prior to the passing of the Estates Land Act a *contract* to pay increased rent even though improvements were made by the tenant was legally enforceable. It was therefore rent "lawfully payable by the ryot" when the Estates Land Act was passed and was to be presumed to be fair and equitable. It is difficult to see under what canons of interpretation it can be held that section 13, clause (3) should be construed as taking away such a right. It is argued by the respondents' advocate that the policy of the law has always been to give to the tenant

(1) (1892) L.R. 3 Ch D., 402. (2) (1886) 31 Ch D., 408

(3) (1911) 2 Ch.D., 1.

the benefit of improvements made by him. This may be so, but the law as it stood prior to the passing of the Estates Land Act did not prevent additional rent being legally recoverable in cases where it was payable under a *contract*.

I am of opinion that the words "contract to the contrary" refer only to contracts made after the passing of the Act and that section 13, clause (3) has no retrospective operation in cases where rent claimed was payable under a contract which would have been legally enforceable under the Rent Recovery Act or any other law in force at the time of the passing of the Estates Land Act.

N.R

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

PERURI VISWANADHA REDDI (DEFENDANT), APPELLANT,

v.

D T KEYMER (PLAINTIFF), RESPONDENT.*

1914.
October 23, 26 and November 6.

Foreign judgment—Defence struck out—No decision on the merits—No cause of action.

Where in a suit in a foreign Court, defence was struck out and judgment entered for plaintiff.

Held, that the judgment is not one decided on the merits and thus not being conclusive could not of itself constitute a cause of action to the suit.

APPEAL against the judgment and decree of BAKEWELL, J., *in* Civil Suit No. 291 of 1913.

The facts of this case appear from the judgment of the trial Judge which is as follows:—

"This is a suit upon a judgment of the High Court of Justice in England for the sum of £425-17-2 A certified copy of the judgment has been filed, and from the recitals therein contained it appears that on the 11th of February 1913, an order was made in an action in that Court between the parties to the present suit that the defendant should answer interrogatories, that he failed to comply with that order and that on the 5th of May 1913 a Judge of that Court ordered that the defendant's defence be struck out and that he be

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* Original Side Appeal No. 77 of 1914.

the benefit of improvements made by him. This may be so, but the law as it stood prior to the passing of the Estates Land Act did not prevent additional rent being legally recoverable in cases where it was payable under a *contract*.

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N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1914
October 23, 26 and November 6.

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D. T. KEYMER (PLAINTIFF), RESPONDENT.*

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* Original Side Appeal

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the enactment is expressed in language which is fairly capable of either interpretation, it should be construed as prospective only." As observed by Maxwell the rules laid down in *Lauri* v. *Renad*(1), *Reid* v. *Reid*(2), and *West* v. *Gwynne*(3), have special operation "where the enactment would prejudicially affect vested rights or the legal character of past transactions or impair contracts."

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Applying these well-known rules to the construction to section 13 of the Estates Land Act, it seems to me that a retrospective operation cannot be given to clause (3) of the section. Clauses (1) and (2) to the section can only refer to improvements to be effected in future and if the legislature intended clause (3) to be retrospective it would have given some indication of such intention. On the contrary the use of the words "shall not by reason of making an improvement *become* liable" indicate that only future improvements are intended.

It appears from other sections of the Act that where the legislature intended any provision to be retrospective it used words "whether before or after the commencement (or passing) of this Act." A reference to sections 8, 37, 187 and 188 makes this clear.

So far as rent is concerned section 28 provides that in all proceedings under the Act, the rent or *rate of rent* for the time being lawfully payable by the ryot shall be presumed to be fair and equitable until the contrary is proved. Under the law as it stood prior to the passing of the Estates Land Act a *contract* to pay increased rent even though improvements were made by the tenant was legally enforceable. It was therefore rent "lawfully payable by the ryot" when the Estates Land Act was passed and was to be presumed to be fair and equitable. It is difficult to see under what canons of interpretation it can be held that section 13, clause (3) should be construed as taking away such a right. It is argued by the respondents' advocate that the policy of the law has always been to give to the tenant

(1) (1892) L.R. 3 Ch D., 402. (2) (1886) 31 Ch D., 408.
(3) (1911) 2 Ch.D., 15.

"A statement of claim must contain the material facts on which the plaintiff relies (Order XIX, rule 4), and the order therefore was made with reference to these facts

"It is true that a statement of claim is not verified by the oath of the plaintiff, or in any other manner, but no hardship is caused to a defendant by accepting the statement as correct, if the defendant has had an opportunity of denying it and has failed to do so.

"By allowing his defence to be struck out and failing to take proceedings to set aside the judgment (Rules of the Supreme Court Order XXVII, rule 15), the defendant must be taken to have admitted the facts contained in the plaintiff's statement of claim (see Piggott on Foreign Judgments, Part I, pages 76 and 77).

"It is obvious that great injustice might be caused to a creditor, if a defendant could appear in a suit, delay the trial by various dilatory proceedings, and at last to allow judgment go against him by default, and then were allowed to plead that there was no decision on the merits, and that the original claim was barred by limitation.

"I hold that the judgment of the English Court was given on the merits of the case, and is conclusive that the amount claimed is due by the defendant, and I answer the second issue in the affirmative.

"There will be a decree for the plaintiff for Rs. 8,649-15-0, costs and interest at 6 per cent from 17th October 1913."

V. Masilamani Pillai and *V. V. Srinivasa Ayyangar* for the appellant.

D. Chamier for the respondent.

WALLIS, C.J., AND SESHAGIRI AYYAR, J.

The judgment of the Court was deliverd by JOHN WALLIS, C. J.—This is an appeal from the decision of BAKEWELL, J., on the original side giving judgment for the plaintiff in a suit on a foreign judgment obtained by the plaintiff against the defendant in the High Court in England. The defendant pleaded among other things that the English Court had no jurisdiction, and that the case was not decided by the English Court on the merits. BAKEWELL, J., overruled both the defences, and gave the plaintiff a decree on the judgment sued on. It appears from the certified copy of the English judgment filed by the plaintiff that the defendant was ordered to answer interrogatories and failed to do so, and that therefore it was ordered that his defence should be struck out and that he should be placed in the same position as if he had not defended, and that the plaintiff should be at liberty to sign judgment against him for £425-17-2, the amount claimed and costs, and that judgment was signed accordingly Now in this state of things the first question that arises is whether a judgment obtained in this manner was a judgment not given on the merits of the case

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within the meaning of section 13 (*b*) of the Code of Civil Procedure, in which case it is not to be conclusive upon the parties in a subsequent suit. BAKEWELL, J., has held that it must in the circumstances be taken to have been given on the merits, but with great respect, we are unable to agree with him. We cannot see how a case, in which the defence, or to use our phraseology, the written statement of the defendant was struck out and he was not permitted to go into the merits at the trial, can be said to have been decided on the merits. In *The Delta*, I.P.D. 393, Sir Robert Phillimore overruled a plea of *res judicata* by reason of a foreign judgment on two grounds, one that the foreign judgment had not been pronounced when the English suit was instituted and that it was therefore merely a case of *lis alibi pendens*, and the second, that the foreign judgment "not having been given on the merits of the case but on matter of form only" could not be set up as a bar to a decision on the merits. A foreign judgment passed in default of appearance was there treated as not being a decree on the merits, as also by GORELL BARNES, J., in *The Challenge*(1). It does not seem to us to make any difference whether the default was to enter appearance or to answer interrogatories when the result of not answering them was to put the defendant in the same position as if he had never entered appearance. There is however even more direct authority. In *Haigh* v. *Haigh*(2) in refusing to set aside a judgment signed, as the judgment sued on was after the defence had been struck out for failure to answer interrogatories, PEARSON, J., said that he has the strongest disinclination that any case should be decided otherwise than upon its merits, but that in the circumstances he could not set aside the judgment. And in *Farden* v. *Richter*(3), the master and the Judge at Chambers set aside a judgment obtained in this way on the default of the defendant to answer interrogatories, and the Court of Appeal restored the judgment on the ground that the affidavit of the defendant in support of the motion to set aside the judgment did not show that he had a defence on the merits. These cases which apparently were not cited before the learned Judge appear to us to show that a judgment obtained in such circumstances as the

(1) (1914) P. 11.
(2) (1886) 31 Ch. D., 478.
(3) (1889) 23 Q.B.D., 124.

present judgment cannot be considered to have been decided upon the merits.

It has next to be considered how this finding affects the present case. This is a suit on the foreign judgment and not on the original cause of action, as appears both from the plaint and the issues; and it is now well settled that in such a suit the cause of action is the legal obligation to satisfy a foreign judgment which complies with the requisite conditions. This was so ruled by PHEAR and BAYLEY, JJ., in *Heera Monee Dossia* v. *Promothonath Ghose*(1), citing the judgment of PARKE, B., in *Williams* v. *Jones*(2), and is in accordance with all the later authorities in England. Such a foreign judgment under the terms of our law is not conclusive unless the case be decided on the merits, and a judgment that is not conclusive for this reason cannot of itself constitute a cause of action. Even before the introduction of the statutory provision in the Code of 1877 that foreign judgments not given on the merits should be no bar to a fresh suit here, it had been ruled in *Sreehuree Bukshee* v. *Gopal Chunder Samunt*(3), citing Storys' "Conflict of Laws" that foreign judgments must, in order to be received, finally determine the points in dispute and must be adjudications on the merits. Whether or not this latter statement be in accordance with principle or with recent decisions in England, it has been accepted by the legislature and embodied in the Code and we are bound to give effect to it. The provisions of the Code of 1877 expressly dealt only with foreign judgments as a bar to a suit and not as constituting a fresh cause of action. It would however be anomalous that different rules as to the recognition of a foreign judgment should apply according as it is set up as a bar to a fresh suit or as a fresh cause of action; and the provision, which was added to section 14 by Act VII of 1888, giving the Courts power to enquire into the merits of the case in suits brought on foreign judgments of certain specified Courts is a clear indication that the general provisions of section 14 were considered applicable to suits on foreign judgments as well as to foreign judgments set up in bar to a fresh suit. This question is very fully discussed in Mr. Hukum Chands' "*Res judicata*"

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(1) (1867) 8 W.R., 32. (2) (1845) 13 M. & W., 628. (3) (1871) 15 W.R., 500.

VISWANADHA REDDI v. KEYMER.

WALLIS, C.J., AND SESHAGIRI AYYAR, J.

where the same conclusion is come to. We must therefore hold that the plaintiff is not entitled to sue on the foreign judgment in this case as it was not a decision on the merits.

In this view of the case it is unnecessary to consider whether the judgment sued on was the judgment of a Court of competent jurisdiction for the purposes of section 13 of the Code by reason of its having been passed in the exercise of jurisdiction conferred on the High Court in England pursuant to an act of the Imperial Parliament as held in *Moazim Hossein Khan* v. *Raphael Robinson*(1). The utility of such a suit is no doubt much impaired by the decision we have come to; but this is not perhaps to be regretted, as but for the fact that the authority conferring jurisdiction on the High Court in England is the Imperial Parliament to which we are subject, no such suit would lie here for the reasons given by their Lordships of the Judicial Committee in the Faridkote case *Gurdyal Singh* v. *Raja of Faridkot*(2). The precise point decided in *Moazim Hossein Khan* v. *Raphael Robinson*(1) might come before the Courts in England if a defendant resident in England were sued there upon a judgment obtained in one of our High Courts under clause 12 of the Letters Patent which are issued under an Imperial Statute but no such case has as yet arisen. In the result the Appeal must be allowed and the suit dismissed with costs throughout.

Messrs. King and Partridge, attorneys for the respondent.

S.V.

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(1) (1901) I.L.R., 28 Calc., 641. (2) (1895) I.L.R., 22 Calc., 222.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

NAGAR DAMODAR SHANBOGUE (PLAINTIFF), APPELLANT,

1915. February 24 and March 2.

v.

GUDLIMAR RAMA ROW AND TWELVE OTHERS (DEFENDANTS), RESPONDENTS.*

Presidency Banks Act (*XI of* 1876), *ss.* 36 *and* 37—*Directors lending on unauthorised securities* (*e g*), *mortgage of immoveable property, not ultra vires of the bank*

The provisions of section 37 of the Presidency Banks Act (XI of 1876) prohibiting the directors of such banks from entering into certain kinds of transactions therein mentioned such as taking mortgages of immoveable properties are only directory and not mandatory and they prohibit only the directors and not the banks from entering into them, and if such transactions are actually entered into by the directors, on behalf of the bank, they are not ultra vires of the bank The directors are only agents of the bank and if in entering into such transactions they exceed the powers given to them by the Act, the bank can ratify them and enforce them; and an assignee (as in this case) from the bank of its rights under such transactions, is equally entitled to enforce them

APPEAL against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of South Canara, in Original Suit No. 30 of 1911.

The following statement of facts is taken from the judgment of the High Court —

"The defendants Nos 1 to 4, the father of defendants Nos. 4 to 6, and the sixth defendant executed to the bank—the twelfth defendant in this case—a deed of mortgage (Exhibit E) on the 5th August 1898. The property was to be regarded as security for a sum of Rs 54,000, already advanced to the defendants and 'for other credits and advances' which may be made to them from time to time. Payments were made towards the debt. On the 2nd June 1905, the bank transferred the balance due to it from the defendants to the plaintiff under Exhibit A. The plaintiff sued under the assignment The defendants admitted the execution of Exhibit E but pleaded payment in full before the date of the transfer. There

* Appeal No 254 of 1912.

VISWANADHA REDDI v. KEYMER.

WALLIS, C.J., AND SESHAGIRI AYYAR, J.

where the same conclusion is come to. We must therefore hold that the plaintiff is not entitled to sue on the foreign judgment in this case as it was not a decision on the merits.

In this view of the case it is unnecessary to consider whether the judgment sued on was the judgment of a Court of competent jurisdiction for the purposes of section 13 of the Code by reason of its having been passed in the exercise of jurisdiction conferred on the High Court in England pursuant to an act of the Imperial Parliament as held in *Moazim Hossein Khan* v. *Raphael Robinson*(1). The utility of such a suit is no doubt much impaired by the decision we have come to; but this is not perhaps to be regretted, as but for the fact that the authority conferring jurisdiction on the High Court in England is the Imperial Parliament to which we are subject, no such suit would lie here for the reasons given by their Lordships of the Judicial Committee in the Faridkote case *Gurdyal Singh* v. *Raja of Faridkot*(2). The precise point decided in *Moazim Hossein Khan* v. *Raphael Robinson*(1) might come before the Courts in England if a defendant resident in England were sued there upon a judgment obtained in one of our High Courts under clause 12 of the Letters Patent which are issued under an Imperial Statute but no such case has as yet arisen. In the result the Appeal must be allowed and the suit dismissed with costs throughout.

Messrs. King and Partridge, attorneys for the respondent.

S.V.

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(1) (1901) I.L.R., 28 Calc., 641. (2) (1895) I.L.R., 22 Calc., 222.

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Presidency Banks Act (XI of 1876), ss. 36 and 37—Directors lending on unauthorised securities (e g), mortgage of immoveable property, not ultra vires of the bank

The provisions of section 37 of the Presidency Banks Act (XI of 1876) prohibiting the directors of such banks from entering into certain kinds of transactions therein mentioned such as taking mortgages of immoveable properties are only directory and not mandatory and they prohibit only the directors and not the banks from entering into them, and if such transactions are actually entered into by the directors, on behalf of the bank, they are not ultra vires of the bank The directors are only agents of the bank and if in entering into such transactions they exceed the powers given to them by the Act, the bank can ratify them and enforce them, and an assignee (as in this case) from the bank of its rights under such transactions, is equally entitled to enforce them

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* Appeal No 254 of 1912.

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were subsidiary pleas of limitation with reference to portions of the claim. The defendants also contended that the document (Exhibit E) cannot be sued upon, as it was made to secure future advances. The Subordinate Judge came to the conclusion that the claim was based upon an invalid document and dismissed the plaintiff's suit."

The reason why the Subordinate Judge held the mortgage void was that it contravened section 37 of the Presidency Banks Act. The Subordinate Judge was also of opinion that the deed of assignment under which the plaintiff claimed to sue was speculative and illegal.

Thereupon the plaintiff preferred this appeal.

B. Sitarama Rao and *K. P. Lakshmana Rao* for the appellant.

K. N. Ayya with *K. Yagnanarayana Adiga* for the respondents.

B. Sitarama Rao.—The lower Court erred in holding that the mortgage is invalid and ultra vires of the bank on account of the prohibition contained in section 37 of the Presidency Banks Act. That section only defines the relationship as between the bank and its directors. The directors are only the agents of the bank, and if they exceeded their powers the bank could ratify and the transaction becomes valid. See *Great Eastern Railway Co.* v. *Turner*(1). *Turner* v. *The Bank of Bombay*(2) which the lower Court quoted against me is really in my favour. I adopt the arguments therein given.

K. N. Ayya.—The Presidency Banks are creatures of the statute and their powers are defined both in sections 36 and 37. The Act does not make any difference between the bank and its directors and the prohibition in section 37 must be taken as prohibition to the bank itself. (See sections 7 and 24 of the Presidency Banks Act.) Section 37 refers to the bank itself and the transaction is void. See *The National Bank of Australasia* v. *Cherry*(3). As the bank can act only through its directors the word "Directors" is used in section 37.

SPENCER AND SESHAGIRI AYYAR, JJ.

The judgment of the Court was delivered by SESHAGIRI AYYAR, J.—The defendants Nos. 1 to 4, the father of defendants Nos. 4 to 6 and the sixth defendant executed to the bank, the twelfth defendant in this case, a deed of mortgage

(1) (1872) L.R., 8 Ch. Ap., 149. (2) (1901) I.L.R., 25 Bom., 52.
(3) (1870) L.R., 3 P.C., 299.

(Exhibit E) on the 5th August 1898. The property was to be regarded as security for a sum of Rs. 54,000 already advanced to the defendants and "for other credits and advances" which may be made to them from time to time. Payments were made towards the debt. On the 2nd June 1905, the bank transferred the balance due to it from the defendants to the plaintiff under Exhibit A. The plaintiff sued under the assignment The defendants admitted the execution of Exhibit E, but pleaded payment in full before the date of the transfer. There were subsidiary pleas of limitation with reference to portions of the claim. The defendants also contended that the document (Exhibit E) cannot be sued upon, as it was made to secure future advances. The Subordinate Judge came to the conclusion that the claim was based upon an invalid document, and dismissed the plaintiff's suit.

In appeal it has not been argued by the appellant that the directors had power under the Presidency Banks Act (XI of 1876) to take a security upon immoveable property or in respect of future advances, as it was not necessary for the disposal of this appeal. The main contention pressed before us was that the limitations on the powers of the directors only affected the relationship inter se between them and the bank, and that even if the directors exceeded their powers the transaction entered into by them would not be illegal. Section 36 of Act XI of 1876 defines the scope of banking transactions and enumerates the various powers conferred upon a bank. Section 37 deals with the duties of the director of the bank. In our opinion section 37 must be regarded as containing instructions for the guidance and the governance of the directors and as defining the powers exerciseable by them. If the directors act in disregard of those powers, they render themselves liable to the bank for any loss it may sustain by acting in excess of their authority. That section does not enable third parties with whom contracts have been entered into to deny their liability to the bank, if the bank chooses to act upon the contract of its directors. In a very elaborate judgment Mr. Justice RUSSEL in *Turner* v. *The Bank of Bombay*(1) points out

(1) (1901) I.L.R., 25 Bom., 52.

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SPENCER AND SESHAGIRI AYYAR, JJ.

that the action of the director under such circumstances will not be *malum prohibitum*. On appeal Sir LAWRENCE JENKINS, C.J., and TYABJI, J., accepted this view. We are of the same opinion. Mr Ayya Ayyar referred to sections 7 and 24 of the Act and contended that the directors are identical with the bank, and that if there is a prohibition against the directors, it is also a prohibition against the bank. We are unable to agree with this contention. As pointed out in Buckley on Companies (9th edition), page 626, "the directors of a company fill a double character. They are: (i) agents of the company, and (ii) trustees for the shareholders of the power committed to them." It is this dual capacity that is recognized throughout the Indian Act. If an agent exceeds the authority conferred upon him by the principal, it is open to the principal to adopt it as if the agent acted within the scope of his authority. The party with whom the contract has been entered into is not entitled to repudiate the transaction. Of course if the unauthorized dealing is opposed to public policy, there can be no ratification. In *Great Eastern Railway Co. v. Turner*(1) Lord SELBORNE defines the position of directors thus: "The directors are the mere trustees or agents of the company—trustees of the company's money and property,—agents in the transactions which they enter into on behalf of the company," and then he says: "I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of *cestius que trust* has been laid out in an unauthorized manner, that therefore they are not to have the benefit of whatever value there is in the property bought with their money." The reason of the rule is that, whatever may be the extent of liability inter se between the directors and the bank or the trustee and *cestius que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations. The view

(1) (1872) L.R., 8 Ch. Ap., 149

enunciated in *Turner* v. *The Bank of Bombay*(1) has been applied in Madras to cases arising under the Indian Trusts Act. In *Kadir Ibrahi Rowthen* v. *Arunachellam Chettiar*(2), the learned Judges held that where a trustee exceeded his powers in granting a lease the transaction was only voidable at the option of the *cestius que trust* and was not void altogether. In *Sinaya Pillai* v. *Munisami Ayyan*(3), where a guardian exceeded the powers given to him by the Guardians and Wards Act, the learned Judges held that his act was only voidable at the option of the ward. We must, therefore, hold that the action of the directors in taking the security to cover future advances, although it may be in excess of the powers was not void *ab initio;* and it was open to the bank to have accepted the contract as concluded by the directors. Mr. Ayya Ayyar relied very strongly upon the decision in *The National Bank of Australasia* v. *Cherry*(4) one essential difference between that decision and the case before us is that in the former the prohibition which was contravened was against the bank itself and not against the directors. Lord CAIRNS in delivering the judgment of Judicial Committee came to the conclusion that as the bank was prohibited from entering into transactions of a certain class, any contravention of such an express prohibition vitiated the contract altogether. Courts have recognized that if a prohibition is in the interests of the shareholders and is based on considerations of public policy, it must be regarded as *malum prohibitum*. See per BLACKBURN, J, at page 379, in *Taylor* v. *Chichester and Midhurset Railway Company*(5) In the present case, the contract does not affect the rights of the shareholders nor does it offend public policy. It is not the bank that is prohibited from taking security in regard to future advances or in the shape of immoveable property, but only the directors. Therefore the decision relied upon by Mr. Ayya Ayyar does not affect the present case. Moreover the Act of 1870, regulating banking transactions in this country, was passed after the decision in *The National Bank of Australasia* v.

(1) (1901 I.L.R., 25 Bom., 52 (2) (1910) I.L.R., 33 Mad., 597
(3) (1899) I.L.R., 22 Mad., 289. (4) (1870) L.R., 3 P.C., 299.
(5) (1867) L.R., 2 Ex., 358.

DAMODAR SHANBOGUE *v.* RAMA ROW.

SPENCER AND SESHAGIRI AYYAR, JJ.

Cherry(1) and when the legislature has advisedly not prohibited the bank but only the directors by section 37 from entering into transactions of a particular nature, it is reasonable to hold that the section only contains instructions to the directors as to how they should manage the business of banking. It is well settled that, where there are provisions in an Act which are only directory, and not mandatory, any disregard of those provisions will not make the transaction void altogether. *The Queen* v. *Lofthouse*(2) and *The Queen* v. *Ingall*(3). In our opinion section 37 is only directory of the powers of the directors. The parties with whom the contract was entered into are not entitled to plead that they are absolved from liability because the transaction is one in which the directors exceeded their powers. Curiously enough the Subordinate Judge quotes *Turner* v. *The Bank of Bombay*(4) but entirely misunderstands the decision. We must, therefore, reverse his decision and direct him to take back the case on his file and to dispose of it upon the other points arising in the case

As the decree itself is reversed it is not necessary to pass separate orders on the memorandum of objections. The costs in this Court of all parties will abide the result and should be provided for in the revised decree.

N R.

(1) (1870) L.R., 3 P.C., 299.
(2) (1866) L.R., 1 Q.B., 433.
(3) (1876) L.R., 2 Q.B.D., 199.
(4) (1901) I.L.R., 25 Bom., 52.

PRIVY COUNCIL.*

1915.
November
3 and 17.

VENKATANARAYANA PILLAY (PLAINTIFF),

v.

SUBBAMMAL AND ANOTHER (DEFENDANTS).

[On Appeal from the High Court of Judicature at Madras.]

Hindu Law, will—Revocation of will—Will disposing of property and nominating boy for adoption to be completed later and giving wife power to complete it if he does not do so—Subsequent completion of adoption by testator—Subsequent will making different disposition of property, but not revoking former will—Later will held in former suit illegal as disposing of ancestral property, which testator had no power to do—Dependent relative revocation

A Hindu testator being the sole coparcener of certain property made a will in 1889 by which he appointed his wife *S* and his daughter *R* executrices, and in which he nominated as his son, one *V* a son of his daughter, but stated that he had not completed the adoption, and he directed that if he should die before completing it, *S* should after his death perform the necessary ceremonies, and take the grandson in adoption, and the will contained the following clause — "In case any danger may happen to my grandson *V* during the lifetime of my wife *S* who is one of my executrices, my wife may according to her wishes take in adoption one of my aforesaid daughter's sons, and give my properties to that son" The testator completed the adoption of *V* on 9th February 1890 On 21st March 1890 he executed another will of which a third person was made executor together with *S* and *R* and which contained a gift that in case of the death of *V* his issues should enjoy the property. There were in it no words revoking the previous will, and it did not refer to the clause in the former will which gave *S* a contingent power of adoption. On 4th April 1890 the testator died. The will of 1889 was not admitted to probate, but a grant of probate was made of the will of 1890. *V* died on 4th June 1891 In 1894 the appellant as reversionary heir of *V* obtained a decree declaring the will of 1890 void and inoperative according to Hindu law as disposing of ancestral property over which the testator had no power of disposal. On 13th August 1906 *S* adopted the respondent *P* in accordance with the authority given her by the will of 1889 In a suit by the appellant against *S* and *P* for a declaration that *P's* adoption was illegal and invalid,

Held, that the document executed by the testator in 1889 was a will, and not a mere non testamentary authority to adopt. It contained the appointment of executors, and was executed by a testator who at its date had power to dispose of the property of which he purported to dispose

Held also, that after the completion of *V's* adoption and the consequent admission into the joint family of another coparcener, the testator had no

* *Present* —VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE and MR. AMEER ALI.

VENKATA-NARAYANA PILLAY v. SUBBAMMAL.

power to dispose of the property which on his death was ancestral property and to that extent the will of 1889 became ineffectual But there was no such inconsistency between the two wills as that the provisions of the earlier will could not stand with the existence of the later will. The will of 1890 no doubt prevailed over the will of 1889, but the contingent power to adopt was unaffected by anything in the later will

Held further, that the question whether the disposition of the property in the later will revoked the provisions as to its disposal in the earlier will, turned upon the application of the doctrine of dependant relative revocation which was really a question of intention, and that under the circumstances an alternative inconsistent disposition which was not valid or effectual in itself, did not revoke an earlier disposition of the same property

Alexander v. *Kirkpatrick* (1874) L.R., 2 H L Sc. & Div, 397, followed in principle.

APPEAL No. 92 of 1913 from a judgment and decree (12th March 1912) of the High Court at Madras in its appellate jurisdiction, which affirmed a judgment and decree (26th March 1909) of the same Court in the exercise of its original civil jurisdiction.

The suit which gave rise to this appeal was instituted by Venkatanarayana Pillay the original appellant for a declaration that the adoption by Subbammal the first respondent, of Parthasarathy Pillay the second respondent, was invalid on the ground that the adoption had been made without any authority from Subbammal's husband

The facts were that one Venkatarama Pillay died on 4th April 1890, leaving him surviving his widow Subbammal, his brother Venkatanarayana Pillay the original appellant, and his daughter Rajammal the mother of Parthasarathy Pillay the second respondent He also left an adopted son Venkatakrishna Pillay. He was separated from his brothers and possessed ancestral property of considerable value, and he had on 8th September 1889, made a will which contained (*inter alia*) the following provisions.—

"I have appointed my wife Subbammal and my daughter Rajammal to be my executrices after my death. I have nominated as my son Chiranjeevi Venkatakrishna Pillay who is my grandson by daughter and the son of my said daughter Rajammal. If by Divine will, I should die before completing the said adoption in the ceremonial form, that should be observed according to the custom prevailing among the Hindus, my wife Subbammal shall, after my death, complete the necessary ceremonies and take in adoption my said grandson as my adopted son in the presence of my friends and relations and *prohiter* and other persons.

"In case any danger may happen to my grandson Chiranjeevi Venkatakrishna Pillay during the lifetime of my wife Subbammal who is one of my executrices, my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons and give my properties to that son."

On 9th February 1890 Venkatarama Pillay adopted Venkatakrishna Pillay the son of his daughter Rajammal mentioned in the above will as having been nominated by him.

On 21st March 1890 Venkatarama Pillay executed another will by which he disposed of the whole of the properties (which were ancestral properties) as follows :—

"(4) My executors shall preserve and take care of the income of the whole of the aforesaid properties and all, and shall deliver up the same to my son Venkatakrishna Pillay after he attains the age of 22 (twenty-two) years My aforesaid son shall keep all the immoveable properties mentioned in my will and maintain himself by means of the incomes accruing therefrom, only so, and he shall have no power to sell or mortgage or dispose of in any other way even one of those properties.

"(5) Should my son Venkatakrishna Pillay happen to die at any time, his issues shall enjoy the same. Should he have no issues, the same shall be divided and be given to the issues of my daughter Rajammal They also may spend only that income and shall not take the estate Should Rajammal, my aforesaid daughter, have no issues, Rajammal shall enjoy the incomes of the aforesaid properties for life, and after her death the necessary expenses for the charity of Maruttisvarar of Tirukkachu, Chingleput district, shall be conducted with the income accruing from the aforesaid properties"

The later will of 1890 contained no clause revoking the earlier will of 1889 Probate of it was granted by the High Court at Madras; but in a suit brought in 1893 by Venkatanarayana Pillay, the original appellant in the present appeal, the will of 1890 was, by a decree of the High Court, dated 20th November 1894, declared to be invalid on the ground that it dealt only with ancestral property over which the testator had no testamentary power.

Venkatakrishna Pillay died in infancy on the 4th June 1891 after the death of the testator: and on 13th August 1906, Subbammal the first respondent, who had succeeded to a widow's estate in the properties, acting under the authority given to her by the will of 1889 took in adoption Parthasarathy Pillay, the second respondent, who was a son of Rajammal. The fact of the

VENKATA-NARAYANA PILLAY v. SUBBAMMAL.

adoption was not disputed, the only question being whether it was authorised by the testator.

The present suit was brought on 1st August 1907 against Subbammal and the adopted son for a declaration that the adoption, as being unauthorised, was illegal and invalid, and could not affect the right of Venkatanarayana Pillay as reversionary heir to the estate of the deceased Venkatakrishna Pillay.

The trial Judge WALLIS, J., was of opinion that the invalid will of 1890 did not effect a revocation of the will of 1889, and that the power of adoption contained in the earlier will was in force at the time of the adoption of Parthasarathy. He consequently dismissed the suit

An appeal from that decision came before Sir CHARLES ARNOLD WHITE, C.J., and SANKARAN NAIR, J., who on 12th March 1912, held, in concurrence with WALLIS, J., that the authority to adopt contained in the will of 1889 was not intended by the testator to be revoked and was not revoked, and that that will though not admitted to probate was admissible in evidence in a suit to have it declared that the adoption was invalid [see for the report of the Judgment on Appeal *Venkatanarayana* v. *Subbammal*(1)].

Venkatanarayana appealed to His Majesty in Council, but during the pendency of the appeal, on 11th November 1913, he died; and by an order in Council on 23rd March 1915, the appeal was reversed and his grandson Kuppusamy Pillay was substituted in his place as appellant See *Venkatanarayana Pillai* v *Subbammal*(2).

On this appeal—

Sir R Finlay, K.C., and *B Dube* for the appellant contended that the document alleged to be a will was merely a non-testamentary instrument of authority to adopt a son, and was inadmissible in support of the adoption for want of registration. Reference was made to the definition of "will" in the Indian Succession Act (X of 1865) and to section 187. But, assuming it is a will, it was ineffectual in the absence of probate, to support the authority to adopt. It was moreover, it was submitted, revoked by the will of 1890, probate of which was

(1) (1912) 22 M.L.J., 295. (2) (1915) I.L.R., 38 Mad., 406 (P.C.).

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granted as being the last will and testament of the testator; the later will would, notwithstanding it had been held to be invalid and inoperative so far as it dealt with ancestral property, be operative to revoke any inconsistent provisions of the earlier will of 1889. The High Court erred in applying to the present case the doctrine of dependent relative revocation which, it was submitted, was not under the circumstances applicable. Reference was made to *Tupper* v. *Tupper*(1), *Onions* v. *Tyrer*(2), *Baker* v. *Story*(3), *Quinn* v. *Butler*(4), and *Alexander* v. *Kirkpatrick*(5). In the will of 1890 the testator made a different disposition of his property, and notwithstanding the fact that it was held to be invalid, that did not, it was submitted, do away with the intention to get rid of the disposition of it made in the earlier will, including the power to his widow to adopt. When the will of 1890 was executed the testator had made an adoption himself, and therefore he omitted the authority to adopt or any reference to it, in the later will: and the Courts below might well have presumed that it was intended that the authority to adopt was to operate only in the event of the husband not making an adoption in his lifetime In any case the respondents had failed to establish that the adoption of Parthasarathy Pillay was authorized by the testator.

De Gruyther, K.C., and *Kenworthy Brown* for the respondent were not called upon.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI

Lord WRENBURY.—At the date of the first testamentary instrument, viz., the 8th September 1889, the testator, Vencatarama was sole surviving co-parcener of the property here in question. It was ancestral property, but a division had been effected, and of the testator's divided share he had no co-parcener. He could, therefore, dispose of it Under those circumstances he made a will dated the 8th September 1889, which contained an appointment of his wife and his daughter to be executrices

(1) (1855) 1 K. & J., 665 s.c., 69 E.R. 627
(2) (1716) 1 Peere Williams, 342, s.c., 24 E.R., 418.
(3) (1875) 31 L.T.N.S., 631; s.c., 23 W.R. (Eng.), 147
(4) (1868) L.R., 6 Eq., 225
(5) (1874) L.R., 2 H.L. Sc. & Div., 397 at p. 400.

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and for the present purpose consisted of two parts, viz.: (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the will that he had, nominated as his son Venkatakrishna, who was a son of his daughter Rajammal, but he had not completed the adoption. By his will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death, complete the necessary ceremonies, and take the said grandson in adoption, and his will contained the following clause:—

"In case any danger may happen to my grandson, Chiranjeevi *Venkatakrishna Pillay, during the lifetime of my wife Subbammal* who is one of my executrices, my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son."

An argument was tentatively put forward, but was not pressed by the appellant's counsel that this document was not a will. Their Lordships can entertain no doubt that it was a will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890 the testator completed the adoption of Venkatakrishna. Another member of a co-parcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the will of the 8th September 1889 became ineffectual.

On the 21st March 1890 the testator executed another will. It contains a new appointment of executors. They are the two executors appointed by the will of the 8th September 1889, and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a co-percener, and could not dispose of it. It contains in article (5) a gift that, in case Venkatakrishna shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous will; is wholly silent as to adoption; and does not refer in any way by revocation or otherwise to the

clause in the will of the 8th September 1889 set out above, which gave the widow a contingent power of adoption.

On the 4th April 1890 the testator died The will of the 8th September 1889 was not, and the will of the 21st March 1890 was, admitted to probate. On the 4th June 1891 Vencatakrisna died.

In 1893 the plaintiff in the present proceedings being the brother of Vencatarama and thus reversionary heir to Vencatakrishna instituted a suit, and on the 20th November 1894 obtained a decree that the will of the 21st March 1890 was null and void, and inoperative according to Hindu law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow Subbammal, on the 13th August 1906, adopted the defendant Parthasarathi.

The present suit is one instituted by Vencatanarayana, as reversionary heir of Vencatakrishna, against Subbammal, the widow, and Parthasarathi, the son adopted by the widow, for a declaration, that his adoption was illegal and invalid.

The appellant advanced two contentions, (1) that the document of the 8th September 1889 was not a will—with this their Lordships have dealt above—and (2) that if it was a will, it was revoked by the will of 21st March 1890, and that no power existed in the widow in 1906 to make an adoption.

The appellant rests his case not upon any words in the will of 1890 revoking the will of 1889, for there are none, but upon such an inconsistency between the two wills as that the provisions of the earlier will cannot stand with the existence of the later will. It has already been pointed out that the will of 1889 consists of two parts, and assuming for the moment that the contention is well founded as to the one part, viz, that which effects a disposal of the property, it does not touch the other part, viz., that which gives a power to adopt.

Whether the contention is well founded as regards the other part, viz., that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his will a testator gives property to *A* and by a codicil gives the same property to *B*, and if in the event it turns out that *B* cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended

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that the gift to *A* should be displaced altogether or that it should be displaced only in favour of *B*, and (if *B* cannot take) the gift to *A* should remain. If, as in *Tupper* v. *Tupper*(1), the testator's language is that (1) he revokes the gift to *A* and (2) in lieu thereof he gives to *B*, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler*(2), the donee of a power to charge does by his will *charge with 4,000l. to be paid to A and 3,000l. to be paid to B, C* and *D* equally, and then by codicil revokes the aggregate charge of 7,000*l* made by his will and charges with 7,000*l*. for *A*, the charge in the will is no doubt gone for all purposes. If, as in *Baker* v. *Story*(3), *A* takes absolutely under the will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick*(4), although a case upon two dispositions, of which the former contained a power of revocation, and not upon two wills, contains a principle applicable in their Lordships' opinion to the present case, viz., that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890 his disposition in 1889 should nevertheless be revoked—and the argument goes beyond this to affirm that not only disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which has taken place is that there are two testamentary instruments. The later must no doubt prevail over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by

(1) (1855) 1 K. & J., 665, s.c. 69 E.R., 627. (2) (1868) L.R., 6 Eq., 225.
(3) (1875) 31 L.T.N.S., 631, s.c., 23 W.R. (Eng.), 147.
(4) (1874) L.R., 2 H.L. Sc. & Div., 394 at p. 397.

anything in the later. In their judgment it has been rightly held that on the 13th August 1906 the widow had the power of adoption which she exercised, and the plaintiff's case fails.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *John Josselyn.*

Solicitor for the respondents: *Douglas Grant*

J.V.W.

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PRIVY COUNCIL.*

SUBRAMANIAN CHETTIAR (PLAINTIFF),

v.

RAJA RAJESWARA DORAI *alias* MUTHURAMALINGA DORAI (DEFENDANT).†

AND TWO OTHER APPEALS, THREE APPEALS CONSOLIDATED.

1915 October 21, 25, 26 and November 3, 16.

[On Appeal from the High Court of Judicature at Madras.]

Trustee, duties of—Trustee of Ramnad Estate—Discretion of trustees—Powers improperly and unreasonably exercised—Liability of transferee of trust estate—Compromise of suit by trustee—Decree ordering party benefiting by Breach of Trust to repay benefit—Compromise where minor is party to suit—Civil Procedure Code (Act XIV of 1882), sec. 462.

In the suit out of which this appeal arose the plaintiff (respondent) was the minor Raja of Ramnad. The first defendant (appellant) was a creditor of the late Raja and the party in whose favour the three instruments which the suit sought to set aside were made. The second defendant was the trustee appointed under a deed of settlement executed by the late Raja on 12th July 1895. The suit was brought for a declaration that an agreement of 16th January 1899 between the appellant and the trustee, and two mortgages of 6th and 15th July 1899 executed by the trustee in favour of the appellant were invalid, and for an order that a sum of Rs. 43,000 paid under those instruments should be repaid by the appellant to the credit of the trust estate. The validity of the deeds was largely dependent on the consideration of whether the trustee under the voluntary settlement of 12th July 1895 had power to give a mortgage bond for four lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Raja of Ramnad.

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* Present:—VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE and MR. AMEER ALI.

† Appeal No. 108 of 1913.

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Held, by the Judicial Committee (upholding the decision of the High Court) that on the evidence, and the construction of the settlement, and under the circumstances of the case the power of the trustee was not exercised properly and reasonably, and in the interest of the trust estate, that the deed of compromise was therefore not valid, and that being so the mortgages could not be regarded as valid and binding on the properties therein comprised. Their Lordships concurred in the conclusions of the High Court both as to the validity of the deed of compromise and of the two mortgages, and as to the amount of the repayment ordered to be made by the appellant to the credit of the trust estate. Even if the deed of compromise could be supported on other grounds it was invalid as not complying with the condition imposed by section 462 of the Civil Procedure Code, 1882, in that, one of the parties to the suit being a minor, the sanction of the Court to the making of the compromise had not been obtained.

Manohar Lal v *Jadunath Singh* (1906) I L R., 28 All., 585 at p. 589, s.c., L R., 33 I.A., 128 at p. 131, per Lord MACNAGHTEN and *Ganesha Row* v. *Tuljaram Row* (1913) I L.R., 36 Mad., 295 (P.C.); s.c., L.R., 40 I.A., 132, followed.

APPEAL No. 108 of 1913, one of three consolidated Appeals (the other two being 118 and 128 of 1913) from a judgment and decree (21st April 1909) of the High Court of Madras, which affirmed a decree (30th March 1903) of the Subordinate Judge of Madura (East), made in Original Suit No. 6 of 1902.

The first defendant in the suit was the appellant to His Majesty in Council.

The principle question for determination in this Appeal was as to the validity of two mortgages respectively dated the 6th and 13th July 1899, executed by the trustee of the estate of the Raja of Ramnad in favour of the appellant.

In 1897 Subramanian Chettiar the present appellant brought a suit against (1) the then Raja of Ramnad, (2) the trustee of the Ramnad estate, one Venkata Rangier; and (3) Raja Rajeswara Dorai the present respondent, who was the eldest son of the Raja and then a minor and others as defendants. In 1899 an agreement of compromise was come to in that suit in pursuance of which the trustee gave the appellant the two mortgages abovementioned on the estate for large sums, and the appellant withdrew the suit. That compromise was not sanctioned by the Court in accordance with the Civil Procedure Code, 1882, section 462.

In 1900 the appellant on 12th January instituted Suit No. 1 of 1900 which gave rise to Appeal No. 128 of 1913; and on 22nd January Suit No. 7 of 1900 which led to Appeal No. 108 of 1900, the object of both suits being to enforce the respective mortgages

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of 6th and 13th July 1899. And on 17th January 1902 the present respondent instituted by his next friend the suit (No. 6 of 1902) out of which the present appeal arose, against the present appellant and the trustee to have it declared that the mortgages were invalid and for other reliefs. The last named was the suit actually tried out in Court. The other two suits depended upon and followed the result of the third suit; and they are therefore not further dealt with in this report.

The suits were tried together by the Subordinate Judge, who held, in favour of the present respondent that the mortgages were invalid, first because they constituted breaches of trust; and secondly because the agreement of compromise had not been sanctioned by the Court as required by section 462 of the Civil Procedure Code, 1882.

On Appeal the High Court (Sir ARNOLD WHITE, C.J., and MILLER, J.) substantially affirmed the decision of the Subordinate Judge, and dismissed the Appeal.

The circumstances under which the Raja of Ramnad on 12th July 1895 executed a deed of voluntary settlement, whereby he conveyed and assigned the Ramnad zamindari, and all his other property both real and personal to the trustee, and the other facts of the case will be found fully stated in the report of the case in the High Court in *Subramanian Chettiar* v. *Rajeswara Dorai*(1).

The portions of the "deed of settlement," necessary for its construction in relation with the present appeal, are sufficiently set out in the judgment of the Judicial Committee.

On this Appeal—

P. O. Lawrence, K.C., D. E. Gruyther, K.C., and *S.A. Kyffin* for the appellant contended that the agreement with the Raja was a valid agreement and was binding on the trust estate, and reference was made to the Transfer of Property Act (IV of 1882), section 53. The agreement of compromise of 16th January, and the mortgages of July 1899, and the compromise of the suit of 1897, challenging the settlement deed were all bona fide transactions, and were within the power of the trustee, and binding on the trust estate. There was no breach of trust; the onus of proving such a breach lay upon the respondent and he had not discharged it. The trustee had power to enter into the

(1) (1909) I.L.R., 33 Mad., 490.

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agreement to pay four lakhs of rupees to the Raja; he was entitled to do it under section 36 of the Indian Trust Act (II of 1882) since it was reasonable and proper for the protection of the trust property, see *Forshaw* v. *Higginson*(1). Besides, the transaction could have been carried out without the suggestion of any breach of trust by the lender advancing the four lakhs. Under such circumstances, it was submitted, the Court will not treat it as a breach of trust. *The Attorney-General* v. *Mayor of Norwich*(2), and sections 43 (c) and 48 of the Indian Trust Act were referred to. The transaction, it was submitted, was not a breach of trust either as being improvident, or not in the interest of the trust estate. The circumstances and the evidence showed it was reasonable because the loan could not have been arranged if the obstacle to making it a first charge on the estate was not removed The trustee therefore acted reasonably in continuing to carry out the agreement after the Raja had failed to get the consent of his brothers who received allowances. The trustee had power to compromise the suit of 1897 brought to set aside the deed of settlement. That suit was brought under section 53 of the Transfer of Property Act which repealed 13 Eliz., c. 5. In the English cases it was held that though such a deed was voidable as against creditors, it was good as against beneficiaries. The decisions under section 47 of the English Bankruptcy Act, 1883 were distinguishable as that section made such a transaction void as against the trustee; see *Sanguinetti* v. *Stuckey's Banking Company*(3), In re *Farnham*(4), In re *Sims; Ex parte Sheffield*(5) and *Tanqueray* v *Bowles*(6) in which it was held that a trustee had committed a breach of trust in not having compromised a suit. The decisions in 1895 were distinguishable because the trustee had a good title under the deed in any case; it was not like a suit to declare a will invalid: reference was made to In re *Bagot's Estate*(7), *Graham* v. *McCashin*(8) and *Abdullah* v. *Rickards*(9). Assuming then that the trustee had the power to make the compromise, it was contended it was not a breach of trust as being improvident, and

(1) (1857) 8 De. Gex. M. & G., 827. (2) (1837) 2 M. & Cr., 414 at p. 424.
(3) (1895) 1 Ch., 176. (4) (1895) 2 Ch., 799.
(5) (1896) 3 Manson, 340; s.c., 45 W.R. (Eng.), 180.
(6) (1872) 14 Eq., 151. (7) (1900) 1 Ir. Rep., 496.
(8) (1911) 1 Ir. Rep., 404. (9) (1888) 4 T.L.R., 622.

the evidence was discussed to show it was not so, reference being made to *Freeman* v. *Pope*(1); and *Eaton* v. *Buchanan* (2) per Lord ATKINSON. Even if the agreement were a breach of trust, the appellant, it was submitted, had no such notice of it as made him privy to it; see *Borell* v. *Dann*(3), per WIGRAM, V.C., and *Hire Purchase Furnishing Company* v. *Richens*(4). Then can the minor claim that the compromise was void because the sanction of the Court was not obtained for it as required by section 462 of the Civil Procedure Code, 1882? It was not an agreement made on behalf of the minor, and section 462, it was contended, did not apply. The compromise was made by the trustee as trustee, not as guardian of the minor: it was come to by the trustee acting on behalf of the whole estate; he did not purport to act on behalf of the minor; the guardian *ad litem* could not have prevented it. [Mr. AMEER ALI.—All the subsequent proceedings were deliberately kept out of Court to avoid section 462.] It was a transaction affecting all the parties. *Ganesha Row* v. *Tuljaram Row*(5) was distinguishable: the compromise in question in that case was expressly made on behalf of the infant who had an interest in the property. In any case the compromise could only be set aside on restoring the parties to their original position.

Sir R. Finlay, K.C. and *Kenworthy Brown* for the respondents contended that there were concurrent findings on fact by the Courts below; and the appellant had not succeeded in attacking the decisions of the lower Courts on the questions of law. There was by law no appeal on the facts. The first defendant was not called. The whole case was that the trustee was always willing to adopt the Raja's point of view, and the Raja succeeded in getting the trustee to burden the estate with post-settlement debts, while the sole object of the settlement was to free the estate from all debts. As to the arrangement to borrow four lakhs, it was the duty of the trustee to get the annuitants to postpone their claim; but he made no such endeavour, but merely acceded to the Raja's wishes. The trustee had, as he knew, power to postpone the annuitants' charge on the estate. Consent

(1) (1870) L.R. 5 Ch. App. 538.
(2) (1911) A.C. 253.
(3) (1843) 2 Hare 440 at p. 452.
(4) (1888) 20 Q.B.D. 387.
(5) (1913) I.L.R., 36 Mad., 295 (P.C.), s.c. L.R., 40 I.A. 132.

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had been given a year before in 1897. The arrangement with the Raja of 25th April 1898 was not supported by consideration. The pretended consideration failed and the arrangement was therefore entered into by the trustee in breach of trust. Both Courts had agreed in finding that the trustee was not acting in the proper execution of the trust. The transactions in question were not enforceable against the respondent or the trust property, because the compromise was invalid as not having been sanctioned by the Court under section 462 of the Code of 1882. The price of the compromise greatly affected the interest of the minor. Reference was made to *Ganesha Row* v. *Tuljaram Row*(1) and *Manohar Lal* v. *Jadunath Singh*(2). The attention of the Court must, under that section, be drawn either by petition or otherwise to the fact that a minor is a party to the suit, and the leave of the Court to compromise it must be obtained. It was not sufficient in this case that the vakil for the guardian *ad litem* was said to have consented to it. The whole compromise was improper and void. The agreement of 16th January having failed there was no power to enter into the contracts of mortgage of 6th and 13th July; they were therefore in fraud of the respondent, and were, as the trustee knew, breaches of the trust

Counsel for the respondent was stopped, and the appellant was called upon, but had nothing to add in reply.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE AND MR AMEER ALI.

Lord PARMOOR.—These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is appellant, and Raja Rajeswara Dorai is respondent It is unnecessary to refer further to the other two appeals since it is admitted that the decision in those cases depends on the decision given in the case which has been argued.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January 1899, and of two mortgages dated respectively the 6th July 1899

(1) (1913) I L R., 36 Mad., 295 (P C.) s.c. L.R., 40 I A., 132.
(2) (1906) I L.R., 28 All., 585 at p 589, s.c., L R., 33 I.A. 128 at p 131.

and 18th July 1899. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July 1895, had power to give a mortgage bond for four lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Raja of Ramnad.

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The father of the appellant lent considerable sums to the respondent's father, who at all material times was the Raja of Ramnad. On the 12th July 1895, the Raja owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 1,30,000, which he owed to the appellant's father. At that date the Raja executed a deed of voluntary settlement settling all his Ramnad zamindari and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Raja himself therein directed to be made and to the several trusts, provisoes, and declarations therein contained, on the present respondent, who was a minor. The Raja appointed as trustee Venkata Rangier, and as coadjutor P. Chensal Rao, and it was provided that the trustee should not without the permission in writing of the coadjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Raja borrowed further sums from the appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

The sums due to the creditors had been borrowed at a high rate of interest, and the income in the hands of the trustee was not sufficient to meet the charges on the trust estate To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the coadjutor, and certain financiers in England. On the 18th June 1897 a preliminary agreement was made between the trustee, Charles Augustus Verner, and Ogilvie, Gillanders & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July 1895 the sum of 160,000*l.*, and the equivalent in sterling of the Government revenue for a quarter of one year, to be secured by a trust deed vesting the Ramnad zamindari freed from all incumbrances in trustees for debenture holders. This arrangement was not completed until the 13th

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of June 1899, on which date the trustee, with the privity and consent of the coadjutor and the Raja, executed a mortgage of the whole trust estate for the sum of 175,000*l.*, repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognize the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Raja should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Raja, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Raja on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Raja on 25th April 1898, and on the same day the Raja wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramnad zamindari, and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Raja would not have executed the English mortgage deed

and consented to postpone his allowance without some payment or consideration. The counsel for the appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Raja would not have assented to sign the deed and postpone his allowance without receiving payment or consideration Their Lordships were not referred to any such evidence and the counsel for the appellant relied on a general statement that the Raja was a difficult person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Raja that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the appellant.

The preliminary agreement for the loan was signed on 18th June 1897. On the 22nd September 1897, the coadjutor, P. Chentsal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lowes, Chartered Accountants, acting on behalf of the lenders, that:—"the Raja consented to sign mortgage deed and Rs. 66,000 or possibly Rs. 76,000 of the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining that the Raja was willing to give a charge upon the zamindari free of the payment of allowances of Rs. 66,000 and possibly Rs 76,000, and that this is what the coadjutor meant by postponement. These telegrams were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the coadjutor again states that the Raja is quite willing to do what Messrs. Lovelock and Lowes propose, namely, to give a charge on the zamindari free from the payment of Rs. 66,000, or possibly Rs. 76,000, out of the allowances of Rs 1,30,000, referred to in the trust deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897 which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that the intending lenders are prepared to proceed with the negotiations for the loan provided that all the

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of June 1899, on which date the trustee, with the privity and consent of the coadjutor and the Raja, executed a mortgage of the whole trust estate for the sum of 175,000*l.*, repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognize the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Raja should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Raja, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Raja on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Raja on 25th April 1898, and on the same day the Raja wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramnad zamindari, and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Raja would not have executed the English mortgage deed

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allowances in favour of the Raja and the members of his family are postponed to the security to be given to the debenture holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Raja's family was not obtained to the postponement of the allowances, but the consent of the other allowance holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust deed.

The material factor is that the letter written by the Raja on 25th April 1898, after receiving the promise of a payment or consideration of Rs. 4,00,000 secured by mortgage bond on a suitable portion of the Rāmnād estate, does not give any undertaking beyond that contained in the telegrams and letter of September 1897. Under these circumstances their Lordships are of opinion that the appellant has failed to prove the first step which is necessary to justify the placing of a charge of Rs. 4,00,000 on the trust estate.

In the second place the appellant has failed to establish that the consent of the allowance holders was required to enable the trustee to postpone their rights to the security of the debenture holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23 and 24. In paragraph 23 the settlement sets out in the sixth place a trust to make payment of the allowances specified in the second schedule, but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 24 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him,

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in the premises thereby assigned free and discharged of the trusts provisoes, directions, and declarations therein contained, except, as otherwise expressly provided in such assignment. The joint effect of sections 7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Section 24, which provides that the trustee shall make the several payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the coadjutor on 18th March 1898, said that he and the coadjutor must point out to the London people that under the trust deed they are empowered to attend to the service of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bashyam Ayyangar on 30th June 1898, and by Mr. Mayne on 20th September 1898. The Counsel for the appellant justified the action of the trustee in giving consideration for the consent of the Raja to postponement, although such consent was not legally required, on two grounds. In the first place he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance holders, after obtaining the opinion of Mr. Mayne. In the second place it was said that, although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Raja and his family, and his unwillingness to incur the ill-will of the Raja and of the other allowance holders, which he might have incurred if he had used his power without their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 1,00,000 on the trust estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage bond to that amount in favour of the Raja.

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The next question is whether the agreement of compromise of 16th January 1899, and the two mortgages of the 8th and 16th July 1899 (6th and 13th July 1899?) can be supported if the promise to give the mortgage bond of Rs. 4,00,000, on the security of the trust estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Raja to give a mortgage bond for Rs. 4,00,000, on the trust estate, thus giving the appellant full notice. Moreover the compromise deed is based, not on imposing a new charge on the trust estate, but on utilising the charge, already promised to the Raja. The deed carries out this proposal by providing for the payment of certain sums to the appellant so soon as the English loan is obtained, and by giving as security a third mortgage on the trust estate, a first mortgage being executed to secure the English loan, and a second to secure Rs. 1,00,000 due to another creditor. In other words the compromise deed assumes the validity of the agreement with the Raja and there is no evidence that the trustee or the coadjutor had any intention, apart from the agreement with the Raja, to place an additional charge in favour of the appellant on the trust estate.

The mortgage of 6th July 1899 was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Towards this sum the trustee paid to the appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July 1899. This is the second mortgage to which this appeal relates. On the second mortgage the appellant has received certain payments from the trustee and has been ordered to repay the sums to the credit of the trust estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the repayment ordered to be made by the appellant to the credit of the trust estate.

If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by

section 462 of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit, the Raja's son the first respondent, was a minor, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. Section 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit shall, without the order of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadunath Singh*(1) :—

"It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained."

Reference may also be made to the more recent case of *Ganesha Row* v. *Tuljaram Row*(2).

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent. *Chapman Walker and Shepherd*

J.V.W.

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(1) (1906) I.L.R., 28 All., 585 at p. 589, s.c., L.R., 33 I.A. 128 at p. 131.

(2) (1913) I.L.R., 36 Mad., 295 (P.C.); s.c., L.R., 40 I.A., 132.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1914, March 20 and 1915, April 16.

K. R. RAMACHANDRA AYYAR (RESPONDENT IN CIVIL MISCELLANEOUS PETITION No. 585 OF 1914 ON THE FILE OF THE HIGH COURT), PETITIONER,

v.

THE PRESIDENT OF THE VAKILS' ASSOCIATION, HIGH COURT, MADRAS (PETITIONER IN CIVIL MISCELLANEOUS PETITION No. 585 OF 1914), RESPONDENT.*

Appeal to the Privy Council—Power of the High Court to give leave—Letters Patent (Madras), cll. 10 and 39—Disciplinary proceedings under clause 10—right to give leave to appeal to Privy Council.

Disciplinary proceedings under clause 10 of the Letters Patent are not appealable under clause 39, and the High Court has no power to give leave to appeal to the Privy Council from an order passed in the exercise of such jurisdiction.

In re an Attorney (1911) I.L.R., 41 Calc., 734, followed.

G S D v. Government Pleader (1903) I.L.R., 32 Bom., 106 and *Tetley v. Jai Shankar* (1878) I.L.R., 1 All., 726, referred to.

In re S. B. Sarbadhicary (1906) 34 I.A., 41, explained.

PETITION praying that the High Court will be pleased to grant the petitioner a certificate to enable him to appeal to His Majesty in Council from the order of WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ., in *The President, Vakils' Association, High Court Madras, v. Ramachandra Ayyar*(1), and to exempt the petitioner from furnishing security as to costs.

An order was passed under clause 10 of the Letters Patent by WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ., suspending the petitioner—a High Court Vakil—from practice for a period of three months. Against that order, dated 20th March 1914, the petitioner applied for leave to appeal to the Privy Council.

G. S. Ramachandra Ayyar for the petitioner.

The respondent did not appear.

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* Civil Miscellaneous Petition No. 2602 of 1914.

(1) Civil Miscellaneous Petition No. 585 of 1914.

RAMACHANDRA AYYAR *v.* THE PRESIDENT, VAKILS' ASSOCIATION, HIGH COURT, MADRAS.

WALLIS, C.J. AND SANKARAN NAIR AND OLDFIELD, JJ.

ORDER.—The petitioner relies upon the fact that leave to appeal was granted by this Court in a similar case *In the matter of Krishnaswami Iyer*(1), but on a further consideration of the question we agree with the recent decision, *In re an Attorney*(2), that disciplinary proceedings under clause 10 of the Letters Patent are not appealable under clause 39, and that we have no power to give leave to appeal to the Privy Council from an order passed in the exercise of such jurisdiction. This is also the view taken in *G. S. D.* v. *Government Pleader*(3). In *Telley* v. *Jai Shankar*(4) also it was held that no such leave could be granted and though in the subsequent case from Allahabad, *In re S.B. Sarbadhicary*(5) it appears that leave was granted by the Allahabad High Court, the reports show that special leave to appeal was obtained from their Lordships before the appeal was heard.

The application is dismissed.

C.M.N.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Ayyar.

1915 July 21 and 30, August 5 and October 18 and 27.

A. T. S. A. ANNAMALAI CHETTY AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

S. V. VELAYUDA NADAR (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), art. 80—Promissory note payable on demand—Agreement fixing time for payment—Suit by payee—Limitation, from the expiry of the period fixed.

Article 80 of the Limitation Act is the article applicable to a suit by the payee on a promissory note payable on demand but accompanied by an agreement fixing a period for payment and time begins to run from the expiry of the period fixed in the accompanying agreement

Simon v *Hakim Mahomed Sherif* (1893) I.L.R., 19 Mad., 369 and *Somasundaram Chettiar* v. *Narasimha Chariar* (1906) I.L.R., 29 Mad., 212 overruled.

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(1) Civil Miscellaneous Petitions Nos. 595 and 59 of 1912

(2) (1914) I.L.R., 41 Calc., 734 (3) (1898) I.L.R., 22 B., 10

(4) (1878) I.L.R., 1 All., 720. (5) (1906) 34 I.A., 41

* Civil Revision Petition No. 8 of 1914.

ANNAMALAI CHETTY v. VELAYUDA NADAR.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of S MAHADEVA SASTRIYAR, the temporary Subordinate Judge of Ramnad at Madura, in Small Cause Suit No. 88 of 1913.

The facts of this case are clearly set out in the Order of Reference of SADASIVA AYYAR, J., to the Full Bench.

B. Sitharama Rao for the appellant.

S. Ranganatha Ayyar for the respondent

This Civil Revision petition came on for hearing before OLDFIELD and SADASIVA AYYAR, JJ. who made the following Orders of Reference to a Full Bench

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiffs are the petitioners in revision. They brought the suit on a promissory note dated 4th August 1909 payable on demand. On that same date, however, a writing, Exhibit A1, was given by the drawer as follows:—

"Ten months' thavanai (time for payment) from the date of the pro-note has been fixed for this note." Thus Exhibit A was in the words of article 73 of the first schedule of the Limitation Act accompanied by a writing postponing the right to sue for ten months. The present suit was brought on the 30th June 1913 more than three years from the date of the promissory note, 4th August 1909, but within the limitation period of three years from the expiry of the ten months' period and within the period of the extension given by the provisions of section 4 of the Limitation Act which permits the plaintiff to institute a suit on the day on which the Court re-opens if the time expired during the vacation of the Court. The Subordinate Judge relying on *Somasundaram Chettiar v. Narasimha Chariar*(1) which followed *Simon v. Halim Mahomed Sherif*(2), held that the writing which evidences the agreement to give time for payment is a collateral agreement, that notwithstanding that agreement, the plaintiffs could have sued on the promissory note within the ten months and that therefore, time for calculating limitation began to run from the date of the promissory note itself and the suit was therefore barred. He does not mention the article of the Limitation Act which in his opinion applies to the case. I presume that he applied article 73 itself of the Limitation Act and that was the article relied upon by the respondent's learned vakil.

(1) (1908) I.L.R., 30 Mad., 212. (2) (1896) I.L.R., 19 Mad., 368.

The petitioners' learned vakil Mr. B. Sitarama Rao argued in the first place that the decision in *Somasundaram Chettiar* v. *Narasimha Chariar*(1) decided only that notwithstanding the contemporaneous written agreement restraining and postponing the payment, the holder of the note was entitled to sue at once and not that the limitation period should be calculated from the date of the note under article 73 of the Limitation Act. Conceding that the actual point decided was only that the holder was entitled to sue from the date of the promissory note notwithstanding the accompanying agreement, that actual decision necessarily involves the conclusion that the cause of action on the note arose at once notwithstanding the accompanying agreement. If the cause of action arose at once the period of limitation must also begin at once except in the cases of disability, etc., provided for by the Limitation Act. I might add that Justice Sir SUBRAHMANYA AYYAR who was one of the two Judges who decided *Somasundaram Chettiar* v. *Narasimha Chariar*(1), decided as a single Judge the prior case in *Simon* v. *Hakim Mahomed Sheriff*(2), in which he enunciated the same view as to the arising of the cause of action at once on a promissory note payable on demand even though there was a contemporaneous written agreement postponing the time for payment In deciding those two cases, that very learned Judge seems to have been guided by certain English decisions, the most important of which is *Salmon* v *Webb and Franklin*(3). It seems to me that those English cases are based upon the doctrine of the English law that an agreement not to sue for a limited time or a covenant for a limited time only, that is, a covenant not to sue for a limited time was no answer to an action on a promissory note or even an ordinary bond unless that covenant was supported by a fresh consideration. As pointed out by Sir SUBRAHMANYA AYYAR, J., himself in *Davis* v. *Cundasami Mudali*(4), the Indian law (enacted in sections 62 and 63 of the Contract Act) is different ; article 73 of the Limitation Act also clearly implies, in my opinion, that an agreement in writing accompanying a promissory note which agreement postpones the time for payment is a valid and enforceable agreement. Of course the negotiable character of the promissory note is not destroyed and bona fide

(1) (1906) I.L.R., 29 Mad., 212.
(2) (1896) I.L.R., 19 Mad., 358.
(3) (1852) 3 H.L.C., 510.
(4) (1896) I.L.R., 19 Mad., 398

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SADASIVA AYYAR, J.

holders without notice of the accompanying agreement in writing will be protected even if they sued before the term mentioned in the accompanying agreement had expired. As between the parties to the note and as between the drawer and holders with notice or holders who are not holders in due course I am unable to see why the accompanying agreement, if in writing, should not be enforced. (That oral agreements to grant time will not extend limitation has been decided long ago by this Court and when such oral agreement varies the terms of a written contract, it would, in most cases, be inadmissible in evidence under section 92 of the Evidence Act.)

Article 73 of the Limitation Act provides three years' period from the date of the promissory note for a suit on a promissory note payable on demand and "not accompanied by any writing postponing the right to sue" The promissory note in the present case as it was accompanied by such writing cannot fall, in my opinion, under article 73. If it cannot fall under article 73 it must in my opinion fall under article 80 which relates to a suit on a bill of exchange, a promissory note or bond not herein expressly provided for, the article providing a period of three years from when the bill note or bond becomes payable. The promissory note in this case not having been provided for in article 73 or by any other previous article falls under article 80 and as it becomes payable according to the accompanying agreement ten months after the date of the note, the three years must be calculated from the expiry of those ten months.

Mr. Sitharama Rao argued on the strength of *Sanjivi* v. *Errapa* (1) that the suit came under the general article 120 which gives a period of six years from when the right to sue accrues. I am unable to accept this contention.

In the first place the terms of the promissory note in *Sanjivi* v. *Errapa*(1), were very peculiar as the note was not one containing merely a promise to pay on demand, nor was it accompanied by anything in writing postponing the period of payment, but its own terms were "to pay at any time within six years on demand." Hence the learned Judges thought that article 120 applied.

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(1) (1883) I.L.R., 6 Mad., 290.

In the second place article 80 of the Limitation Act is not referred to in the judgments and seems not to have been brought to the notice of the learned judges. Mitra in his Limitation Act, page 960, referring to this case doubts its soundness and is evidently of opinion that article 80 was the proper article to be applied in such cases. Another learned writer Rustomji in his recent book on the Law of Limitation, at page 233, also thinks that article 80 ought to have been applied. In *Kuttiassan* v. *Suppi* (1), article 80 was applied to a promissory note which was payable on demand to be made after the payee attained majority, the Court holding that time began to run from when the payee after attaining majority made his demand.

I would therefore refer for the decision of the Full Bench the following question:—

What article of the Limitation Act applies to the suit on the promissory note sued on and when did the period for calculation of limitation begin?

(The opinion of the Full Bench will govern the decisions in the connected petitions also.)

OLDFIELD, J.—I should have been inclined after so many years to follow *Somasundaram Chettiar* v. *Narasimha Chariar*(2), as settled law. But I am not sure that English decisions, on which it is based, are applicable in India or that they represent the English law correctly. Vide observations on *Cumber* v. *Wane*(3) and *Thimbleby* v. *Barron*(4).

I therefore concur in the reference proposed by my learned brother.

B. Sitharama Rao for appellant.

The question is one of limitation, viz., which article of the Act applies, article 73, 80 or 120? The period of limitation runs, not from the date of the note but from the date to which the time has been extended by agreement. The two cases quoted against this view are *Simon* v. *Hakim Mahomed Sheriff* (5) and *Somasundaram Chettiar* v. *Narasimha Chariar*(2).

[WALLIS, C.J.—The agreement will not bind the holder in due course. A third party without notice must sue within

(1) (1893) 3 M.L.J., 190.
(2) (1906) I.L.R., 29 Mad., 212. (3) 1 Sm. L.C., 338 at p. 352, s.c. 1 Strange, 426.
(4) (1838) 3 M. & W., 210. (5) (1896) I.L.R., 19 Mad., 33?.

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the time mentioned in article 73. Here the suit is between the maker and the payee and they are bound by the agreement. This is your argument.]

Yes. The words in section 32 of the Negotiable Instruments Act in "the absence of a contract to the contrary" also support my view.

Refers to *Salmon* v. *Webb and Franklin*(1); Smith's Leading Cases, volume I, page 352, paragraph 8, and section 24, sub-section 5 of the Judicature Act.

Under the English Common Law, a collateral agreement like the present one cannot be relied upon as a bar but in equity the party could always get an injunction compelling the plaintiff not to sue. See *Norton* v. *Wood* (2).

[WALLIS, C.J.—What is stated to be the law in Byles on Bills?]

Refers to pages 121 and 251. A covenant to renew is a good defence. See *Maillard* v. *Page*(3) and *Bowerbank* v. *Menteirs*(4).

In *Simon* v. *Hakim Mahomed Sheriff* ( ) the remedy by an injunction has been overlooked. In *Norton* v. *Wood*(2) there was a bond and collateral agreement. The view stated in Bosanquet on Limitation, page 41, is that after the Judicature Act, the collateral agreement will be a good plea in defence.

[WALLIS, C.J., refers to page 321, Byles on Bills. This is in your favour, you say that the decisions in *Simon* v. *Hakim Mahomed Sheriff* ( ) and *Somasundaram Chettiar* v. *Narasimha Chariar*(6) are not in accordance with English law.

That is my submission. See 19 Halsbury, page 55, paragraph 88

Refers to Stoke's Anglo Indian Codes regarding section 32 of the Negotiable Instruments Act, Daniel's Negotiable Instruments, section 156; Chalmer's Bills of Exchange, page 66 and Bashyam and Adiga on Negotiable Instruments, page 145.

S. Ranganatha Ayyar for the respondent.

I want to draw your Lordship's notice to one passage at page 372 in *Simon* v. *Hakim Mahomed Sheriff* (5).

[ABDUR RAHIM, J.—Why should not this contract be enforced in the same suit?]

(1) (1852) 3 H.L.C., 510. (2) (1830) 1 R. & M., 178, s.c., 39 E.R., 69.
(3) (1870) L.R., 5 Ex., 312. (4) (1813) 4 Taunton, 844.
(5) (1896) I.L.R., 19 Mad., 308. (6) (1906) I.L.R., 29 Mad., 212.

Refers to the observation of Sir BARNES PEACOCK in 14 W.R., 14.

A memorandum written subsequent to the note is not part of the same instrument. Byles on Bills, page 121, *Sanjivi* v. *Errapa*(1) and *Kuttiassan* v. *Suppi*(2).

This REFERENCE coming on for hearing the Court expressed the following

OPINION.—We agree with SADASIVA AYYAR, J., and, for the reasons given by him, that article 80 is the article applicable, and that time began to run from the expiry of the period fixed in Exhibit A 1. Such an agreement to give time is operative in India under sections 62 and 63 of the Indian Contract Act, and is recognised by the legislature in article 73 of the Limitation Act which excludes on demand bills and notes from the operation of that article when they are accompanied by any writing restraining or postponing the right to sue. Lastly, such agreements appear to be expressly saved by the provision in section 32 of the Negotiable Instruments Act, which provides that notes and bills are payable at maturity according to the apparent tenor of the note or acceptance only in the absence of a contract to the contrary, thus expressly recognising that such a contract may postpone the date of payment. We think that *Simon* v. *Hakim Muhomed Sheriff*(3) and *Somasundaram Chettiar* v. *Narasimha Chariar*(4) proceed on the authority of English decisions which are inapplicable to India and would appear to be no longer law in England since the passing of the Judicature Act, and that they must be treated as no longer law.

This civil revision petition came on for final disposal after the expression of the opinion of the Full Bench, when the Court (SADASIVA AYYAR and NAPIER, JJ.) delivered the following judgment.—

SADASIVA AYYAR AND NAPIER, JJ.

"In accordance with the opinion of the Full Bench, we set aside the decision of the Small Cause Court which dismissed the suit on the preliminary point of limitation and remand the suit for disposal on the other questions arising in the suit. Costs hitherto incurred will abide. There will be similar orders in the connected Civil Revision Petitions Nos. 339 and 340 of 1915."

C.M.N.

(1) (1883) I.L.R., 6 Mad., 240.
(2) (1893) 3 M.L.J., 169.
(3) (1896) I.L.R., 19 Mad., 368.
(4) (1900) I.L.R., 23 Mad., 212.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1914 November 30 and December 1 and 1915, January 9, March 3 and 23.

SOUNDARARAJAN (MINOR BY HIS MOTHER AND NEXT FRIEND KANNAMMAL) (PLAINTIFF), APPELLANT,

v.

T. R. M. A. R. R. M. ARUNACHALAM CHETTY (DECEASED AND TWO OTHERS) (DEFENDANTS), RESPONDENTS.*

Hindu Law—Illegitimate son of a Sudra, by a dancing woman kept in continuous and exclusive concubinage—Right to succeed to joint family property.

The illegitimate son of a Sudra by a dancing woman who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter, is entitled to get his appropriate share in the joint family property after his father's death provided the connection between his father and mother was not incestuous or adulterous. This right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged.

APPEAL *in forma pauperis* against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Ramnad, in Original Suit No. 89 of 1910.

The facts of this case are clearly set out in the Order of Reference of WALLIS, C.J., to the Full Bench.

K. N. Aiya for the appellant.

B. Sitarama Rao for the third respondent.

This appeal came on for hearing before WALLIS, C.J., and SESHAGIRI AYYAR, J. who made the following Orders of Reference to a Full Bench.

WALLIS, C.J.

WALLIS, C.J.—The plaintiff in this suit as the illegitimate son by a dancing woman of the late Ramaswami Chettiar, a Nattukottai Chetty, seeks to recover a one-third share of the joint family properties as against the legitimate son, the first defendant, who would otherwise take the whole by survivorship. The Subordinate Judge found that the paternity of the plaintiff was not proved and dismissed the suit. We are unable to agree with this conclusion.

The deceased as found by the Subordinate Judge appears to have become acquainted with the plaintiff's mother in 1900 when

* Appeal No. 74 of 1911 (1).

she had for some years been carrying on the profession of a dancing girl and a prostitute. He set her up in a house at Srirangam near Trichinopoly where he carried on business, and lived with her there for some years. Shortly before the plaintiff's birth early in 1903 he was imprisoned for fraud, and the correspondence shows that he regarded the child about to be born as his and that subsequently he recognised it as such. The correspondence also shows that his legitimate son, the first defendant used to live in the house with his approval. In 1905, when the plaintiff was a little over two years old, the deceased refused any longer to maintain him and his mother, who petitioned the Deputy Magistrate on his behalf for maintenance in Exhibit III. The order of the Assistant First-class Magistrate, which was rejected by the Subordinate Judge, but admitted by us as evidence of the conduct of the deceased with reference to this claim, shows he made no serious attempt to contest the petition or show grounds for doubting his paternity, and in these circumstances very little weight attaches to the fresh evidence as to the conduct of the plaintiff's mother prior to his birth which has now been put forward for the first time. Further, that evidence in itself is of a very worthless kind, and is more than counterbalanced by the letters of the deceased which show that he was at one time much attached to the plaintiff and recognised him as his son. The question then arises whether the plaintiff as the son of the deceased by a woman of the position and antecedents of his mother is entitled to claim a share of the joint family property as the illegitimate son of the deceased. It must now be taken as settled that the illegitimate children of the higher castes are not entitled to inherit, *Bhaiya Sher Bahadur* v. *Bhaiya Ganga Bakhsh Singh*(1), but it is otherwise with Sudras. All the Courts recognise that the son of a Sudra by a *dasi* is entitled to inherit. Manu (IX 179) and Yajnavalkya (II. 133) mention not only a *dasi* but also the wife of a *dasa* or slave, and the Dayabhaga adds "or other unmarried woman" which as pointed out in *Padala Krishna Rao* v. *Padala Kumarajamma*(2) may merely mean not married to the father of the child. As pointed out in *Krishnayyan* v. *Muttusami*(3) the words "or other unmarried

(1) (1913) I.L.R., 41 I.A., 1. (2) (1912) 15 I.C., 380.
(3) (1884) I.L.R., 7 Mad., 407 at pp. 411 and 412.

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WALLIS, C.J.

woman" do not occur in the Mitakshara or other commentaries of the south. The Mitakshara merely speaks of a son begotten by a Sudra on a *dasi*. In a recent case *Chatturbhuj Patnaik* v. *Krishna Chandra Patnaik*(1), MOOKERJEE and BEACHCROFT, JJ., have given good reasons for doubting the correctness of the Calcutta decisions that under the Dayabhaga this must be read as meaning a woman in the position of a slave, and have refused to follow these decisions in a case arising under the Mitakshara, agreeing in this with our own and the other High Courts. In this Court it is also well settled that the son must be born of a continuous concubine, and also that he must not be the issue of a connection that is incestuous or adulterous—*Krishnamma* v. *Papa*(2)—though the latter condition is said to be disregarded in Bombay—*Rahi* v *Govind valad Teja*(3). The question then is, are there any further restrictions? In *Krishnayyan* v. *Muttuswami*(4) it is said that the reason of the rule is that the *dasi's* son succeeded not as a slave but as the son of one who was in the position of a substitute for a wife though not legally married. It is not clear that this meant more than that she must have been a continuous concubine, but it is now suggested very largely on the authority of this passage that she must have been qualified to marry the father. I do not think the learned Judges who decided *Krishnayyan* v *Muttusami*(4) intended to lay down any such rule, as one of them, MUTTUSWAMI AYYAR, J., in a subsequent case *Brindavana* v. *Radhamani*(5), expressly reserved the question whether a dancing girl could not give up her profession and be the mother of illegitimate children within the meaning of the Mitakshara law. In *Karuppannan Chetti* v. *Bulokam Chetti*(6), to which SUBRAHMANYA AYYAR, J., was a party, it was held that the sons of a woman continuously kept by the father as a concubine whose connection was neither adulterous nor incestuous were in this Presidency entitled to inherit, but in *Annayyan* v. *Chinnan*(7), WHITE, C J, and BENSON J., held that the son of a child widow who had lived with the father as his concubine could not inherit. This ruling appears to have been based on the finding that re-marriage of widows was

(1) (1912) 17 C W N, 442
(2) (1869) 4 M H.C.R., 234.
(3) (1875) I.L.R, 1 Bom., 97.
(4) (1884) I.L.R, 7 Mad, 407 at pp 411 and 412.
(5) (1889) I L.R., 12 Mad, 72 at p 84.
(6) (1900) I L.R., 23 Mad., 16
(7) (1910) I L.R. 33 Mad., 366.

forbidden among Sudras of the class to which the father belonged, and that the father and mother had been outcasted by their community in consequence of their living together. In these circumstances the connection was treated as one in violation of or forbidden by the father's customary law In *Sundaram* v. *Meenakshi Achi*(1), it was held by SANKARAN NAIR and AYLING, JJ., that the son of a dancing girl who had formed her first connection with the father and lived with him ever since was not entitled to inherit apparently on the ground that she had not severed her connection with the temple and so could not fulfil the duties of a wife relying on the passage in *Krishnayyan* v. *Muttusami*(2), which I have already mentioned. In *Minakshi* v. *Muniandi Panikkar*(3), where however the point did not arise for decision, my learned brother expressed the view, that illegitimate children of Sudras were allowed to inherit because among them continuous concubinage was equivalent to marriage and in the judgment in the present case which I have had the advantage of reading, he has come to the conclusion that the plaintiff is not entitled to succeed because his mother in his opinion was not qualified to marry the plaintiff's father. The question is one of considerable importance and, as the authorities are not uniform, I think it would be better before deciding it to refer to a Full Bench the question whether in the circumstances set out above the plaintiff is entitled to share in the joint family property.

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WALLIS, C.J.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J —This is a suit by the son of a woman belonging to the dancing girls' caste for a share in the property of one Ramaswami Chettiyar who is alleged to have kept the plaintiff's mother as his concubine. There is an alternative claim for maintenance. The first defendant is the son of the deceased by his wedded wife, the third defendant. The defendants denied that the plaintiff was born to Ramaswami Chetty. The Subordinate Judge came to the conclusion that the plaintiff was not born to the deceased and dismissed the suit. In the view he had taken, it was not necessary to consider the question of maintenance. The plaintiff has appealed.

I am unable to agree with the Subordinate Judge regarding the plaintiff's paternity. It is in evidence that Ramaswami

(1) (1912) 16 I C., 787 (2) (1884) I L R., 7 Mad , 407 at pp. 411 and 412.
(3) (1915) I L.R , 38 Mad., 1144 , s c , 27 M.L.J., 353 at p. 360.

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ıan became the concubine of Ramaswami, she was not a in. She was then, according to one account, 23 years of and according to another, 27 years. It was admitted that vas a native of Ariyalur and that she was dedicated as a (दासी) in a temple there. Women of this class soon fall evil ways. Mr. Aiya Ayyar did not seriously argue that ıad not known others before she became Ramaswami's ıbine. The evidence and the probabilities are against it. onclusion is that she had been in the keeping of others, she came to Ramaswami Chetty.

ıe point for decision is whether to a child born to a woman class and of the antecedents I have mentioned, the text of valkya contained in the Mitakshara, Chapter I, section 12, s. The sage says: "Even a son begotten by a Sudra on ale slave, may take a share by the father's choice." s Hindu Law Books, page 426). Manu states the law in tly different way (Chapter IX, section 179) The view Calcutta High Court in *Narain Dhara* v. *Rakhal Gain*(1), the term *dasi* (दासी) in Yajnavalkya's text means only a e slave has not been accepted in Madras. See *Krishnayyan uttusami*(2) and *Brindavana* v. *Radhamani*(3). On the hand, the interpretation of the text by Jimuta Vahana the concubine should be unmarried has been regarded as ectly expressing the meaning of the sage A further limita- that the kept woman must have been a continuous concubine been insisted upon. *Datti Parisi Nayudu* v. *Datti Bangaru iyudu*(4), *Kuppa* v. *Singaravelu*(5), *Karuppannan Chetti* v. *llokam Chetti*(6), *Rahi* v. *Govinda valad Teja*(7), and *alip* v. *Ganpat*(8). The object of these restrictions has een to confine the special rule of inheritance within strict imits, in order that no encouragement beyond what is absolutely within the letter of the law may be afforded. Therefore to enable an illegitimate son to lay claim to a share in his father's property, his mother must be a Sudra, must have been unmarried and must have been kept by the putative father as a continuous

(1) (1876) I.L.R., 1 Calc., 1 (2) (1884) I.L.R., 7 Mad., 407 at p. 412.
(3) (1889) I.L.R., 12 Mad., 72 at p. 86.
(4) (1869) 4 M.H.C.R., 204 (5) (1885) I.L.R., 8 Mad., 325
(6) (1900) I.L.R., 23 Mad., 16 (7) (1875) I.L.R., 1 Bom., 97.
(8) (1886) I.L.R., 8 All., 387

concubine. The question is, whether the plaintiff's next friend satisfies all these requirements. I have come to the conclusion that in two essential particulars she is outside this rule of law.

In the first place, a dancing girl is not a Sudra. Manu in Chapter VIII, section 415, describes a *dasa* or servant thus: "There are servants of seven sorts; one made captive under a standard or in battle, one maintained in consideration of service, one born of a female slave in the house, one sold, or given, or inherited from ancestors, and one enslaved by way of punishment on his inability to pay a large fine." Narada gives 15 sources from which a *dasa* can be drawn. It is not necessary to refer to them as Balambhatta points out that the 15 classes are really amplifications of Manu's seven classes. It need hardly be mentioned that a *dasi* (the feminine of *dasa*) should belong to one of these seven classes. Kulluka Bhatta in commenting upon Manu's text points out that a *dasi* must belong to one of the seven classes. Reference may also be made to the well-known dictionary, the "Sabda-Kalpa Druma." It is clear that a dancing girl does not come under any one of the seven classes These seven classes constitute with those born as such, the Sudra caste. The matter is made very clear by the commentary of Vijnaneswara (Chapter 24 of Acharadhyaya of the Mitakshara entitled "Stri-Sangrahana-Prakarana"). The text of Yajnavalkya prescribes varying degrees of punishment for men and women who go wrong. In sloka 272, the Rishi prescribes a different kind of punishment for a man cohabiting with a *vesya* or dancing girl from that prescribed for one having connection with a *dasi*. In commenting upon the term *dasi*, Vijnaneswara, at the outset of his commentary upon sloka 290 says: "उक्तलक्षणा वर्णस्त्रियो दास्य:" (*Ukta-lakshana varna-striyo dasyah*). (Caste women of the above description are slaves). The *reference here is to the fourteenth prakarana and to the* four castes He then says that prostitutes are common to all men. He is met by the objection that there is nothing in the Shastras to countenance the theory that certain women are common to all men The objector further points out that such women should belong to one of the four castes. It is desirable to quote here the exact language used by the objector · "Again, by becoming a slave, a woman does not cease to be governed by her own personal law, for slavery deprives her of her independence and

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not of the law which otherwise governed her person. Nor are dancing girls common to all men, for besides the four castes and the caste resulting from the union of a male with a female of a lower caste, there is no separate caste in which women are common. If the dancing girls fall within those castes they are, as already stated, not common. If, on the other hand, they belong to a class resulting from the union of males with females of higher castes, they are still farther from being common. When, therefore, people have sexual intercourse with them, they are degraded for repeating a condemned act; and as a degraded (that is, declared an outcaste) person is ordained not to be associated with, dancing girls are not fit to be common to all people." The answer given to these objections is very explicit. The commentator justifies his position that the dancing girl herself is not to be punished as in the case of others, because she commits no sin in following her profession. On the question, whether she belongs to one of the four castes, the answer is in these terms: "What was said therefore that in the absence of any such separate caste, the dancing girls must belong to the caste system by the process of reasoning that, being human beings, they must, as Brahmans and others, belong to the caste system, is wrong, as the caste system does not cover the entire humanity, there being distinct classes, like the son born to a paramour while the husband is living and the widow's son. Hence dancing girls form a separate class which has been in existence from time immemorial, which has resulted from the union of men of superior or equal caste with them (dancing girls) and whose profession is prostitution, and as this class, like that of Brahmans and others, has been well known to people, it is but fit that it should be recognized. Nor is the popular conviction unsupported by authority. It is said in the Skanda Purana 'There was a celestial damsel named Panchachuda and her progeny form the fifth caste of dancing girls.' Therefore, not having the institution of marriage, they incur no sin in having sexual intercourse with men of superior or equal caste, nor are they liable to punishment." I have made these long quotations from the commentary because the statement therein contained is clear and decisive of the question before us. Some commentaries give a different origin to the term *vesya*. It is not necessary to pursue the subject further. My conclusion

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therefore is that a dancing girl does not belong to the Sudra caste.

There has been no direct decision on this point In *Brindavana* v. *Radhamani*(1), Sir ARTHUR COLLINS and Mr Justice MUTTUSWAMI AYYAR left it open "whether dancing girls may not give up their profession and become mothers of illegitimate children within the meaning of the Mitakshara law." Mr. Justice SANKARAN NAIR in his judgment in *Sundram* v *Meenakshi Achi*(2), considered it unnecessary to decide the point. In *Chellammal* v. *Ranganatham Pillai*(3), the question whether a dancing girl can be a continuous concubine as described in the Mitakshara was not considered. *Ananthaya* v *Vishnu*(4) was a case of maintenance. So also was the case decided by the Judicial Committee in *Muttusawmy Jagavera Yettappa Naicker* v *Vencataswara Yettaya*(5) Mr. Aiya Ayyar contended that the term *dasi* has been interpreted by Professor Monier Williams and others to include a dancing girl. This is beside the point. These dancing girls have assumed in Southern India the appellation of *Dasis* and *Devadasis*." Consequently the compiler of the lexicon says that the term is also applicable to dancing girls. This will not assist us in finding out in what sense the Smriti writers used the term

The second point which is equally fatal to the claim of the plaintiff for a share of the inheritance is that his mother was not an unmarried woman It is true that she has not gone through a form of marriage with any particular individual. But as pointed out by Mr. Justice SANKARAN NAIR in *Sundram* v. *Meenakshi Achi*(2), the fact of her having been dedicated to service in a temple renders her unfit for married state. Whether we accept the theory that a woman dedicated in a temple is married to the deity or not, there can be no question that the object of the farce that is gone through is to ensure that her services shall be at the disposal of the temple authorities whenever required. As Sir T MUTTUSWAMI AYYAR, J., points out in *Krishnayyan* v. *Muttusami*(6), in order that the illegitimate offspring may claim a share, she must be "a substitute for a wife." Mr. Justice SANKARAN NAIR expresses the same opinion in the case I have already referred to. In a

(1) (1889) I.L.R., 12 Mad., 72. (2) Appeal No. 50 of 1908
(3) (1911) I.L.R., 34 Mad., 277 (4) (1894) I.L.R., 17 Mad., 160.
(5) (1865) 11 M.I.A., 203. (6) (1884) I.L.R., 7 Mad., 407.

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recent case in which I had to consider the rights of illegitimate children to inherit their mother's Stridhanam, I expressed an opinion that the provision in the Mitakshara for illegitimate offspring contemplates that the continuous cohabitation must be equivalent to marriage. [(See *Minakshi* v. *Muniandi Panikkar*(1)]. I was not then aware of the pronouncement to the same effect by Sir T. MUTTUSWAMI AYYAR and Sir C. SANKARAN NAIR. Mr. Justice CHANDAVARKAR in *Tara* v. *Krishna*(2), had to consider whether a prostitute who leads a life of promiscuous intercourse can be said to be an unmarried woman. The learned Judge came to the conclusion that such a woman was neither a कन्या (*kanya*) (maiden) nor a कुलस्त्री (*kulastri*—married woman) I entirely agree with this conclusion. In Mitakshara, Chapter I, section 12, placitum 3, the author says that the illegitimate son of the three higher castes are not entitled to inheritance. (See also *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*(3) and *Roshan Singh* v. *Balwant Singh*(4). It has further been held that even in the case of Sudras, if the connection is adulterous or incestuous, the son of such a union cannot claim a share in the father's property—*Yettapa Naikar* v. *Venkatasubba Yettia*(5), *Krishnamma* v. *Papa*(6) and *Vencatachella Chetty* v. *Parvatham*(7). The reason of these exclusions is that the woman with whom such intercourse is maintained cannot be a "substitute for a wife." Therefore, unless the woman who is kept as a concubine could have been legally married by the paramour, the son will not be entitled to a share, and a dancing girl, being outside the *varnas*, is not eligible for marriage to persons within the *varnas*. I am aware that it is open to persons belonging to the dancing girls' caste to become married women. It is of constant occurrence in Southern India; but that is only among their own people. If she is once dedicated to a temple, she cannot be married even among her castemen. As Mr. Justice SANKARAN NAIR points out in *Sundram* v. *Meenakshi Achi*(8) a woman thus dedicated puts herself under the power of the temple authorities and is no longer a free agent; and she becomes a साधारणस्त्री (*sadharanastri*) in the language of Vijnaneswara.

(1) (1915) I.L.R., 38 Mad., 1144; s.c., 27 M.L.J., 353 at p. 360.
(2) (1907) I.L.R., 31 Bom., 495.
(3) (1857) 7 M.I.A., 18.
(4) (1899) L.R., 27 I.A., 51.
(5) (1865) 2 M.H.C.R., 293.
(6) (1869) 4 M.H.C.R., 234.
(7) (1875) 8 M.H.C.R., 134.
(8) Appeal No. 56 of 1908.

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Moreover it would be preposterous to speak of such a woman as a 'कन्या' *kanya* or an unmarried woman. In the present case, as I pointed out already, this woman had known other men before she became the concubine of Ramaswami. She was not a *kanya* at the time. I am clearly of opinion that the term "unmarried" *cannot apply to a woman of such antecedents. It is necessary* that the exceptional rule stated in the Mitakshara should be applied with great care and caution The rule, under no circumstances, should be extended beyond what the letter of the text warrants. The interests of public morality and the changes which time has brought about have to be taken into account in applying the texts of Hindu Law It is on that account that certain texts have been regarded as obsolete Fortunately in this case the law as explained by Vijnaneswara and the conditions of the times both favour the non-applicability of Yajnavalkya's text to the class of women known as dancing girls. I have assumed throughout that Ramaswami was a Sudra, as it was not contended before us that a Nattukottai Chetti did not belong to that caste.

For the reasons given by me the claim of the plaintiff for a share in Ramaswami's property is in my opinion unsustainable. He is undoubtedly entitled to maintenance. As the learned Chief Justice *considers it desirable that the question arising for* decision in this case should be referred to the decision of a Full Bench, I agree in the order proposed.

K. N. Aiya for the appellant.—The order of reference by SESHAGIRI AYYAR, J., contains the arguments which I have to meet. *That order is based on two grounds, viz.* (1) a dancing girl is not a Sudra woman and (2) she is not an unmarried woman or in other words she does not possess all the qualifications for becoming a lawful wife.

[WALLIS, C.J.—That judgment assumes she must have all qualifications *for marriage Where do you get this from?*]

From some expressions used by MUTTUSWAMI AYYAR, J., in *Krishnayyan* v. *Muttusami*(1).

The first ground I have referred to is not raised in the lower Court. As a matter of fact dancing girl holds a respectable

(1) (1884) I.L.R., 7 Mad., 407 at p. 410.

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position, even a higher position than a Sudra. But no evidence is taken on this point.

[SADASIVA AYYAR, J.—I do not know if it is necessary to go into old history. Have you any cases to show to what caste she belongs ?]

I shall show that she holds a respectable position. This question has never been raised before. The text which gives the right of inheritance to illegitimate son of Sudra is Mitakshara Chapter I, section 12 जातोपि दास्यां शूद्रेण the word used is दासी *dasi*. The words are "born to a dasi by a Sudra". This text has been considered in *Yettappa Naicker* v. *Vencataswara Yettaya*(1) and *Krishnamma* v. *Papa*(2). In the latter case the mother of the illegitimate son belonged to the dancing girl class and was dedicated as a *dasi*; but this point was never raised.

[AYLING, J.—What was decided in that case ?]

As the estate was impartible the illegitimate son could not get a share.

[WALLIS, C.J.—These cases go on the old idea that a dasi is a sort of slave in the house.]

[SADASIVA AYYAR, J.—*Dasi* दासी means a Sudra woman in Mitakshara.]

In *Yettapa Naikar* v. *Venkatasubha Yettia*(3) and *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya*(1), the plaintiff's mother was a dancing girl. The position of woman as one belonging to the dancing girl's class was considered valuable only for determining whether the connection was casual or continuous. In *Ananthaya* v. *Vishnu*(4) an illegitimate son of a Brahman by a concubine was held entitled to maintenance.

[WALLIS, C.J.—That case is one of maintenance and not of inheritance. In *Brindavana* v. *Radhamani*(5), the present question did not arise exactly. There the child was born to a Sudra woman by a Kshatriya.]

Sundaram v. *Meenakshi Achi*(6) is against me. But it follows *Krishnayyan* v. *Muttusami*(7)

(1) (1865) 12 M I A, 203 at p. 204 (2) (1865) 2 M.H.C.R., 293

(3) (1865) 2 M.H.C.R., 203. (4) (1894) I.L.R., 17 Mad., 160 at p. 162.

(5) (1889) I.L.R., 12 Mad., 72 (6) (1912) 16 I.C., 787

(7) (1884) I.L.R., 7 Mad., 407 at p. 410.

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need not go over the ground again. The order of SESH AYYAR, J., proceeds upon the ground that the illegitimate son Sudra is not entitled to inherit unless the mother was comp to marry the father, and he holds that the mother in this was not competent on two grounds that she was not a Sudra not an unmarried woman. After hearing the question fu argued we think it is unnecessary in our opinion to con what are the essentials of a marriage among Sudras, becaus are not satisfied, that this is the test to be applied. To sa the texts it must be shown that the mother is a *dasi*, not tha is qualified to become a wife. As regards her being unmar woman the Dayabhaga no doubt mentions this, but this text been interpreted as meaning not married to the father of child—*Vencatachella Chetty* v. *Parvatham*(1), *Karuppan Chetti* v. *Bulokam Chetti*(2), *Annayyan* v. *Chinnan*(3) and *Pa Krishna Rao* v. *Padala Kumarajamma*(4)— and this is how passage was understood by Medatithi. However this may we think that the plaintiff's mother who followed the profess of a dancing girl was not a married woman. The only ot question then is, was she a *dasi*? *Dasi* is the feminine of *d* which according to MacDonnell's Vedic Index, volume I, p 356, volume II, page 388 at first meant 'an enemy' and afterwards applied to conquered enemies reduced to a serv condition. The word *dasa* was long applied to this class, term Sudra being introduced later, and even to this day *dasa* a *dasi* are in use in some parts of India as suffixes to Sudra nan in the same way as Ayyar, etc., in the case of Brahmin names.

Professor Jolly in the Tagore lectures for 1883 at page 1 draws attention to the fact that Medatithi, who flourished befo Vijnaneswara, understood the text as meaning the son of a Sud by a woman neither married to him nor authorized to raise o spring (according to the custom of Niyoga). Professor Jolly al refers to the fact that the term *dasi* was also understood by th commentators as meaning a prostitute, citing the Calcutta editi of the second part of the Mitakshara where the term *dasi* in passage in Yajnavalkya is explained as meaning a lewd marrie woman or prostitute. He also alludes to the common use of th

(1) (1875) 8 M.H.C.R., 143. (2) (1900) I.L.R., 23 Mad., 16.
(3) (1910) I.L.R., 33 Mad., 366. (4) (1912) 15 I.C., 340

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word in South India to denote the consecrated female dancers attached to temples. In these circumstances it seems difficult to say that women of this class are not *dasis* within the meaning of the texts. We are not satisfied that the passage of the Mitakshara cited by SESHAGIRI AYYAR, J., is sufficient authority for holding dancing girls to form a separate caste, though this again does not appear to be very material, as it cannot be said that according to Hindu ideas unions of this kind are regarded more unfavourably than unions founded on the seduction of an unmarried Hindu woman not belonging to this class. It has not been shown that in practice the offspring of such unions which are very common have been regarded as having less claim to inherit than the children of concubines who had not been dancing girls.

In *Brindavana* v. *Radhamani*(1), the learned Judges in their observations at page 87, though they do not decide the point, were apparently inclined to hold that a dancing girl might become the mother of an illegitimate child within the meaning of the Mitakshara law. The learned Judges who decided *Sundaram* v. *Meenakshi Achi*(2), expressly reserved this point, and their decision may possibly be explained on the ground that a woman who continued to do service in the temple could not be regarded as an exclusive and continuous concubine. The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality. The partial rights of succession which are conferred upon illegitimate children under Hindu law may be matter for regret, but we should not, in my opinion, be justified in imposing for this reason fresh restrictions which are not shown to be supported by authority or in conformity with the practice of the community.

AYLING, J.

AYLING, J.—I agree and need only add a few words with reference to a case relied on by the respondent's vakil, *Sundaram* v. *Menakshi Achi*(2), to the decision of which I was a party. The circumstances of that case, and in particular the fact that the plaintiff's mother while in the keeping of his father, did not give

(1) (1884) I.L.R., 12 Mad., 72. (2) (1912) 16 I.C., 767.

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up her profession as a dancing girl attached to the temple made it difficult to say that the finding of the original Court that she was not kept by him *exclusively* was wrong. Speaking for myself this consideration strongly affected the decision of the case; and I do not think the judgment of my learned brother, SANKARAN NAIR, J., in which I concurred, should be treated as laying down any general principle of restriction of the right of inheritance o an illegitimate son of Sudra.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The learned Chief Justice in his referring order has summarised the rulings in all the important cases on the question of the right of the illegitimate son of a Sudra to claim a share in paternal property. I may state shortly that I respectfully adopt the opinion of Sir S. SUBRAHMANYA AYYAR, J, in *Karuppannan Chetti* v. *Bulokam Chetti*(1), that the son of a Sudra woman continuously kept by a Sudra father is entitled to obtain a full share in the father's property at his father's choice during the father's life-time and to obtain a half share with the legitimate sons of the father after the father's death if the connection between his father and his mother was neither adulterous nor incestuous. I might be permitted to state that that decision was given in Second Appeal in a suit which was decided by myself as District Munsif. I was inclined to hold in that case (decided so long ago as in 1896 or 1897) that the son of a Sudra male born of a permanent female concubine of the Sudra caste is, strictly speaking, not an illegitimate son but a legitimate औरस *aurasa* son born of a *Gandharva* marriage. In the very recent case *Minakshi* v. *Muniandi Panikkar*(2), my learned brother, SESHAGIRI AYYAR, J., says at page 360: "I am of opinion that this treatment" (that is, the favourable treatment of illegitimate sons of Sudras as regards right to share in paternal and ancestral property) "was due to the idea that marriage among them (Sudras) was not so strictly formal and ceremonial as in the case of the higher classes. *Continuous concubinage was regarded as equivalent to marriage* although the children of this irregular union did not rank equally with those with whose mother there was a formal marriage."

As regards the translation of the word "*dasi*" as "female slave" in the text of Yajnavalkya as distinguished from an

(1) (1900) I.L.R., 23 Mad., 16.
(2) (1915) I.L.R., 38 Mad. 1144; s.c., 27 M.L.J., 353 *et seq*.

ordinary Sudra female, that translation has not been accepted by the Madras and Bombay High Courts and very rightly, if I may say so with respect. *Dasa*, according to Apte's Sanskrit Dictionary, has got also the following meanings: a servant in general, a Sudra, a man of the fourth caste, the caste-title of a Sudra. *Dasi* has got the meaning of a "female servant." The Sudra caste was formerly the servant caste. The members belonging to the Sudra caste even in the old days ought not to be called "slaves" as they had very substantial rights against their masters; see also *Chatturbhuj Patnaik* v. *Krishna Chandra Patnaik*(1), as to the meanings of "*dasa*," "*dasi*" and "*dasi-putra*." See also Manu, Chapter VIII, Slokas 413 and 441 as to a Sudra being *by his natural qualities* an irredeemable servant or *Dasa* of the higher castes.

When the connection between a Sudra male and a Sudra female begins in mutual love and they live together as husband and wife continuously by mutual understanding or agreement, I held long ago that such connection was created by the *Gandharva* form of marriage. Mr. B. Sitarama Rao, the learned vakil for the third respondent suggested that the *Gandharva form of* marriage was never legal for Sudras. I am unable to accept the suggestion. A reference to Manu, Chapter III, Slokas 23 to 25 would indicate that the *Gandharva* and *Asura* forms were considered as the most proper forms of marriage for the servant class by the majority of the old lawyers though, speaking for himself, Manu would treat the *Asura* form as illegal even for Sudras and leave the *Gandharva* form alone as the approved form. If then "continuous concubinage is equivalent to marriage" among Sudras, it seems difficult to hold in strict logic that the son born of such a marriage is an illegitimate son. But my opinion that such a son is, according to the Shastras, an *aurasa* (औरस) legitimate son cannot now be sustained in a Court of law in the face of the decisions which describe such a son as an illegitimate son. I therefore concur respectfully with the judgment of My Lord the Chief Justice just now pronounced that according to the preponderating weight of the case-law the son by a permanent concubine while he is an illegitimate son and not a legitimate son is entitled to get his appropriate share after the father's death provided the

(1) (1912) 17 C.W.N., 442.

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connection between his father and his mother was not incestuous or adulterous and that his said right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged. I respectfully dissent from the decision in *Annayyan* v. *Chinnan*(1), which holds the contrary. When the legislature itself treats the marriage of all widows (including a Brahmin widow) as lawful, it seems to me rather difficult to hold that the permanent connection between a Sudra widow and a Sudra male is equivalent to an incestuous and adulterous connection because in the *sub-caste of* the lady, remarriage is not approved of by custom and to hold in consequence that the son born of such a connection is not entitled to a share. I am for the same reason not prepared to follow the decision in *Padala Krishna Rao* v. *Padala Kumarajamma*(2), which goes even further than the decision in *Annayyan* v. *Chinnan*(1).

Mr. B. Sitharama Rao argued for imposing still another restriction that the mother must have been a virgin when she became the permanent concubine of the plaintiff's father. There is nothing in the Hindu Law texts to support that contention. The well-known text of Manu that the *panigrahanika-mantras* can be pronounced only at the marriages of virgins has no relevancy in this connection as the recitation of Vedic Mantras were neither necessary nor permitted in the conduct of marriages among Sudras

The next question is whether the plaintiff's father was a Sudra and the plaintiff's mother also was a Sudra woman, it being not denied that their connection was neither adulterous nor incestuous. It seems not to have been contested in the lower Courts, and it was not contested before us, that a Nattukottai Chetty belongs to the Sudra caste. No doubt, according to very learned Sanskrit scholars like Pandit A. Mahadeva Sastri and the late Diwan Bahadur Raghunatha Rao, a Nattukottai Chetty who belongs to a caste whose profession is *not menial service* but trading *enterprise and money-lending* ought not to be called a Sudra. In fact, it sounds very grotesque now-a-days in the ears of many cultured Hindus to

(1) (1910) I.L.R., 33 Mad., 366. (2) (1912) 15 I.C., 310.

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call that community Sudras and not Vaisyas. But, as my learned brother SESHAGIRI AYYAR, J., said in *Muthukaruppa Pillai* v. *Kanakammal*(1), the Sastras cannot go against "usage" and according to custom and the consciousness of the vast majority of the Hindus, Nattukottai Chettis are Sudras. Hence they must be considered to belong to the Sudra caste.

As regards the dancing girl caste, in Palni, Coimbatore and other places, they are usually known as belonging to the *Kaikola Mudali* caste. Of course, this *Kaikola Mudali* caste should not be confounded with the respectable caste of high class Mudaliyars. But still *Kaikola Mudalis* are always recognized by usage as belonging to the Sudra caste and though many of the females of the caste take to the profession of the dancing girls, a respectable proportion are *kulastris*. Other sub-sections of the dancing girl caste call themselves *Kavarais* (again not to be confounded with the high class *Kavarais*) and the Telugu dancing girls call themselves *Sanis*. Permanent concubinage of females belonging to these castes with males belonging to the several respectable sub-divisions of the Sudra caste is not very uncommon and the children of such unions after a few years (if the father is a very respectable and influential man) or after a few generations (if the descendants continue to lead respectable lives) are quietly incorporated into the father's respectable Sudra sub-caste, the progeny calling themselves Mudaliyars, Nayudus, Pillais and so on. Such an elevation to respectability is not at all opposed to the genius of the Hindu Social polity. Manu says in chapter X· "Should the tribe sprung from a Brahman by a Sudra woman reproduce a succession of children by the marriages of its women with other Brahmans, the low tribe shall be raised to the highest in the seventh generation."

"As the son of a Sudra may thus attain the rank of a Brahman and as the son of a Brahman may sink to a level with Sudras, even so must it be with him who springs from a Kshatriya, even so with him who was born of a Vaisya."

"He who was begotten by an exalted man on a base woman may, by his good acts, become respectable."

It is, however, said that these dancing girl *dasis* ought not to be classed as Sudras but as belonging to a fifth caste, and reliance is placed upon the commentary of Vijnaneswara in the

(1) (1914) 16 M.L.T., 657, s.c., 26 M.L.J., 587.

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Mitakshara) on the 290th verse of Yajnavalkya. Chapter XXIV in which the verse occurs relates to the subject of illicit intercourse with women and has nothing to do with the law relating to marriage or legitimacy or caste except in a very remote and indirect way. (Colebrooke did not translate the later portions of the Mitakshara beginning with chapter IX of the Vyavahara Adhyaya of Yajnavalkya as they deal with those portions of the Hindu Law which need not and in many cases ought not to be applied by the British Courts of Justice.) A free translation of this 290th verse of Yajnavalkya is: "In the case of women who are the house-born servants of another or the kept mistresses of another, even though they are fit for intercourse" (that is, though there is no other objection to an intercourse with them) "the man who has had such an intercourse shall be fined ten panas." It is clear to my mind that Yajnavalkya when he uses the expression "fit for intercourse" (गम्य *gamya* in Sanskrit) means that the intercourse is not prohibited as adulterous or incestuous, etc. But the Mitakshara proceeds to invent an objector who says that as every intercourse with even an unmarried woman is immoral whether she belongs to the same caste or a lower caste, or an *anuloma* caste or a *pratiloma* caste, intercourse can never be permissible, that is, the woman cannot be "fit for intercourse." Vijnaneswara answers by saying that punishment by legal tribunals does not exist in the case of prostitutes who are not under the guardianship of the father or other guardian or in the case of an unmarried woman, who, though not a prostitute, is not the kept mistress or *Dasi* of one particular man. And he says that only a private *prayaschittam* for immorality is prescribed in such cases and not punishment (दण्ड *danda*) by the king and his tribunals. "For having intercourse with brutes or prostitutes, the *prajapatya* expiation is ordained" Then he says that though originally there were only four castes or *varnas*, there have sprung up by the birth of illegitimate children among the castes, persons like *kundas* and *golakas* and their descendants, a very numerous class born of illicit connections of women with men of their own caste or of superior castes. This shows that a prostitute by profession born in any of the four castes was called *vesya* वेश्या. Then he refers to the Skandapurana and to the fanciful story of ethereal nymphs or *Apsarasas* called *Panchachudas* and their progeny who lead the life of prostitutes (but prostitution only with *males*

of their own birth-caste or with people of superior caste) and all these may be called a fifth caste. As far as I could understand the Mitakshara, the commentator does not intend to say that *vesyas* are not human beings. He might have meant that prostitutes being the progeny of illicit connections in all *varnas* may be fancifully styled to be the descendants of the *Apsarasas* called *Panchachudas,* for immediately afterwards he says that a *vesya* might have lawful connection with a man of an equal or superior caste. It seems to be the same sort of allegorical description which says that the four castes were born from and even now from the limbs and organs of the *Prajapati Purusha.* It is well known that the original Skandapurana has been so much expanded by the addition of fanciful stories (including many recent *Sthala-mahatmyams*) that it is very difficult to say of any passage alleged to be found therein that it is undoubtedly genuine. I shall now say a few words on the value to be given to such passages when the community has not adopted the view enunciated in those passages. The Privy Council has declared that "under the Hindu system of the law, clear proof of usage will outweigh the written text of the law." In one recent case, the following passage occurs: "I would say, as a judge who is bound to follow the authority of the Privy Council, that the rules of the commentators must be discarded, if opposed to custom." "Several instances might be cited to show that practices which were valid according to the ancient books are not legally valid now". for example *Niyoga—The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*(1). Mr. Justice BHASHYAM AYYANGAR was of opinion that the rule as to lameness being a bar to inheritance had become obsolete see *Venkata Subba Rao* v. *Purushottam*(2). The same learned Judge in *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(3) said that "this branch of the law relating to '*putrika-putra*' is now obsolete." So also it has been held that the rule as to impartibility of waters found in the Mitakshara has become obsolete. Again ABDUR RAHIM, J., in *Visvanathaswamy Naicker* v. *Kamu Ammal*(4) said, "supposing for argument's sake that the *Gandharva* form of marriage would according to the ancient texts, be permissible among the Sudras, I am of opinion that so far as this caste is concerned, it must upon the evidence in the case be held to be

(1) (1868) 12 M.I.A., 397 at p. 441 (2) (1903) I.L.R., 26 Mad., 133.
(3) (1904) I.L.R., 27 Mad., 300 at p. 311. (4) (1913) 24 M.L.J., 271 at p. 282.

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obsolete and no longer recognised as valid. It has been strongly contended that if ancient Hindu Law texts sanction this form of marriage we must hold that it is valid. But I am not inclined to accept that position. If I find that a certain caste among the Hindus has long given up this form of marriage and this is shown by their consistently adopting other more regular forms, I do not think that we are still obliged to recognise its validity in that caste." It is on account of such considerations that, as I said before, I felt obliged, sitting as a Judge, not to press my view that the son born of a permanent concubine to a Sudra is a legitimate son On similar grounds I think that it is now difficult to hold that the dancing girl caste in the present day is not a sub-division of the Sudra caste, notwithstanding this fanciful story of the Skandapurana, used for a particular dialectical purpose by Vijnaneswara in connection with the question of punishment by the king for intercourse with a public prostitute. (Punishment by the king is *Danda*, while penance for the sin is *Prayaschitta* and the distinction is clearly made by Vijnaneswara.) I respectfully adopt the opinion of SANKARAN NAIR, J., that all those Hindu castes which are not proved to be twice-born must be treated as Sudras where it is admitted that they are not "untouchables." See *Muthusami Mudaliar* v. *Masilamani*(1). Persons belonging to the dancing girls' caste are freely allowed into temples and Brahman houses and being caste Hindus, not belonging to any of the three twice-born castes, must, according to the clear consciousness of the vast majority of the Hindu community, be deemed to belong to the Sudra caste Even if it be held that the Mitakshara does intend to treat a particular class of prostitutes who claimed to be the progeny of *Apsarasas* (called *Panchachudas*) as not belonging to the Sudra caste, but to a fifth *varna* there is nothing to show that the dancing girl caste to which the plaintiff's mother belonged was not derived from the Sudra caste but claimed to be descended from these *Apsarasas*.

Coming to the decision in *Sundram* v. *Meenakshi Achi*(2) quoted by the third respondent's vakil, that decision must be deemed to have proceeded on the facts of that particular case as pointed out by my learned brother, AYLING, J., in the judgment just now delivered by him. I do not think that in a different case where slightly different (though similar) facts are established the same

(1) (1910) I.L.R., 33 Mad., 342. (2) Appeal No. 66 of 1906.

conclusion against the existence of the relationship of permanent concubinage is bound to be arrived at. A man who allows his permanent concubine to serve as a domestic servant for wages in a respectable household cannot, in my opinion, be held to have thereby destroyed the permanency of the connection between him and his said concubine any more than a husband who so allows his wife weakens the matrimonial relationship between himself and his wife.

In the result, I would answer the reference by saying that the plaintiff is entitled to a share in the joint family property left by his father.

O.M.N.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Seshagiri Ayyar.

SOUNDARARAJAN (MINOR BY HIS MOTHER AND NEXT FRIEND KANNAMMAL) (PLAINTIFF), APPELLANT,

v.

T. R. M. A. R. R. M. ARUNACHALAM CHETTY (DECEASED AND TWO OTHERS) (DEFENDANTS), RESPONDENTS.*

1915. July 19 and 26, September 27, 28 and 29 and October 14.

Hindu Law—Joint family—Partition, suit for, by one member, whether effects separation.

A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition

Suraj Narain v. Iqbal Narain (1913) I.L.R., 35 All., 80 at p. 87 (P.C.), followed.

APPEAL in *forma pauperis* against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 59 of 1910.

The facts of this case are clearly set out in the Order of Reference to the Full Bench.

K. N. Aiya for the appellant.

The second respondent did not appear in person nor by pleader.

S. Srinivasa Ayyangar and *B. Sitarama Rao* for the third respondent.

This appeal came on for hearing before WALLIS, C.J., AND SESHAGIRI AYYAR, J., who made the following

* Appeal No. 74 of 1911 (?).

ORDER OF REFERENCE TO A FULL BENCH.

This was a suit by a person alleging himself to be an illegitimate son of one Ramaswami Chettiar for partition against the legitimate son of his father. The Subordinate Judge held that the paternity of the plaintiff was not proved and dismissed the suit. On appeal, we came to the conclusion that the plaintiff was the son of Ramaswami Chettiar. On a reference to the Full Bench, it was decided that he is entitled to the share of an illegitimate son in his father's property. See *Soundararajan v. Arunachalam Chetty*—I(1). While the appeal was pending in this Court, the legitimate son died unmarried. His mother was brought on the record as his legal representative.

It is now contended for the appellant that he is entitled to the whole of the property of Ramaswami Chettiar by survivorship. The respondent's vakil argues that by the presentation of the plaint for partition, the plaintiff became a divided member and that consequently he is not entitled to succeed to his legitimate brother by survivorship. He has also raised a preliminary objection on the ground that as the suit was framed for partition, it ought not to be converted into one for sole possession. We see no force in this latter contention. The claim of the plaintiff was to establish his status as an illegitimate son and to obtain a share in his father's property on that footing. The claim for partition is consequent on the declaration of status. The relief claiming sole possession is similarly consequential. This objection must be overruled. On the main question of survivorship, the observations of the Judicial Committee in *Suraj Narain v. Iqbal Narain*(2) are relied on by the respondent. Very recently SANKARAN NAIR, J., in *Pothi v. Nagana*(3) held that these observations clearly mean "that it is open to a member of an undivided family governed by the Mitakshara Law to effect a separation between himself and the other members of the family by a declaration to that effect made to the other members." It is accordingly contended that the plaint in this suit which was served on the defendant was a declaration by the plaintiff of his intention to separate himself from his undivided brother, and effected a partition. This view is not consistent with the decisions of this Court in *Subramanyam Maistri v. Narasimhulu Maistri*(4) and *Thandayuthapani Kangiar v. Ragunatha*

(1) (1916) I.L.R., 39 Mad., 159. (2) (1913) I.L.R., 35 All., 80 (P.C.).
(3) (1915) 25 M.L.J., 423. (4) (1902) I.L.R., 25 Mad., 149 at p. 150.

Kangiar(1) or with the decisions of some of the other High Courts. *Pothi* v. *Nagana*(2) is now the subject of a Letters Patent Appeal, but as the other learned Judge disposed of the case on other grounds, it may not be necessary to decide the point in that case, and as the question is one of great importance we have decided to refer it to a Full Bench. We, therefore, refer the question, "whether a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition."

A. Krishnaswami Ayyar for *K. N. Aiya* for the appellant.—A mere unilateral declaration of an intention to divide by a member of a joint Hindu family not acquiesced in by the other members is not enough to effect partition. This is what is laid down as law in *Appovier v Rama Subba Aiyan*(3) and this has not been altered since then. This follows from the definition of partition in the Mitakshara and in the Viramitrodaya. Partition is the severance of interest. The only authority against this view is what is contained in the Vyavahara Mayukha. The difference between the Mayukha and the Mitakshara in this respect is pointed out by Mandlik.

I would also say that with regard to the principle that is to be applied there is no difference between the English law and the Indian law. So far as English law is concerned it is settled that a unilateral declaration will not bring about a severance of tenancy.

Any other view will be inconsistent with law as administered in Madras and Calcutta. Take the case of alienation. Except on the basis of my arguments it is impossible to reconcile the view that an alienee's title is only an equitable title. He has no legal right. We have the Privy Council's view that alienation is a new doctrine inconsistent with the true theory of the Mitakshara Law.

Take the case of gifts. A gift is invalid without the concurrence of other members. A person cannot will away his share in the joint property except with the consent of the other coparceners. With these remarks in view your Lordships have to hold whether *Suraj Narain* v. *Iqbal Narain*(4) lays down the correct law.

Even in Calcutta there is no long course of decisions. There is only the *dictum* of Mr. Justice GARTH in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(5).

(1) (1912) I.L.R., 35 Mad., 239
(2) (1915) 28 M.L.J., 423
(3) (1866) 11 M.I.A. 75
(4) (1914) I.L.R., 35 All., 80 (P.C.)
(5) (1880) I.L.R., 5 Calc., 148

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says *that the members became divided after the preliminary decree "if not before."* These words refer only to the time when the other co-parcener agreed in the witness box to have his share also. *Joy Narain Giri* v. *Girish Chunder Myti*(1) treats only the decree as effecting a partition.

[SADASIVA AYYAR, J.—If so, why did the Privy Council allow mesne profits as from the date of the plaint?]

As he was excluded entirely from participation, not because he was severed in status. *Balkishen Das* v. *Ram Narain Sahu*(2) restates *Appovier* v. *Rama Subba Aiyan*(3), and *Ram Pershad Singh* v. *Lakhpati Koer*(4) is a similar case. In *Parbati* v. *Naunihal Singh*(5) although there was an unambiguous joint petition to the revenue authorities expressing the intention of each to enjoy the properties separately in equal shares, the Board did not rest its decision on the unambiguous declaration, but rested its decision that there was a partition on the footing of an agreement which their Lordships take elaborate trouble to find. In *Suraj Narain* v. *Iqbal Narain*(6) the Privy Council do not decide the point. They only say that if there was an unambiguous declaration by one member to separate, it may amount to separation but as there was no such declaration they dismissed the contention.

The Madras cases also lay down that a severance of the *family can only be by mutual agreement or by decree of the Court*. In *Sangili* v *Mookan*(7) there was a fluctuation of shares owing to the death of one member pending an appeal in a partition suit. In *Subbaraya Mudali* v. *Manika Mudali*(8), it is observed that if death occurs before decree, survivorship takes effect but that after decree heirship comes in. Their Lordships say that a decree is equal to mutual consent in effecting partition. In *Sudarsanam Maistri* v *Narasimhulu Maistri*(9) SIR BHASHYAM AYYANGAR *says that simple declaration by one is* not sufficient. In *Thandayuthapani Kangiar* v. *Raghunatha Kangiar*(10) it is laid down that partition may be effected by

(1) (1879) I.L.R., 4 Calc., 434 (P.C.), s.c., 5 I.A., 228.
(2) (1903) I.L.R., 30 Calc., 738 (P.C.)
(3) (1866) 11 M.I.A., 75.
(4) (1903) I.L.R., 30 Calc., 231 (P.C.), s.c., 30 I.A., 1.
(5) (1909) I.L.R., 31 All., 412 at pp. 413 and 421, s.c., 36 I.A., 71.
(6) (1913) I.L.R., 35 All., 80 (P.C.)
(7) (1893) I.L.R., 16 Mad., 350.
(8) (1896) I.L.R., 19 Mad., 345 at p. 346.
(9) (1902) I.L.R., 25 Mad., 149 at p. 154.
(10) (1912) I.L.R., 35 Mad., 239 at p. 240.

consent and in proper cases by decree. In *Balakrishna Mudaliar* v. *Raju Mudaliar*(1) there was an agreement to divide. See also the passing observation in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(2).

Even in Bombay where the Mayukha prevails, the decisions are in my favour. In *Ramkrishna Gopal* v. *Vithu Shivaji*(3) it is said that agreement express or tacit is the basis of partition. *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar*(4) is also to the same effect.

[SESHAGIRI AYYAR, J., refers to *Babaji Parshram* v. *Kashibai*(5)].

In England, Lord HARDWICKE in *Partriche* v. *Powlet*(6) decided that mere unilateral declaration is not sufficient to effect severance. See also Freeman on Cotenancy, page 83, section 31. Halsbury's Laws of England, volume 24, page 204. *In re Wilks; Child* v. *Bulmer*(7) decides that even a suit does not effect severance and that a decree alone does. *Nanjaya Mudali* v. *Shanmuga Mudali*(8) decides that alienation by one member does not sever the joint tenure in the family and that the alienee has only an equity. Similar is the case in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(9). See also *Ganesh Row* v. *Tulja Ram Row*(10). If even a purchase for value will have only an equity and will have to work out his right by means of a suit for partition there is no higher equity in favour of a member who has not alienated. Any other view will upset all previous decisions relating to the validity of one member's gift or will, all of which have been held to be invalid.

S. Srinivasa Ayyangar for the respondent—Mere unilateral declaration is sufficient to effect partition. The Hindu Law does not say that a partition could be effected only by mutual agreement. Exclusion, attachment, alienation or declaration would do. See Viramitrodaya, chapter 2, placitum 5, page 311, volume II, Setlur.

[SESHAGIRI AYYAR, J.—That simply says that even at the desire of one member partition can be effected.]

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(1) (1915) M W N, 17 (2) (1914) 27 M L J, 409 at p. 411.
(3) (1873) 10 Bom H C R., 411 (4) (1891) I L R, 15 Bom., 201 at p 205
(5) (1880) I.L.R., 4 Bom., 157 (6) (1740) 12 I L.R., 54, s c 26 E. R., 430.
(7) (1891) 3 Ch., 59
(8) (1914) 15 M L T, 186, s.c., 26 M L.J., 576
(9) (1914) 27 M.L.J., 409. (10) (1914) 23 M L.J., 400

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If the consent of others is necessary for partition, then why should a suit for partition at the instance of one member be allowed? This shows that the right does not stand on contract or consent. If one irrevocably says: "I relinquish my right of survivorship in the properties in your possession, I become divided from you", it effects a severance. We must distinguish between the effect of a partition made and how to effect a partition.

Sarasvati Vilasa, placitum 28, states that mere intention of one to divide is sufficient to create severance. The passage is not confined to partition of religious duties in the case of those who have no wealth to divide. In the case of people having wealth, partition of wealth has to precede partition of religious duties. See *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1) and Sarasvati Vilasa, page 121 (Setlur).

[WALLIS, C J.—Then what is the meaning of the words "whether with or without others' consent" in placitum 28 of Sarasvati Vilasa? That shows no consent is necessary where there is no wealth but that consent is necessary in the case of a partition of the wealthy]

No—those words govern both cases. Refers to Viramitrodaya (volume 2, page 311—Setlur). Mandlik's Hindu Law, page 38, dealing with Vyavahara Mayukha is very clear on the sufficiency of a single man's declaration to effect partition. *Suraj Narain* v. *Iqbal Narain*(2) is clearly in my favour. It is not an *obiter dictum*.

The cases quoted on the other side can be distinguished. *Madho Parshad* v. *Mehrban Singh*(3)—a Bengal case says that an attachment of one member's share effects a severance. In *Joy Narain Giri* v. *Girish Chunder Myti*(4) the Privy Council say that the conduct of one member in expelling another would amount to partition. It is this case that made the Privy Council lay down the law in *Suraj Narain* v. *Iqbal Narain*(2). In *Appovier* v. *Rama Subba Aiyan*(5), the Privy Council while saying that an agreement may bring about severance do not mean that there is no other mode of severance. The view laid down in *Sudarsanam*

(1) (1902) I.L.R., 25 Mad., 149 at p. 154.
(2) (1913) I.L.R., 35 All., 80 at p. 81 (P.C.).
(3) (1891) I.L.R., 18 Calc., 157 (P.C).
(4) (1878) I.L.R., 4 Calc., 434 (P.C); s.c. 5 I A, 228.
(5) (1866) 11 M.I.A., 75.

Maistri v. *Narasimhulu Maistri*(1) is not sustainable. See *Thangavelu Pillai* v. *Doraisami Pillai*(2). *Tej Protap Singh* v. *Champa Kalee Koer*(3) does not touch the present question.

Alienation of a member's share effects a severance. See *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(4). *Chinnu Pillai* v. *Kalimuthu Chetti*(5) and *Subba Row* v *Ananthanarayana Aiyar*(6). *Ram Chunder Dutt* v. *Chunder Coomar Mundul*(7) holds that alienation severs joint tenancy. For cases of exclusion, attachment, conversion, etc., bringing about severance, see *Joy Narain Giri* v. *Girish Chunder Myti*(8), *Suraj Bunsi Koer* v. *Sheo Persad Singh*(9), *Madho Parshad* v. *Mehrban Singh*(10) and *Kulada Prosad Pandey* v. *Haripada Chatterjee*(11). A father can of his own accord effect a division among his sons—see Mitakshara. Then it follows that division by consent is only one mode of partition. The following cases were also referred to:— *Bala Krishna Goswami* v. *Gopal Krishna Goswami*(12), *Sangili* v. *Mookan*(13), *Subbaraya Mudali* v. *Manika Mudali*(14), *Thandayuthapani Kangiar* v. *Ragunatha Kangiar*(15) and *In re Wilks; Child* v. *Bulmer*(16). The Privy Council decision in *Suraj Narain* v. *Iqbal Narain*(17) concludes the matter. *Thandayuthapani Kangiar* v. *Ragunatha Kangiar*(15) is no longer good law.

This REFERENCE coming on for hearing, the Court expressed the following OPINION:—

WALLIS, C.J.—The arguments in favour of a negative answer to the reference have been very ably presented by Mr. A. Krishnaswami Ayyar, but after all it comes back to this, what is the effect to be given to the following passage in the judgment of their Lordships of the Judicial Committee in *Suraj Narain* v. *Iqbal Narain*(17): "The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad* v. *Mussumat Radha Beeby*(18) and the well known case *Apporier* v. *Rama Subba Aiyan*(19).

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(1) (1902) I.L.R., 25, Mad., 149 at p. 156. (2) (1914) 27 M.L.J., 272.
(3) (1886) I.L.R., 12 Calc., 96 (4) (1902) I.L.R., 25 Mad., 690
(5) (1912) I.L.R., 35 Mad., 47. (6) (1912) 23 M.L.J., 64.
(7) (1869) 13 M.I.A., 181 (8) (1879) I.L.R., 4 Calc., 434 (P.C.), s.c. 5 I.A., 228.
(9) (1880) I.L.R., 5 Calc., 148
(10) (1891) I.L.R., 18 Calc., 157 (P.C.) (11) (1913) I.L.R., 40 Calc., 407.
(12) (1907) 5 C.L.J., 417. (13) (1893) I.L.R., 16 Mad., 350.
(14) (1886) I.L.R., 17 Mad., 345 (15) (1912) I.L.R., 35 Mad., 210
(16) (1891) 3 Ch., 59. (17) (1913) I.L.R., 35 All., 80 at p. 84 (P.C.).
(18) (1846) 4 M.I.A., 137 (19) (1866) 11 M.I.A., 75.

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Narain v. *Iqbal Narain*(1), that no separation of the plaintiff in status, which will affect what is loosely called the right of survivorship, takes place by the mere fact of the suit for partition and that it is only the decree of the Court passed in the suit which affects such status. In *Subbaraya Mudali* v. *Manika Mudali*(2), there is the following *obiter dictum* :—"The right to continue a suit for partition after the death of the plaintiff would, of course, not devolve on his widow or other heir, not being a coparcener of the defendant, because, immediately on the death happening before the decree, the right of survivorship would take effect." In *Sudarsanam Maistri* v. *Narasimhulu Maistri*(3), the following *obiter dictum* occurs at page 156: "Any such person" (that is a member of an undivided Hindu family) "may also retire therefrom" (that is from the membership in the undivided family) "by civil death or by renunciation on his part *acquiesced in by the remaining members*, provided such renunciation and acquiescence are manifested by an overt act—namely, the giving him 'some trifle' out of the family property." "With all deference to GARTH, C.J., I find myself wholly unable to concur in the proposition enunciated by that learned Judge that a mere declaration by one member that he was separate from the others, would seem to be sufficient to effect the separation. *Radha Churn Dass* v. *Kripa Sindhu Dass*(4)." These seem to me to be the only *dicta* that *directly* negative the proposition that it is open to a member of an undivided Hindu family governed by the Mitakshara Law to effect separation between himself and the other members by an unequivocal and unambiguous declaration to that effect made in the plaint in a suit for partition brought by him, even after that declaration has been communicated to the other adult male members by the service of summonses in the suit. There are observations in numerous other judgments, not only of this High Court but of the other High Courts and of the Privy Council, that a partition of status is made by mutual consent or by decree of Court, but those observations cannot be safely relied on as implying that except in those two modes, partition of status cannot be effected and that *only* in those modes, it could be

(1) (1913) I.L.R. 35 All., 80 (P.C.) (2) (1896) I.L.R., 19 Mad., 315.
(3) (1902) I.L.R., 25 Mad., 149 at p. 156.
(4) (1880) I.L.R., 5 Calc., 474 at p. 477.

effected. It is well established that even without the consent of his sons who are his coparceners, a father can effect a partition among his sons and between himself and his sons and it has been further held that without an express agreement to divide, partition in status is effected by conduct such as separate messing, separate contracting of debts, separate dealings with properties; mutual dealings on the footing of separate interests and so on. See *Gadian Chettiar* v. *Gadian Chettiar*(1) and *Mussamut Josoda Koonwur* v. *Gourie Byjonath Sohae Sing*(2). As I have said already, even the direct pronouncements in *Subbaraya Mudali* v. *Manika Mudali*(3) and *Sudarsanam Maistri* v. *Narasimhulu Maistri*(4) are *obiter*.

In several cases in the Calcutta High Court, on the other hand, cases falling under the Mitakshara Law, there are *dicta* (though again, mostly if not wholly *obiter dicta*) that an unequivocal declaration by one member with or to the knowledge of the other members does effect a division in status. See *Bulakee Lall* v. *Mussamut Indurputlee Kowar*(5), *Mussamut Josoda Koonwur* v. *Gourie Byjonath Sohae Sing*(2), *Mussamut Vato Koer* v. *Rowshun Singh*(6), *Debee Pershad* v. *Phool Koeree* alias *Gheena Koeree*(7), *Mussamut Phoolbas Koer* v. *Lall Juggessur Sahi*(8) and *Raghubanund Doss* v *Sadhu Churn Doss*(9).

I do not think it necessary to refer to the other numerous cases decided by our High Court and the other High Courts quoted before us *as they do not contain any dicta directly dealing with the proposition for which the defendant contends in this case*, namely, that an unequivocal declaration does create a *division of status*. These other cases deal (1) with the effect of an alienation attempted to be made *by will* of his undivided share in the whole or in one or more of the coparcenery properties or the alienation of the entire ownership in one or more of such properties by a member of the coparcenery or (2) with the effect of *gifts inter vivos* so attempted to be made or (3) with the effect of alienations *inter vivos for value* so made. The observations found scattered in such cases were relied on for

(1) (1914) 1 L.W., 7[illegible]
(2) (1866) 6 W.R., 129 at pp. 140 to 144.
(3) (1896) I.L.R., 19 Mad., 315.
(4) (1902) I.L.R., 25 Mad. 149.
(5) (1865) 3 W.R., 41.
(6) (1867) 8 W.R., 52.
(7) (1869) 12 W.R., 510.
(8) (1870) 14 W.R., 340.
(9) (1879) I.L.R. 4 Calc., 425 at p. [illegible]

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the purpose of showing that as the logical result from those observations, there followed either the affirmative or the negative of the above proposition for which the defence contends in the case before us. The development of law is not always logical and the development of the Hindu Law in connection with the legal effect of alienations by a member of a coparcenery, cannot be proved, in my opinion, to be strictly logical even by the employment of the highest ingenuity and learning and I, of course, shall not attempt to do so. Similar observations apply to the law relating to the son's liability for the father's debts, the law relating to alienations for discharging such debts, the law relating to the rights of alienees from the incumbent of an impartible zamindari, the law relating to succession to such zamindaris and to many other branches of Hindu Law. In *Chinnu Pillai* v. *Kalimuthu Chetti*(1), in the opinion of the Honourable Mr. KRISHNASWAMI AYYAR printed at page 59, the following occurs:—"But it does not follow from this that if a coparcenor alienates his interest in family property, the alienee has, until actual partition, no definite share in the property. Like the alienee from a joint tenant in England, *the alienee from a coparcener in India has a fixed share in the common property with reference to the date of alienation.*" This implies that the alienor who sells away his share in *all the coparcenery properties* becomes severed from the joint family and the alienee becomes a tenant in common with the other coparceners in respect of the share so alienated. See also the decision in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2), the judgment of SUNDARA AYYAR, J., in *Doraiswami* v. *Nondiswamy*(3) and the decision of BENSON and SUNDARA AYYAR, JJ., in *Subba Row* v. *Ananthanarayana Aiyar*(4). I respectfully agree with the above opinions and respectfully dissent from the decisions which have held that the alienor coparcener continues to be a member of the undivided Hindu family (and is hence entitled to the accretions to his share caused by the subsequent death of coparceners dying without leaving male issue) and from the decisions which hold that the alienee from a coparcener does not get any rights in or title to the share of the alienor but only an "equity" to be

(1) (1912) I.L.R., 35 Mad., 47.
(2) (1902) I.L.R., 25 Mad., 690.
(3) (1911) 21 M.L.J., 1041.
(4) (1912) 23 M.L.J., 64.

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worked out, in a partition suit. (Some of the decisions I so respectfully dissent from are found in *Nanjaya Mudali* v. *Shanmuga Mudali*(1), *Ganesh Row* v. *Tulja Ram Row*(2) and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(3).

Before proceeding further, I shall first consider the question whether the filing of a suit for partition is, in the language of the Privy Council, "a definite and unambiguous indication by one member of his intention to separate himself and to enjoy his share in individuality" and whether such intention is made "unequivocal" by the filing of the plaint and becomes "clearly expressed" to the other coparceners by the summonses served on them in the suit. It seems to me that if the plaint is filed, not merely for a declaration of the plaintiff's right as a coparcener in an undivided family (as in the old Calcutta case *Debee Pershad* v. *Phool Koeree* alias *Gheena Koeree*(4), but is brought for a partition of the joint family property on the basis that the plaintiff wishes to be treated as a divided coparcener from the date of the plaint (if not from an earlier date) and if he seeks for mesne profits at least from the date of the plaint if not from an earlier date, and asks for the division of the properties as they stood at the date of the plaint, if not at an earlier date, it seems to me difficult to conceive of a stronger, more unequivocal and more unambiguous declaration of an intention to separate himself and if that intention is communicated through the Court by summonses issued to the defendants (the remaining coparceners) in that case, such clear expression of intention becomes fully effectual to create division in status. I take it that the phrase "clearly expressed" means "clearly expressed to the definite knowledge of the other coparceners."

I shall now proceed to consider the Hindu Law texts on this point. Manu in chapter 9, sloka 111, seems to treat a separation in living and messing as a very laudable act as it multiplies religious acts and hence a mere desire to live apart and the consequent living apart among brothers as effecting separation in interest so as to put an end to the right of the eldest brothers to manage the whole patrimony. Saraswathi Vilasa deals in placita 22 to 33 with the question of what constitutes division of status

(1) (1914) 15 M.L.T. 160, s.c., 26 M.L.J. 570.
(2) (1914) 26 M.L.J. 460
(3) (1914) 27 M.L.J. 402
(4) (1869) 12 W.R. 510.

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In placitum 29, it lays down the rule that, in the case of brothers who have wealth, partition of religious duties should be made only after the partition of wealth. In placitum 28, it lays down another general rule that "partition can be effected by mere intention, just as the making of an appointed daughter can be effected by mere intention without any formality." It seems to me clear that in this placitum the word, "partition," *does not exclude* partition of wealth and is not confined to partition of religious duties as argued by Mr A. Krishnaswami Ayyar for the appellant. Placitum 30 is as follows:—"Therefore also in the case of those who have no wealth, the separate performance of religious duties with or even without others' consent constitutes a partition of religious duties, but in the case of the rich, partition of wealth takes place." It seems to me that the phrase "with or even without others' consent" is introduced so as to show the applicability of the general rule laid down in placitum 28, that mere intention without the other coparceners' consent does effect a division and not to introduce any qualification that, as regards partition of wealth, others' consent is necessary. The distinction made is not, between the creation of a division in status with or without others' consent in the case of religious duties and the creation of a division in status with others' consent alone in the case of partition of wealth, but between the creation of a division in status in the case of those who have no wealth effected by a separate performance of religious duties alone with or without consent and the creation of a divsion in status by a separation of interest in wealth only with or without consent in the case of those who have wealth, because a separate performance of religious duties alone in the case of coparceners who have wealth is not sufficient to effect division in status.

In placitum 33, the Saraswathi Vilasa declares that not only Manu and Yangavalkya but every Smrithi and every commentator and the Nibandha Kara without exception favour division in status, thus showing that the true Hindu Law does not favour the doctrine of joint status, though customs borrowed from the Malabar Marumakkattayam system or other sources might have gradually encroached upon the Shastraic Law originally followed.

Again even in the case of those who have wealth, a coparcener who has not effected division in status by getting his

share of the wealth or by a clear intention expressed to his other coparceners can by conduct continued for a number of years be deemed to have expressed that intention, that conduct being the separate performance of religious ceremonies for ten years. This is provided for by placitum 34. Placitum 34 cannot apply to those who have no wealth as the separate performance of religious duties in their case without any condition as to the length of the period at once severs the interests. In fact, placitum 34 says that those separately performing religious duties for ten years " should be *understood as divided* in respect of the *paternal wealth*," that is, even without actual division or declaration of intention to divide. The ten years period is, of course, only a rule of evidence under the old Hindu Law which is not now binding on the Courts which are governed by the Evidence Act.

In the Viramitrodaya, placitum 4 of chapter II, says at the end that even while the mother is living (after the father's death) the sons have no right to the parental wealth as they ought to be dependant on the mother for their support and maintenance. Then placitum 5 clearly states that the status of division is created at the desire of a single coparcener and hence a meeting of the brothers in order to arrive at a consensus in respect of divided status is not necessary.

In Vyavahara Mayuka, section 3, placitum 2, it is said " also when there is a total failure of common property, a division in status may even then be made, by the mere declaration, 'I am separate from thee'; for, a partition merely indicates a state of the mind. Transactions relating to partition are only declaratory of this mental state." I am unable to accept the far-fetched gloss of Mr. A. Krishnaswami Ayyar on the last two sentences that they relate only to those who have no secular wealth to divide nor can I accept the still more far-fetched comment of Mr. Mandlik that the Bombay author of the Vyavahara Mayukha was influenced by the Bengalee commentator Jimuta Vahana.

If a coparcener can demand partition and separation of his share at any time and if the other coparceners are legally bound to give him his share at once, it seems to be clear that separation in interest takes place as soon as he expresses an unequivocal intention to that effect or makes an unequivocal

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demand for partition and that the necessary delay in ascertaining the particular property which falls to his share either by agreement or by an award of panchayats or by a decision of the Court cannot delay the separation in status. As it is put in *Raghubanund Doss* v. *Sadhu Churn Doss*(1), "this separation of status by declaration and communication of intention has its origin in the power of each member of a family to demand a partition at any moment and *the inability of the family to retain any member in joint ownership longer than he may desire.*" The managing member of an undivided Hindu family cannot surely represent a junior member after the latter refused to remain a member of the undivided Hindu family and demanded his share, except, of course, in respect of dealings with third persons to whom notice had not been given of the said junior member's intention to terminate the agency of the managing member. If, as was argued, the English Law of joint tenancy does not allow a joint tenant by a mere unilateral declaration to make the joint tenancy a tenancy in common so as to defeat the right of survivorship [see Lord HARDWICKE in *Partriche* v. *Powlet*(2) quoted in *In re Wilks; Child* v. *Bulmer*(3), and the opinions of Lord THURLOW and Lord HATHERLY given at page 63], that rule of the English Law has, in my opinion, no relevancy in the decision of the question of Hindu Law whether a coparcener of a joint undivided Hindu family can put an end to his status as undivided coparcener by such declaration. Even in English Law, joint tenancy with the right of survivorship was never favoured by Courts of equity and the increasing tendency has been to take advantage of slight indications to convert a joint tenancy to a tenancy in common. Alienation by a joint tenant of his share to a third party severs the joint tenancy in English Law. In *Narayanasami Naidu Garu* v. *Tirumalasetti Subbaya*(4), I said, "I am of opinion that Courts should lean against the continuance of joint tenancies and against claims of survivorship." See page 100. "The ancient Hindu Law knew, according to the learned writer Mr. J. C. Ghose, no such principle as joint tenancy and no principle of survivorship. . . . Equity also does not favour joint tenancies and rights of survivorship."

(1) (1879) I.L.R., 4 Calc., 425 at p. 430. (2) (1740) 2 Atk., 54; s.c., 26 E.R., 430.
(3) (1891) 3 Ch., 59 at p. 62. (4) (1913) M.W.N., 90.

I know it has been said that the Mitakshara recognised the principle of *survivorship and joint tenancy and I myself have*, following the language used by the highest authorities, stated so. The Mitakshara first created a *revolution (it may be that it* sanctioned by its authority or recognised the revolution already being effected by the then prevailing customs) by giving the sons rights by birth jointly with the father in ancestral properties, taking advantage of the moral admonitions addressed in ancient texts to the father not to alienate his ancestral properties so as to leave his children penniless. Then the right of the widow of a sonless coparcener to inherit her husband's share was denied to her and the other male coparceners were made the inheritors of that share. The whole of Chapter II, section I, placita 1 to 30 of the Mitakshara which contains the ingenious special pleading by which the widow of an undivided sonless coparcener was disqualified from inheriting his share in the estate does not contain a word about survivorship. Vijnanesswara professes to find equally authoritative texts for either view *as to the rule of inheritance, some texts recognising the* right of the widow and some excluding her on the ground of incapacity to perform religious ceremonies and he then professes to reconcile the texts by saying, *not that any principle of survivorship prevents the inheritance of the widow* but that the succession itself to the undivided share of the deceased coparcener passes to the remaining coparceners. This idea of a distinction between accretion by survivorship and the passing of property by inheritance or succession proper seems absolutely foreign to Hindu Law. I cannot but believe that because the other coparceners were to inherit the deceased sonless coparcener's share *under the Mitakshara instead of the proper female* heir under the old texts (namely, the widow or the daughter if the widow had died) inheriting it, a confusion of ideas based upon the notion of English Law that the surviving joint tenants get the deceased tenant's share by survivorship was introduced into the consideration of cases under the Hindu Law. That there are numerous differences between the joint tenancy of the coparceners in a Mitakshara Hindu family and the joint tenancy as understood in English Law has been recognised in several cases. As SANKARAN NAIR, J., says in his judgment in *Pethi v.*

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Nagana(1): "It is argued that the joint tenancy has been converted into tenancy in common. The differences between the joint tenancy of a Hindu family and as it is understood in English Law must be borne in mind. In the former the joint tenancy has its origin in birth and not by conveyance. There is no unity of possession, the managing member being alone entitled to it against the others. There is no unity of title as the members do not derive their interest at the same time. There is no unity of time as they do not hold for the same time and from the same time. There is no unity of interest as some may be entitled to larger share than others. The chief characteristic of survivorship does not exist as a coparcener's interest devolves, not on all the others but only on his sons, if any. A coparcener's interest again is liable to diminution unlike the interest of a joint tenant in English Law." In the well known case, *Appovier* v. *Rama Subba Aiyan*(2), Lord WESTBURY no doubt said: "Thus the joint tenancy is severed, and converted into a tenancy in common." But he carefully added the qualifying clause "using the language of the English Law *merely by way of illustration*." I cannot, however, help thinking (as I said before) that notwithstanding this qualifying phrase, the idea of a right by survivorship in the remaining coparceners instead of a right by succession which is the right known to Hindu Law has coloured the language of almost all the subsequent decisions. It seems to me therefore with the greatest respect that if a mere alienation by a coparcener even under the English Law severs the joint tenancy so as to prevent the right of survivorship, to hold that under the Hindu Law (which knows no such principle as the principle of survivorship and into which the principle of survivorship was introduced by a side wind as a synonym for the right of succession of undivided coparceners to the share of a deceased coparcener) an alienation by one of the coparceners even of his entire interest does not sever the joint tenancy seems to me inadmissible. I should, in this connection, like to fortify my opinion as to the true Hindu Law by the following quotation from the Tagore Law Lectures of a very learned Hindu Lawyer Mr. Bhattacharyya. He says (pages 53 to 55): "Now, we shall

(1) Appeal No. 119 of 1912. (2) (1866) 11 M.I.A., 75 at p. 92.

see that the members of an undivided Hindu family stand very much in the same relation to one another as joint tenants under the English law do. Each member has possession over the whole of the joint family property, and if one member dies, his right devolves upon the rest under certain limitations. Thus we shall see that in a true joint family, that is, in a joint family governed by the Mitakshara Law, the widow of a deceased member does not succeed her husband to his rights, but the whole joint property remains as before subject to the title and possession of his undivided coparceners, in a case in which the deceased member had no lineal descendant to take his place. This is the feature of a joint family governed by the Mitakshara Law which strikes every student of Hindu Law of Succession as the most distinctive. I have no doubt that it was this peculiar feature, which at once suggested to the minds of the early British administrators of Hindu Law, the close resemblance between the joint tenants under the English Law and the joint Hindu family under the Mitakshara Law This is called the right of survivorship—a term unknown to the original texts, nor do we know, nor can we pitch upon, any expression in Sanskrit which would convey the idea. This is not to be wondered at; for the original texts do not treat much of the law relating to undivided families; the sayings of the ancient sages, such as Manu and Yagnavalkya, directly making mention of undivided coparceners are few; nor have the later authors, such as Vignaneswara and Vachaspati Misra, dwelt at length upon the subject. We have at present a goodly mass of legal maxims which lay down the rights, the liabilities, the status, the obligation and the duties of the members of a joint Hindu family; but those maxims are to be gathered from the case-law as it has been developed by the British administrators of justice for the people of India. It consists of a number of deductions gradually made from the few principles to be obtained, generally in the Mitakshara, and sometimes also in other authorities. The number of such authorities is not very large" .

"But be that as it may, the doctrine of survivorship, which was never put into a form or words by any writer of original texts of Hindu Law, from the Mitakshara downward, has yet proved a powerful engine in the development of the case-law on the subject of Hindu joint families. As soon as it was observed that

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there was a very tangible analogy between Hindu coparceners and English joint tenants, it was inevitable that incidents of English joint tenancy should have been extended to the legal position of the Hindu coparceners, at least in cases where such extension did not run counter to anything to be found in the original texts. We must remember that the judges who did this, had no other course left open to them; for they were familiar with the law of the English joint tenancy; they saw nothing in the original texts, or in the translations, to guide them in the particular instances; certainly the most reasonable course for them was avowedly or not, to take advantage of that other law they were familiar with, supported as this course was by the analogy already adverted to."

I shall now pass on to consider the two Privy Council decisions which seem to me to be almost conclusive on the question. In *Ram Chunder Dutt* v. *Chunder Coomar Mundul*(1), their Lordships say: "It is true that the status of the family as a joint Hindu family was not continuing. *The alienation of the shares of two members of that family to the Munduls determined that status, and substituted the status of co-sharers or joint owners,* whose rights, as is shown by Lord Westbury in the case of *Appovier* v *Rama Subba Aiyan*(2), are in many important respects distinguishable from those of a joint and undivided family." I think this is a clear and unambiguous authority for the proposition that an alienation by a coparcener does effect a severance of the joint status of the family so as to prevent the right of survivorship. In the latest case *Suraj Narain* v. *Iqbal Narain*(3), their Lordships say "What may amount to a separation or *what conduct on the part of some of the members* may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships wholly wanting." I think these sentences clearly indicate that the conduct on the

(1) (1869) 13 M.I.A., 181 at p. 193. (2) (1866) 11 M.I.A., 75.
(3) (1913) I.L.R., 35 All., 80 at p. 87 (P.C.)

part of *some members alone* without the consent of other members may lead to disruption and convert the joint tenancy into a tenancy in common and that the definite and unambiguous indication of intention by one member if unequivocal and clearly expressed can amount to separation. After full consideration I am wholly unable to accept the argument of Mr. A. Krishnaswami Ayyar for the appellant (based on an undue emphasis on the word "may"), that their Lordships only intended to assume for the purpose of argument that a definite and unambiguous intention unequivocally and clearly expressed may amount to separation and that they did not intend to decide that it would amount to separation. That even an attachment of a coparcener's share by a simple money-decree-holder will prevent survivorship has been decided in numerous cases. See *Muthusami Chetty* v. *Chinnammal*(1) and *Thadi Ramamurthi* v. *Moola Kamiah*(2). Unless the joint tenancy becomes severed and converted into a tenancy in common, by the attachment and seizure of the share of the coparcener, I think it is difficult to find a tenable basis for such decisions, mere vague references to the equities of creditors and of alienees for value not creating in my mind any nexus between the attachment or alienation on the one hand and the extinction of the right of survivorship on the other. Mr. A Krishnaswami Ayyar argued that if an unilateral declaration by a coparcener deliberately and clearly expressed to others, severs the so-called joint tenancy, it will lead to several practical inconveniences. I do not feel much impressed by this argument. The older and purer Hindu Law was altered by the Mitakshara so as to prevent widows from inheriting their husband's share and it is now almost a truism with careful students of the Shastras that the older and purer sources of Hindu Law are more in consonance with the needs of a progressing and progressive society than the rules introduced by the glosses of medieval commentators on those texts (the glosses very often being far-fetched and even distorting the texts). Such new rules were made according to the temporary exigencies of the times and places, a commentator belonging to one part of India or to one period of its history differing from a commentator on the same texts in another part or in another period. The consequent

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(1) (1914) 26 M.L.J., 517. (2) (1914) 16 M.L.T., 122.

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degradation of the Hindu Law by the medieval commentators which led to the doctrine of rights by birth in sons (instead of merely moral claim by birth) the doctrine of the right of a son to question alienations by his father and to the exclusion from inheritance of most female heirs except under exceptional circumstances is being gradually got rid of through the development of the law by the several decisions of the Privy Council and the older and purer Hindu Law is being gradually brought back. The power of the father to alienate for antecedent debts and the power of the father's creditor to pursue his remedy against the whole property for the father's debts have been now established so as to restore the *earlier* purer Hindu Law. The decisions of the Privy Council therefore which tend to defeat the artificially introduced right of survivorship (introduced not even by Hindu commentators and introduced in comparatively modern times) so as to restore the purer Hindu Law which allowed inheritance by widows and other female heirs to a deceased coparcener's share should not, in my opinion, be attempted to be evaded by arguments involving too fine distinctions. As G. Sirkar Sastri says in his Hindu Law, page 239 at page 240, the doctrine of the Hindu Law is that "partition must take place by the desire of a single member, and the others are bound to consent and agree to it." Therefore, the declaration by a member of his desire for partition to the other members, accompanied or *followed by* conduct evidencing its earnestness, must be sufficient to cause the severance of his interests. That is all that he can do: if the *others do not agree but obstruct his desire, and compel* him to continue to live with them for some time as before, they cannot be permitted by both law and equity to prejudice his right, and to gain an advantage by their such wrongful omission. He should thenceforward be deemed to live with them in the same manner as a member of a joint family governed by the Dayabhaga, that is to say, as a tenant in common and no longer as a joint tenant."

As regards the danger of perjured oral evidence about such declarations and intentions, not only have their Lordships of the Privy Council taken care to lay down in *Suraj Narain* v. *Iqbal Narain*(1), that such intentions must be proved by cogent and

(1) (1913) I.L.R., 35 All., 80 (P.C.).

clear evidence but there is the Legislature which could by enacting registered documents as necessary to evidence such declarations, obviate that inconvenience. Piece-meal legislation is no doubt not desirable but so long as the generality of the followers of Hindu Law, even in the same province are not willing to have it ascertained by a commission and codified according to the recommendations of that commission, piece-meal legislation is the only course open to the Legislature.

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In the result, I would give the following answer to the reference, namely, that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition and by the unequivocal declaration made in the plaint in that suit when such unequivocal declaration has been clearly expressed to the other coparcener or coparceners through the Court or otherwise.

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SESHAGIRI AYYAR, J.—If the question were not concluded by the latest decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain*(1), I would have answered the reference in favour of the appellant. I feel with the learned Chief Justice that it is not competent for us to explain away the decision of their Lordships of the Judicial Committee as suggested by Mr. Krishnaswami Ayyar. The Judicial Commissioner quoted the early Calcutta decisions in his judgment and in the argument before the Privy Council reference was made to some of them. Mr. Krishnaswami Ayyar contended that their Lordships should not be understood as overruling the current of decisions in Madras without even adverting to them. But the question did arise for decision and there was a pronouncement. Their Lordships alone can explain away their judgment, if they did not really intend to decide the question. I, therefore, hold that the question referred to us is concluded by the authority of the Judicial Committee. However as I feel that the texts of Hindu Law and the authorities in Madras and elsewhere are in favour of the contention of the appellant, I feel bound to state my views at some length on the points raised before us. The question under reference has been argued with great ability on both sides.

(1) (1913) I.L.R., 35 All., 80 (P.C.)

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In my opinion the weight of textual authority is in favour of the appellant's contention. The definition of *Vibhaga* in the Mitakshara gives no indication regarding the mode of effecting a partition. The Saraswati Vilasa has been claimed by both the learned Vakils for their contentions. The chapter commencing with the twenty-second sloka is headed "what is partition." The author quotes *Baruchi* for the position that *Vibhaga* is the division of wealth and of religious duties. He then points out that the definition of Vignaneswara is not comprehensive enough to include the division of religious duties, and proceeds in slokas 25 to 27 to deal with the spiritual merits of performing separate religious duties. The conclusion on this sub-head is stated in sloka 28, thus: "From this it is known that without any formality, partition can be effected by mere intention just as the making of an appointed daughter can be effected by mere intention without any formality." The next topic deals with persons who have wealth to divide. The author says that in such cases partition of wealth must precede the partition of religious duties. In sloka 30, the requisites of the two classes of division are stated, as a result of the previous discussion: "Therefore also in the case of those who have no wealth, the separate performance of religious duties *with or even without other's consent* constitutes a partition of religious duties; but in the case of the rich, partition of wealth takes place." As pointed out by the learned Chief Justice in the course of the argument, the last clause seems to refer to an actual division of the properties. I feel no hesitation in holding that the introduction of the clause "with or even without other's consent" was intended to point out the distinction between the two classes of cases. Having regard to the doubts expressed by Mr. Justice SADASIVA AYYAR during the course of the argument, I examined the Sanskrit verses with some care, and I am clear that in the case of the partition of wealth, the consent of the co-owners is essential. I may also refer to verse 34 which pointedly brings out the difference: "Here the separate performance of religious duties alone of one's own will without consent of others for a period of ten years constitutes partition." This sentence would be meaningless if the contention of Mr. Srinivasa Ayyangar is to be accepted. The various slokas to which I have referred show that the author was conscious

that in matters which affected the wealth of all the co-owners, their consent must be taken, but where the religious merit is the object aimed at, as in the case of the division of religious duties only, the consent of the others is unnecessary.

Mr. Srinivasa Ayyangar relied upon placitum 5, chapter II of Viramitrodaya, another authority accepted in Southern India. The author is there considering whether the statement of Manu that the brothers should "assemble together" is mandatory or only directory. His opinion is that it is not a rule of law, because the word *assembly* will not be apt to describe the meeting of only two brothers. His another reason is "otherwise partition could not take place at the desire of the coparcener." This statement, it is argued, declares that in *all cases* partition can take place at the desire of one of the members. What the author meant to say was that there are instances in which partition can be effected at the desire of one of the members: for example, the separate performance of religious duties; and consequently Manu should not be held to have enjoined that whenever partition takes place, the brethren should assemble. I do not think that Viramitrodaya helps the solution of the problem one way or the other.

We have then the Vyavahara Mayuka which is somewhat enigmatical. The author does not discuss the mode of partitioning wealth. In section III, placitum 1, he quotes *Naradha* for the definition of partition and abruptly says in placitum 2, "Even when there is a total failure of common property, a partition may also then be made, by the mere declaration 'I am separate from thee'; for, a partition merely indicates a state of the mind. Transactions relating to partition are only declaratory of this mental state." It may be as suggested by the learned Vakil for the appellant that the author was only dealing with religious duties; or it may be as pointed out by Mr Mandalik in his Hindu Law that the author was influenced by Jimuta Vahana's opinion. It is worthy of note that in the province where this treatise is the paramount authority, there is no decided case which accepts the view that partition of property can be effected by a bare declaration on the part of one of the co-owners.

Jimuta Vahana is explicit. His view proceeds on the theory that there is no survivorship in a joint family. "Since any one

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parcener is proprietor of his own wealth" sums up the distinction between the two schools of law. I do not propose to embark upon the speculation whether Yagnavalkya and his commentator really laid down that there is survivorship or joint tenancy in a joint family. It is enough to say that the essential characteristics of Hindu Law as understood by the writers of the Benares School are *survivorship and representation*. So far as a cursory examination of these treatises goes, the idea of survivorship is in entire consonance with the genius of Hindu Law as it is administered in Southern India. The case of the Nambudri Brahmans who follow Makkathayam Law and the incidents of tarwad ownership among Nairs show that the principle of survivorship has taken deep root in Southern India. That is not the position of those to whom the Dayabhaga applies. It is therefore perfectly clear that Jimuta Vahana's view is inapplicable to the Mitakshara system. Moreover students of Hindu Law must have noticed how laboriously Jimuta Vahana has endeavoured to differ from Vignaneswara whenever possible. On an examination of textual law my conclusion is that in the Benares School, a mere declaration of intention will not effect a partition among co-owners.

Now I go to decided cases. Naturally the Calcutta cases come in for examination first, as it is in them that we meet with the pronouncement that a mere declaration will suffice to effect a division of status. Before dealing with them individually, I wish to make one observation without meaning the slightest disrespect to the eminent Judges who took part in those decisions. The Bengal Judges have to deal with two separate systems of inheritance, the Dayabhaga and the Mitakshara. Both have to be administered to Hindus, and unconsciously the principles of one of the systems of law get mixed up with the other. In *Bulakee Lall* v. *Mussamut Indurputtee Kowar*(1), the question we have to decide was not in issue. The point for decision was whether one of the co-sharers who had become divided from the other in interest can revoke a power-of-attorney jointly given by both to manage their properties. After quoting Storey on Agency, the learned Judges say " that the parties are not in a position substantially different from that of a joint Hindu

(1) (1865) 3 W.R., 41

family." It is difficult to see how such a position is tenable. However that may be, they proceed to apply the Mayuka to the case in question and say "And any act or declaration, showing unequivocal intention on the part of any share-holder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition." This is purely *obiter*. *Mussamut Vato Koer* v. *Rowshun Singh*(1), was decided after the well-known case *Appovier* v. *Rama Subba Aiyan*(2), was decided by the Judicial Committee. The head-note to this case is not accurate. There was a concurrence of the parceners for dividing the property and petitions for registry were presented to the Revenue authorities. The substantial argument of the contesting defendants was that there should be a division by metes and bounds. The learned Judges held that Appovier's case was a complete answer to that contention. The same learned Judges decided *Debee Pershad* v. *Phool Koeree* alias *Gheena Koeree*(3). They held that a previous plaint which only sought for a declaration of rights was not sufficient to constitute a divided status, but that if the suit had been one for partition, it would have been different. The second statement was unnecessary for the decision of the case. Some months before this decision was pronounced, a Full Bench had to consider this and other connected questions. Curiously enough, no reference is made in the later case to the opinion of Sir BARNES PEACOCK to which I shall at once refer.

In the Full Bench Case—*Sadabart Prasad Sahu* v. *Foolbashkoer*(4)—an undivided Hindu died leaving two widows behind him. His creditors sued the widows for the debt due to them, attached the deceased's share in the joint family property and purchased it in Court-auction. The surviving joint member sued to have it declared that the share did not pass to the purchasers by the Court sale. The Full Bench held that the purchaser did not acquire the rights of the deceased owner. There was a further question whether the mortgage of his undivided share created by the deceased was binding on his share. This second question involved the consideration whether the conduct

(1) (1867) 8 W.R., 82.
(2) (1866) 11 M.I.A., 75.
(3) (1869) 12 W.R., 510.
(4) (1869) 3 Beng. L.R., 31 (F.B.).

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and act of the deceased worked out a divided status. Sir BARNES PEACOCK says: "I was at one time disposed to think that as one of the several members of a joint family can compel partition of ancestral property against the will of the others (see Mitakshara, chapter I, section 5, verse 8), so he might, without the will of the others, alienate that share to which he would be entitled upon partition; but upon reflection I feel that that opinion cannot be maintained according to the true principles of the Mitakshara law" This considered opinion of the Full Bench must be taken to have overruled all previous decisions to the contrary. Reference may also be made to the interpretation which their Lordships of the Judicial Committee placed on this pronouncement in *Madho Parshad* v. *Mehrban Singh*(1). Two of the Judges who were responsible for *Mussamut Vato Koer* v. *Rowshun Singh*(2), also sat in the Full Bench. We next come to *Mussamut Phoolbas Kooer* v. *Lall Juggessur Sahi*(3). Mr Justice MARKBY in this case does not conceal his disapproval of the ruling of the Full Bench. The *Mussamut Phoolbas Kooer* v. *Lall Juggessur Sahi*(3), is really a minute of dissent from the Full Bench decision The same learned Judge reiterated his views in *Raghubanund Doss* v. *Sadhu Churn Doss*(4). Here again the pronouncement about the mode of partition was entirely *obiter*. In *Radha Churn Dass* v *Kripa Sindhu Dass*(5), Sir RICHARD GARTH goes back to the view enunciated in *Bulakee Lall* v. *Mussamut Indurputtee Kowar*(6), without adverting to the decision of the Full Bench. On the other hand Mr. Justice WILSON in *Tej Protap Singh* v *Champa Kalee Koer*(7) inclines to the view that there should be either a decree or an agreement to divide. In two very recent cases *Bata Krishna Goswami* v. *Gopal Krishna Goswami*(8) and *Bunwari Lal* v. *Daya Sunker Misser*(9), MOOKERJEE, J., regards the question as still open. In my opinion, the Calcutta decisions give us no definite guide.

In Bombay, as I said before, there is no decision which upholds the Mayuka doctrine that a bare declaration will sever

(1) (1891) I.L.R., 18 Calc., 157 at p. 161 (P.C.).
(2) (1867) 8 W.R., 82.
(3) (1870) 14 W.R., 340.
(4) (1879) I.L.R., 4 Calc., 425.
(5) (1880) I.L.R., 5 Calc., 474.
(6) (1865) 3 W.R., 41.
(7) (1886) I.L.R., 12 Calc., 96.
(8) (1907) 5 C.L.J., 417.
(9) (1909) 13 C.W.N., 815.

the co-parcenary status. In *Moro Vishvanath* v. *Ganesh Vithal*(1) the learned Judges speak of a contract to divide. *Babaji Parshram* v. *Kashibai*(2) goes the length of laying down that even after decree, unless the partition is by metes and bounds, the status is undisturbed. In *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar*(3), the learned Judges found "a tacit agreement of enjoyment according to shares," although if a declaration was sufficient, it would have been easy to find it. In *Mahadev Laxman* v. *Govind Parashram*(4), a decree for partition was relied on and not the filing of the plaint. West and Buhler in pages 680 and 681 in dealing with "will to effect a separation" seem to lay down that the assent of all the co-parceners is necessary to effect a partition. It may, therefore, be safely stated that in the province where the Mayuka is followed, the Courts have never been asked to hold that a declaration of intention will sever the co-parcenary in regard to joint property.

In Madras, the High Court has consistently held that the filing of a plaint does not put an end to the co-parcenary. In *Sangili* v. *Mookan*(5), the death of one of the co-parceners after suit and before decree was held not to have affected the undivided status. In *Subbaraya Mudali* v. *Manika Mudali*(6), it was laid down that a decree dissolved the co-parcenary notwithstanding the filing of an appeal against it. The learned Judges point out that until decree the co-parcenary continued. In *Sudarsanam Maistri* v. *Narasimhulu Maistri*(7), BHASHYAM AYYANGAR, J., expressly dissented from the view of SIR RICHARD GARTH in *Radha Churn Dass* v. *Kripa Sindhu Dass*(8), that a mere declaration by one member is sufficient to effect a separation There are observations to the same effect in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(9) In *Thandayuthapani Kangiar* v. *Ragunatha Kangiar*(10), the learned Chief Justice (then WALLIS, J) points out "Partition may be effected by consent and in proper cases by decree." SANKARAN NAIR, J, says that the practice in this Presidency has always been in accordance with the law as laid down

(1) (1873) 10 Bom. H.C.R, 444 at p 454.
(2) (1880) I L R., 4 Bom 157.
(3) (1891) I L.R., 15 Bom. 201
(4) (1912) I L.R., 36 Bom. 520
(5) (1893) I.L R, 16 Mad. 350.
(6) (1886) I L R 10 Mad 345.
(7) (1902) I L.R, 25 Mad, 149
(8) (1880) I L.R., 5 Calc., 474
(9) (1902) I L.R., 25 Mad., 690.
(10) (1912) I L R, 35 Mad., 239 at page 244

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n *Subbaraya Mudali* v. *Manika Mudali*(1). I entirely concur with this estimate of the practice obtaining among Hindus governed by the Mitakshara law. Reference may also be made to *Balakrishna Mudaliar* v. *Raju Mudaliar*(2).

Before considering the decision of the Judicial Committee on the subject I shall briefly refer to the views held by the High Court and by the Judicial Committee on certain collateral subjects which are not easily reconcilable with the theory that partition can be effected by a declaration. In all the Courts in India, it is now settled law that a co-parcener cannot by a testamentary disposition or by gift *inter vivos* dispose of his share of the joint family property. Their Lordships of the Judicial Committee have given their sanction to this position in *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(3). In my opinion the denial of this right is not consistent with the hypothesis that a unilateral declaration to sever the status is enough. This view receives support from the decisions which lay down that a disposition by will or gift will be valid if the consent of the other co-parceners is obtained. See *Indar Sahai* v. *Shaiam Bahadur*(4), and *Parmanandas Jivandas* v. *Vinayek Rao Wassudeo*(5).

On the question of the power of a member to alienate for consideration his share of the property it is somewhat curious that it should be conceded in Madras and Bombay, while it is denied in Bengal. The earlier Bengal decisions enunciating the view that a declaration of intention will sever the joint status logically requires that the co-parcener should have power to dispose of his share. This is apparently Mr. Justice MARKBY's view. Their Lordships of the Judicial Committee held in *Balgobind Das* v. *Narain Lal*(6), that an undivided member is not competent to alienate his share in Bengal and in the United Provinces. It is significant that this restriction is said to apply to alienation without the consent of the co-parceners. See also *Madho Parshad* v. *Mehrban Singh*(7). This pronouncement lends further support to the proposition that in dealing with co-parcenary property individual acts or declarations are of no avail, but that they would be valid if assented to by the others

(1) (1896) I.L.R., 19 Mad., 345. (2) (1915) M.W.N., 17.
(3) (1881) I.L.R., 5 Bom., 48 (P.C.). (4) (1913) 25 M.L.J., 57.
(5) (1883) I.L.R., 7 Bom., 19 (P.C.). (6) (1893) I.L.R., 15 All., 339 (P.C.).
(7) (1891) I.L.R., 18 Calc., 157.

interested in the property. There is only one other class of cases to which reference may be made. It has been held in Madras that even after alienating his share the alienor continues to be a member of the joint family. *Nanjaya Mudali* v. *Shanmuga Mudali*(1) and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(2). These decisions all proceed on the theory accepted in Madras that a unilateral act is not sufficient to effect partition.

Mr. Krishnaswami Ayyar referred to the analogy of partition among joint tenants. A coparcenary under the Hindu Law has many features in common with joint tenancy. The principles which apply to the severance of a status of joint tenancy therefore deserve consideration.

It was held in *Patriche* v. *Powlet*(3), that a declaration by one of the tenants will not put an end to the joint tenancy. In *In re Wilks; Child* v. *Bulmer*(4), it was decided that the presentation of a bill does not arrest survivorship. The filing of a plaint cannot be in a better position. On the other hand in *In re Dodson; Yates* v. *Morton*(5), it was ruled that a decree would terminate the joint tenancy. See also Freeman on Co-tenancy and Partition, section 31 I am of opinion that these decisions are applicable to determine the rights of coparceners in India.

In my view it is not right to say that the other members are not entitled to be heard when one of them wishes to separate himself from them. While each individual member has a right *to his share the others have a contingent right by survivorship* to succeed to it. It may be unreasonable to withhold assent on this ground; but as *undoubtedly the right* of survivorship exists, in reason there can be no severance of the status unless they consent, or until the Court decrees partition.

Now I shall proceed to consider the decisions of the Judicial Committee. If they are clear and definite, whatever may be my view of the law, I am bound to follow them.

In the first of the cases decided by the Judicial Committee, *Rewun Persad* v. *Mussumat Radha Beeby*(6), it was held that a bequest to two brothers subject to a life estate did not create a joint tenancy, but only a tenancy in common. Further there

(1) (1914) 15 M.L.T. 186 s.c., [illegible] M.L.J., 570.

(2) (1914) 27 M.L.J., [illegible].

(3) (1740) 2 Atk., 54, s.c., 26 E.R., 430.

(4) (1891) 3 Ch. [illegible].

(5) (1898) 2 Ch., 635.

(6) (1846) 4 M.I.A., 137.

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was also a finding that the brothers had agreed to divide, although possession did not pass. The second case is *Appovier* v. *Rama Subba Aiyan*(1); it has always been treated as the leading case on the subject of the mode of effecting a partition. It laid down explicitly that a division by metes and bounds was unnecessary, and that an agreement to divide can be gathered from the acts and conduct of the parties. Their Lordships nowhere intimate in this case that a unilateral declaration will suffice. *Ram Chunder Dutt* v. *Chunder Coomar Mundul*(2) has given some trouble in understanding it. After reading it over again, I am satisfied that the severance of the status of coparcenary among the Ghoses was not attributed by their Lordships of the Judicial Committee to anything done by one of the brothers without the knowledge and consent of the others. The determination of joint status and the substitution of co-ownership are not traced to unilateral acts. I do not think this case helps the respondent. In *Runjeet Singh* v. *Kooer Gujraj Singh*(3) the separate enjoyment of the income of particular portions of the family property by each of the members was held not to constitute a divided status. *Baboo Doorga Pershad* v. *Mussumat Kundun Koouar*(4) follows *Appovier* v. *Rama Subba Aiyan*(1), and points out that whether a course of conduct pursued by the members effected a division in interest would depend upon the intention of the parties. The next decision *Joy Narain Giri* v. *Girish Chunder Myti*(5) requires careful examination. One of the two undivided members who was expelled by the other from the family house sued for a declaration of his right and mesne profits. He obtained a decree in the Courts below and died pending the appeal to the Privy Council. His widow was brought on record and their Lordships confirmed the decree. The second suit was instituted by the surviving member for a declaration that the deceased died undivided and that a will executed by him was invalid. Two propositions were laid down by their Lordships, Firstly, that the decree, though not in terms one for partition, effectively destroyed the joint estate; secondly, the conduct of

(1) (1866) 11 M.I.A., 75.
(2) (1869) 13 M.I.A., 181.
(3) (1873) 1 I.A., 9.
(4) (1873) 1 I.A., 55.
(5) (1879) I.L.R., 4 Calc., 434 (P.C.); s.c., 5 I.A., 228.

the parties showed distinctly that they regarded themselves as divided. The following passage was relied on by Mr. Srinivasa Ayyangar: "Their Lordships regard the conduct of Shibpershad Giri, when he left the house in which both he and Joy Narain Giri lived, and withdrew himself from commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance as well as his making a will, as indicating, at all events, that he himself considered that separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation." The reference to the acceptance of the expulsion shows that in the opinion of their Lordships it was necessary that there should be an agreement between the parties. I do not think this decision is any authority for the proposition contended for by the learned vakil for the respondent. In *Chidambaram Chettiar* v. *Gauri Nachiar*(1), there was a preliminary decree for partition and a commissioner was appointed to ascertain the extent of the family property. The plaintiff died before a final decree could be passed. It was contended that the members remained undivided. Their Lordships negatived this contention and said that from the date of the preliminary decree the brothers became separate in estate "if they had not previously become so." It was argued that this last clause pointed to a leaning on the part of their Lordships to the position that the plaint itself effected a partition. On an examination of the original records, it is clear that the reference was to the deposition of the contesting coparcener in which he said that he had no objection to a division of the properties. *Ram Pershad Singh* v. *Lakhpati Koer*(2) only lays down that a decree ascertaining the shares of the members, though no division by metes and bounds followed it, effected a partition. In *Parbati* v. *Naunihal Singh*(3) all the members had jointly petitioned the Collector that their joint property should be held in specific shares and requested him to make separate entries in the Revenue Register to that effect. It was

(1) (1879) I.L.R., 2 Mad., 83; s.c., 6 I.A., 177.
(2) (1903) I.L.R., 30 Calc., 231 (P.C.); s.c., 30 I.A., 1.
(3) (1909) I.L.R., 31 All., 412 (P.C.); s.c., 36 I.A., 71.

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afterwards contended that the members were undivided. Their Lordships of the Judicial Committee held that the petition and the subsequent conduct of the parties afforded unmistakable evidence of an agreement to regard themselves as divided. Throughout this judgment their Lordships speak of the necessity for an agreement whether written or parol.

Thus far, there is no decision of the Judicial Committee which lends support to the contention that a unilateral declaration of intention will constitute a severance of interest. Naturally the respondent laid great stress on the latest decision of their Lordships in *Suraj Narain* v. *Iqbal Narain*(1). As I said at the outset, I cannot accept the suggestion of the appellant's vakil that the use of the expression "may amount to a partition" indicates that their Lordships without deciding the point proceeded to deal with the facts assuming for the sake of argument that the contention was well founded. I was at first inclined to agree with this contention. But on further consideration I think that a decision was given on the point by their Lordships. Whether this should be extended to Madras can be decided only by their Lordships of the Judicial Committee. I agree in the conclusions of the learned Chief Justice and of Mr. Justice SADASIVA AYYAR.

C M N

(1) (1913) I.L.R., 35 All., 80 (P.C.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Wallis, Kt., Chief Justice, Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

VUPPULURI ATCHAYYA *et al* (DEFENDANTS), PETITIONERS,

1912. March 11, August 19 and 30.

v.

SRI KANCHUMARTI VENKATA SEETHARAMACHANDRA RAO (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 115—Wrong decision of the lower Appellate Court that the first Court had or had not jurisdiction to entertain a suit—Revision—Power of High Court to interfere in

Held, by the FULL BENCH (SADASIVA AYYAR, J., dissenting) that the High Court has jurisdiction to interfere under section 115, Civil Procedure Code (Act V of 1908), where an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of First Instance had or had not jurisdiction to entertain a suit.

Case-law on the subject reviewed

Per WALLIS, C. J.—The power of the High Court to interfere in such matters is under the third part of section 115.

Per SUNDARA AYYAR, J.—The power of the High Court to interfere in such matters is under the first part of section 115 The function of an Appellate Court is to do that which the first Court ought to have done

Per SADASIVA AYYAR, J.—Under none of the three parts of section 115 has the High Court power to interfere in such matters. Clauses (*a*) and (*b*) of section 115 apply only to the jurisdiction of the Court whose decree or order is sought to be revised, to pass such order or decree and not to its decision on the jurisdiction of some other Court. The words "acted illegally" in section 115, Civil Procedure Code, mean "giving a wilfully perverse but not a mere erroneous decision on a question of law."

PETITIONS under section 115 of the Civil Procedure Code (Act V of 1908), praying the High Court to revise the orders of the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeals Nos. 9, 7 and 8 of 1911 respectively, preferred against the orders of G. GANGADHARA SOMAYAJULU, the District Munsif of Tanuku, in Original Suits Nos 486, 189 and 490 respectively.

V. Ramadoss for the petitioners.

T. Prakasam for the respondents.

The facts of the case are given in the Order of Reference to the Full Bench made by SADASIVA AYYAR, J

* Civil Revision Petitions Nos. 744 to 746 of 1911.

These petitions came on for hearing before SANKARAN NAIR and SADASIVA AYYAR, JJ., who made the following orders o reference to a full bench.

SADASIVA AYYAR, J.—These three petitions have arisen out of suits in ejectment brought by the same plaintiff (who comes under the definition of a landlord under the Estates Land Act) against his tenants. The Court of First Instance (the District Munsif's Court of Tanuku) was of opinion that a Civil Court had no jurisdiction to try the suits and that under the Estates Land Act, the plaintiff ought to have brought the suits in a Revenue Court. The learned Munsif therefore ordered the plaints to be returned to the plaintiff for presentation to the proper Court.

On appeal, the Subordinate Judge of Ellore held that under the saving clause to section 153 of the Estates Land Act, the suits were cognisable by a Civil Court. He set aside the District Munsif's orders and directed the District Munsif to take back the plaints, to restore the suits to his file and dispose of them according to law.

These Civil Revision Petitions have been filed, praying for the reversal of the learned Subordinate Judge's orders in the suits. Under Order XLIII, rule 1 (*a*) of the Civil Procedure Code, an appeal lay to the Subordinate Judge's Court from the District Munsif's order returning the plaint in each suit. Under section 104 of the Civil Procedure Code, clause 2, a Second Appeal is prohibited from orders so passed in appeal. Hence, the defendants have come before us by way of Civil Revision Petitions under section 115 of the new Civil Procedure Code (which corresponds to the old section 622).

Under section 115, the High Court has power to interfere if a Subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted illegally or with material irregularity, in the exercise of its jurisdiction.

The learned counsel for the plaintiff (respondent), Mr. T. Prakasam, has taken a preliminary objection to the hearing of these Civil Revision Petitions on the ground that the Subordinate Judge in hearing and allowing the appeals against the Munsif's orders neither wrongly clutched at jurisdiction nor wrongly

refused to exercise jurisdiction, that he acted neither illegally nor with material irregularity and hence section 115 did not apply so as to give the High Court jurisdiction to interfere in revision.

The decision of the preliminary objection thus raised is by no means free from difficulty. The leading case on the question of the powers of the High Court to interfere under the old section 622 is the Privy Council case of *Amir Hassan Khan* v. *Sheo Baksh Singh*(1). But in construing their Lordship's dicta in that case, the High Courts and even the different benches of the same High Court have not been in agreement.

In *Dwarka Nath Sen* v. *Kesory Lal Goswami*(2), decided by MUKERJEE and TEUNON, JJ., the learned Judges say as follows :—(see page 707). "As pointed out by STANLEY, C.J., in *Ross Alston* v. *Pitambar Das*(3), that decision" [i.e., the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*(1)] "is an authority for the proposition that the words 'acted illegally or with material irregularity' do not comprehend a case or decision attacked merely on the ground that it is erroneous in law,—in that particular case, the erroneous decision upon a question of res judicata. The judgment of the Judicial Committee, however, does not furnish any test for determining under what circumstances a Court may be said to have acted illegally or with material irregularity nor is any general principle deducible from the numerous cases in the reports which are by no means easy to reconcile." Then the learned Judges go on to say that the phrase "acted illegally or with material irregularity" is not limited to cases of procedure only but includes cases of decisions vitiated by an error so palpable as to lead to "grave and manifest injustice."

But if the doctrine is thus enunciated so as to enable the High Court to interfere in cases of "grave and manifest injustice" "it obviously leave smuch room for divergence of judicial opinion." In *Ross Alston* v. *Pitambar Das*(3), two learned Judges held that they could interfere under section 622 with an erroneous decision of the District Judge that a barrister could be sued for the return of his fees if he did not appear for

(1) (1885) I.L.R., 11 Calc., 6 (P.C.) (2) (1910) 14 C.W.N., 703.
(3) (1903) I.L.R., 25 All., 509.

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These Civil Revision Petitions have been filed, praying for the reversal of the learned Subordinate Judge's orders in the suits. Under Order XLIII, rule 1 (a) of the Civil Procedure Code, an appeal lay to the Subordinate Judge's Court from the District Munsif's order returning the plaint in each suit. Under section 104 of the Civil Procedure Code, clause 2, a Second Appeal is prohibited from orders so passed in appeal. Hence, the defendants have come before us by way of Civil Revision Petitions under section 115 of the new Civil Procedure Code (which corresponds to the old section 622).

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(3) (1903) I.L.R., 25 All., 509.

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his client, whereas the third learned Judge (BANNERJEE, J.) held that section 622 did not empower the High Court to interfere with the lower Court's said erroneous decision, as the lower Court had jurisdiction over the suit and could not be said to have acted illegally or with material irregularity simply because it determined a legal question erroneously.

In the Revision Petitions before us, the Subordinate Judge could not be said to have had no jurisdiction to hear appeals against the Munsif's orders returning the plaints for presentation to the proper Court. Assuming that his decision on the interpretation of the saving clause to section 153 of the Estates Land Act is erroneous, he could not be said to have acted illegally or with material irregularity in the exercise of his jurisdiction though he might have decided erroneously, the question of law. However, as was said in *Dwarka Nath Sen* v. *Kesory Lal Goswami*(1) above referred to, several benches in the several High Courts seem to have held that if the decision on the question of law is so erroneous as to have led to grave and manifest injustice, the High Court had the power to interfere in revision notwithstanding the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*(2). The boldest attempt made to minimise the effect of the Privy Council decision was made in *Badami Kuar* v. *Dinu Rai*(3) where STRAIGHT, J., went so far as to say that the words "acted illegally" in section 622 had the very same meaning as the words in section 584 which empowered the High Court to entertain a Second Appeal where the Court below had in the exercise of its jurisdiction come to a decision which is "contrary to some specified law or usage having the force of law." It is unnecessary to set out the very numerous cases in which conflicting views have been pronounced on this question as to the scope of section 622. I shall refer to only a few to indicate the irreconcilable conflict. In *Kali Charan Sirdar* v. *Surat Chunder Chowdhry*(4), a Full Bench of the High Court clearly said that the mere fact that the lower Court had fallen into an error of law cannot give jurisdiction to the High Court under section 622 to interfere in revision. This Full Bench case has almost been ignored by some division benches of the Calcutta High

(1) (1910) 14 C.W.N., 703. (2) (1885) I.L.R., 11 Calc., 6 (P.C.)
(3) (1886) I.L.R., 8 All., 111. (4) (1903) I.L.R., 30 Calc., 3?7.

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Court in later cases In *Duraisami Reddi* v. *Muthial Reddi*(1), MILLER, J., clearly held that the decree of the Judge of a lower Court cannot be interfered with under section 622 merely because the Judge had made a mistake in law. In *Subramaniya* v. *Munusawmi*(2), SANKARAN NAIR, J., also held similarly. In *Mathura Nath Sarkar* v. *Umesh Chandra Sarkar*(3), MACLEAN, C.J., and BANNERJEA, J., held that when a Court of First Instance ordered a plaint to be returned for presentation to the proper Court and the Court of Appeal set aside such order, the High Court had no jurisdiction to interfere with such appellate order under section 622 of the Civil Procedure Code. Now *Mathura Nath Sarkar* v. *Umesh Chandra Sarkar*(3) is almost exactly similar to the present revision petitions. In that case also, it was argued by the petitioner's vakil (Mr. Saroda Charan Mitter, afterwards MITTER, J.), that if too strict an interpretation be put upon the Privy Council decision in *Amir Hassan Khan* v. *Sheo Baksh Singh*(4), there will be practically no remedy in cases of manifestly erroneous decisions pronounced by lower Courts in cases where no appeal or second appeal lay. It seems also to have been argued that if the High Court can interfere in revision where a Court against whose decision there is no appeal at all, acts without jurisdiction, the High Court can also interfere where an Appellate Court against whose appellate decision there is no second appeal) erroneously asks the Court of First Instance to act without jurisdiction or not to act when the first Court really has jurisdiction. But these contentions were overruled by their Lordships in that case. I might add that though BANNERJEA, J., in a previous case *Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi* (5), of the same volume, had expressed the view that section 622 allowed the High Court to interfere with gross and palpable errors of law committed by lower Courts, he did not seem inclined to take the same lax view in the latter case *Mathura Nath Sarkar* v. *Umesh Chandra Sarkar*(3).

In *Zamiran* v. *Fateh Ali*(6), where a District Judge confirmed the order of the Subordinate Judge returning the plaint for want of jurisdiction, the High Court interfered in revision simply because the District Judge committed an error of law in

(1) (1908) I.L.R., 31 Mad., 458. (2) (1908) 18 M.L.J. 240.
(3) (1896) 1 C.W.N., 626. (4) (1885) I.L.R. 11 Calc. 6 P.C.
(5) (1896) 1 C.W.N., 617. (6) (1905) I.L.R. 32 Calc. 146.

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confirming an erroneous decision of the Subordinate Judge as to the Subordinate Judge's jurisdiction. In *Meenatchi Achi* v. *Ananthanarayana Ayyar*(1), BENSON and BHASHYAM AYYANGAR, JJ., in the third sentence of their judgment thus formulate the objection of the respondent before them to their interference in revision in *Meenatchi Achi* v. *Ananthanarayana Iyer*(2). *Meenatchi Achi* v. *Ananthanarayana Iyer*(2) does not lie by reason that the appeal did lie to the District Court and that though the Munsif who passed the order appealed against acted in the exercise of his jurisdiction with material irregularity yet the order passed by the District Judge on appeal cannot be revised by this Court under section 622, of the Civil Procedure Code, though, in the exercise of its appellate jurisdiction, he (the District Judge) failed to set aside the order appealed against which was erroneous." Having thus stated the preliminary objection, their Lordships merely say that they overrule it. In a very recent case *Chindan* v *Kunhiraman*(3), decided by MILLER, J., in which the learned Judge was pressed to set aside the order of a District Judge who in appeal had set aside the order of the District Munsif returning the plaint, the following judgment was delivered —"I am clear that this petition does not lie under section 115 There is no illegality or irregularity so far as I can see in the exercise of his jurisdiction by the District Judge. This Code allows only one appeal from the order of the Court of First Instance and I am not at liberty to admit a second. Dismissed with costs." Thus there seems to me a clear conflict between the decision in *Meenatchi Achi* v. *Ananthanarayana Ayyar*(1) and that in the recent case of *Chindan* v. *Kunhiman*(3). I doubt the correctness of those decisions in which it has been held that the words "acted illegally" in section 115 would include erroneous decisions of law and not merely decisions in which by reason of erroneous procedure (such as shutting out of evidence or arguments) the party applying in revision was prejudiced in the trial of the case and I also doubt the correctness of those decisions which held that because the question of the jurisdiction of the Court of First Instance was involved in the erroneous decision of the Appellate Court the

(1) (1903) I.L.R., 26 Mad., 224 at p. 226.
(2) Civil Revision Petition No. 343 of 1900.
(3) Civil Revision Petition No. 612 of 1911.

High Court can interfere in revision with the erroneous decision of the appellate Court on the footing that the appellate Court itself acted without jurisdiction by pronouncing an erroneous decision on the question of the jurisdiction of the Court of First Instance.

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As I am given to understand that, owing to the passing of the Estates Land Act and to the conflicting views taken as to the jurisdiction of the Civil Courts over ejectment suits by landlords, numerous similar Civil Revision Petitions have either been filed or are likely to be filed in the High Court, and having in view the conflict of decisions on the exact scope of the provisions of section 115 of the Civil Procedure Code, I consider it desirable to refer the following questions for the decision of a Full Bench:—

(1) What is the exact scope of the meaning of the words "acted illegally" in section 115 of the Civil Procedure Code? Has the High Court power to interfere in any class of cases (and if so which class) where a question of law is wrongly decided by the Court whose decision is attacked in revision?

(2) Has the High Court jurisdiction to interfere under section 115 where an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of First Instance was or was not competent (i.e., had or had not jurisdiction) to entertain a suit?

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SANKARAN NAIR, J.—I agree.

V. Ramadoss for the petitioners

T. Prakasam and *P. Narayanamurti* for the respondent

This REFERENCE coming on for hearing before the Full Bench, the Court expressed the following OPINION:

WALLIS, J.

WALLIS, J.—The second question referred to us covers the present case, and I do not think it advisable to travel outside of it especially as the more general question has been considered by a Full Bench of five Judges in *Kristamma Naidu* v. *Chapa Naidu*(1) and the decision of the majority appears to me to be binding upon the Court as at present constituted As regards the second question, I am of opinion that the case is not covered by the decisions of the Privy Council and the Full Bench in *Amir Hassan Khan* v. *Sheo Baksh Singh*(2) and *Kristamma Naidu* v.

(1) (1894) I.L.R., 17 Mad., 410 (F.B.). (2) (1885) I.L.R., 11 Calc., 6 (P.C.).

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Chapa Naidu(1) neither of which deals with errors of law affecting jurisdiction. I think that the High Court is empowered under section 115 to keep Courts subordinate to it within the bounds of their jurisdiction and to see that they do not refuse to exercise it, functions discharged in England by means of the writs of prohibition and mandamus. No question of jurisdiction arose in *Amir Hassan Khan* v. *Sheo Baksh Singh*(2) or as it seems to me, was considered by their Lordships. That decision was considered by a Full Bench of five Judges in *Manisha Eradi* v. *Siyali Koya*(3), where it was held by the majority that a Small Cause Court Judge who assumed jurisdiction owing to an error of law as applied to the facts found by him acted without jurisdiction within the first part of the section. MUTTUSWAMI AYYAR, J., with whom PARKER, J., concurred, preferred to treat the third part of the section as applicable and held that it applied in cases where the lower Court assumed or declined jurisdiction in consequence of some error of law or of some material irregularity in its proceedings and in no others. In the later Full Bench case *Kristamma Naidu* v. *Chapa Naidu*(1), MUTTUSWAMI AYYAR, J., was of opinion that this was too narrow a construction and agreed with the majority that the third part of the section authorized interference when the decision of the lower Court was perverse. In this case too SHEPHERD, J., appears to have considered that all erroneous decisions as to jurisdiction would be covered by the earlier provisions of the section, but if this be not so, there is nothing to show that he would have regarded the third as inapplicable. In *Badami Kuar* v. *Dinu Rai*(4), the majority of the Full Bench were of opinion that the questions to which the present section 115 applies were questions of jurisdiction only. In *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi*(5), the subordinate appellate Court in dismissing a suit for want of jurisdiction under an error in law was held to have acted illegally in the exercise of its jurisdiction. The decision in *Mathura Nath Sarkar* v. *Umesh Chandra Sarkar*(6), the facts in which are on all fours with the present case that the High Court could not interfere was based on the authority of

(1) (1894) I.L.R., 17 Mad., 410 (F.B.). (2) (1885) I.L.R., 11 Calc., 6 (P.C.).
(3) (1888) I.L.R., 11 Mad., 220. (4) (1886) I.L.R., 8 All., 111.
(5) (1888) I.L.R., 15 Calc., 47. (6) (1896) 1 C.W.N., 626.

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Amir Hassan Khan v. *Sheo Baksh Singh*(1) which was I have already said does not appear to me to apply to errors in law as to jurisdiction.

In *Meenatchi Achi* v. *Ananthanarayana Ayyar*(2) which was also a case like the present, the Court overruled the objection that it could not interfere under the section but without giving reasons. In *Zamiran* v. *Fateh Ali*(3), it was held that the lower Appellate Court acted illegally in the exercise of its jurisdiction in affirming the decree of the Court of First Instance dismissing the suit for want of jurisdiction owing to an error of law. I am prepared to follow the decisions in support of the view already cited to hold in the case referred to us the High Court is empowered to interfere under the third part of the section. Cases of jurisdiction of course can only come under this part of the section if they do not come under the first or second parts and the contention has been raised before us that a subordinate Appellate Court acts without jurisdiction within the meaning of the section in deciding under an error of law that the Court of First Instance has jurisdiction and directing the latter to retake the case on its file and dispose of it according to law. This contention is opposed to *Mathura Nath Sarkar* v *Umesh Chandra Sarkar*(4), but the point was not argued there as it was conceded that this part of the section was inapplicable. There could be no doubt that a Court of First Instance which wrongly assumes jurisdiction owing to an error of law acts without jurisdiction. Similarly it may, I think, be said that an Appellate Court has no jurisdiction to remit for trial to a lower Court cases over which the latter has no jurisdiction and that if it does so under an error of law it acts without jurisdiction within the meaning of the section. In either view I answer the second question in the affirmative I have not considered the propriety of interfering in the present case.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J—These petitions arose out of three suits instituted by a landholder to eject the tenant in each case in the District Munsif's Court of Tanuku The defendants objected to the jurisdiction of the Munsif's Court and contended that the suits should have been instituted before the Collector The question of the proper Court empowered to try the suits depended

(1) (1885) I.L.R., 11 Calc., 6 (P.C.) (2) (1903) I.L.R., [illegible] Mad., [illegible]
(3) (1905) I.L.R., 32 Calc., [illegible] (4) (1897) 1 C.W.N., [illegible]

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on the construction of section 153 of the Estates Land Act. The District Munsif held that he had no power to entertain the suits and returned the plaints for presentation to the proper Court. An appeal was presented against his order; the Subordinate Judge who heard the appeal put a different interpretation on section 153 of the Estates Land Act and was of opinion that the plaints were rightly presented to the District Munsif's Court. He passed the following order:—"The lower Court's order is therefore set aside with a direction to the District Munsif to take back the plaint, restore the suit to its file and dispose of the same according to law." The defendant applied to this Court under section 115 of the Civil Procedure Code to set aside the Subordinate Judge's order on the ground that the Munsif's view on the question of jurisdiction was right and that the Subordinate Judge was wrong. The petitions came on for hearing before SANKARAN NAIR and SADASIVA AYYAR, JJ. The learned Judges holding that there was a conflict of judicial opinion on the question whether the Subordinate Judge could be held, in passing his order, to have exercised a jurisdiction not vested in him or to have acted illegally in the exercise of his jurisdiction and that there was a great diversity in the opinions of the Judges as to the right interpretation to be put on the words "acted illegally" in section 115 of the Civil Procedure Code, referred the following questions for the decision of a Full Bench:—

"(1) What is the exact scope of the meaning of the words 'acted illegally' in section 115 of the Civil Procedure Code? Has the High Court power to interfere in any class of cases (and, if so, which class) where a question of law is wrongly decided by the Court whose decision is attacked in revision?

(2) Has the High Court jurisdiction to interfere under section 115 when an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of First Instance was or was not competent (i.e.), had or had not jurisdiction to entertain a suit?"

The second question alone arose for decision in the petitions before the learned Judges who made the reference. The first question is very wide in its scope. It is doubtful whether it is possible, or desirable, if possible, to attempt an exhaustive definition of the expression "acting illegally in the exercise of

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jurisdiction." The question was considered by a Full Bench of five Judges of this Court in *Kristamma Naidu* v. *Chapa Naidu*(1). Their opinions were not unanimous. We considered it desirable in the circumstances to give our answer only to the second question referred for our opinion in this case and to abstain from dealing with the wider point raised in the first question.

So far as the second question is concerned, MILLER, J., in a similar case—*Chindan* v. *Kunhiraman*(2)—held that there was no illegality or irregularity in the exercise of its jurisdiction by an Appellate Court in setting aside an order returning the plaint for presentation to the proper Court and remanding the suit to the Court of the First Instance for adjudication according to law. It was apparently not urged before the learned Judge that there was an exercise of jurisdiction not vested in the Appellate Court; at any rate he pronounced no opinion on that question. In *Mathura Nath Sirkar* v. *Umesh Chandra Sirkar*(3), MACLEAN, C.J., and GURUDASS BANERJEE, J., held the same view as MILLER, J., and on the same grounds MACLEAN, C.J., observed: "It is conceded also by the appellant's pleader that the learned District Judge in doing what he did was clearly acting within his jurisdiction, and the point urged is this, that if he did anything, he committed an error in law alone." BANERJEE, J., also considered only the question whether there was an illegal exercise of jurisdiction. He said: "It may seem anomalous that where a Court acts without jurisdiction, it may be set right under section 622 but, when it directs another Court to do so, its order is not open to revision under that section. But the anomaly, so far as cases like the present are concerned, has been removed by section 646 (*b*), which shows that the remedy in such a case, supposing the petitioner's contention to be right that the case was triable by the Court of Small Causes, lies in the course prescribed by that section, and not in an application under section 622. This observation would not apply where the question of jurisdiction does not arise on account of a doubt as to whether a case is of small cause nature or not. Section 646 (*b*) or the corresponding section in the present Procedure Code would have no application, for instance

(1) (1894) I.L.R., 17 Mad., 410 (F.B.)
(2) Civil Revision Petition No. 612 of 1911
(3) (1896) 1 C.W.N., 626.

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"(1) What is the exact scope of the meaning of the words 'acted illegally' in section 115 of the Civil Procedure Code? Has the High Court power to interfere in any class of cases (and, if so, which class) where a question of law is wrongly decided by the Court whose decision is attacked in revision?

(2) Has the High Court jurisdiction to interfere under section 115 when an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of First Instance was or was not competent (i.e.), had or had not jurisdiction to entertain a suit?"

The second question alone arose for decision in the petitions before the learned Judges who made the reference. The first question is very wide in its scope. It is doubtful whether it is possible, or desirable, if possible, to attempt an exhaustive definition of the expression "acting illegally in the exercise of

Court must be taken to have failed to exercise a jurisdiction vested in it by not setting aside the first Court's order. So far it will be observed that all the cases in which the High Courts interfered to set aside an order of an Appellate Court relating to the question of the jurisdiction of the first Court, have not proceeded on the ground that the Appellate Court exercised a jurisdiction not vested in it or failed to exercise a jurisdiction vested in it. Apparently the attempt to induce the High Court to interfere was based in the arguments at the Bar in those cases on the ground that there was an illegal exercise of jurisdiction by the Appellate Court. I cannot therefore but be diffident in arriving at the conclusion to which my reasoning has led me that in such cases the High Court has power to interfere under the first part of section 115 of the Civil Procedure Code (section 622 of the repealed Code), that is, on the ground that the Appellate Court has exercised a jurisdiction not vested in it or failed to exercise a jurisdiction vested in it. With all deference I cannot but think that insufficient attention has been paid in the consideration of the High Court's powers under section 115 to the true nature of the functions performed by an Appellate Court. It is not denied that if a Court by an error of law in deciding whether it had jurisdiction, exercised a jurisdiction not vested in it or failed to exercise a jurisdiction vested in it the High Court has power to interfere under section 115 of the Civil Procedure Code and that its right of interference cannot be objected to on the ground that the Court has jurisdiction to decide whether it has jurisdiction over the cause or not and that an erroneous decision on the question is a mere error of law which the High Court cannot rectify according to the decision of the Judicial Committee of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*(1). See *Manisha Eradi* v *Siyali Koya*(2) and *Elston* v. *Rose*(3). What is contended is that though an error of the Court regarding its own jurisdiction can be rectified the mistake of an Appellate Court concerning the jurisdiction of the Court of First Instance cannot be set right under section 115 of the Civil Procedure Code It is argued that the Appellate Court in an appeal, from an adjudication of

(1) (1884) I.L.R., 11 Calc., 6 (P.C.) (2) (1888) I.L.R., 11 Mad., [illegible]
(3) (1868) L.R., 4 Q.B. [illegible]

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the first Court concerning its jurisdiction merely decides whether that adjudication is right or wrong, that the matter before it is nothing more nor less than the order of the first Court regarding its jurisdiction and that the Appellate Court pronouncing its own decision on the question exercises no jurisdiction over the cause itself which was before the first Court and that therefore the first part of section 115 would be inapplicable. I am of opinion that this is an entirely wrong view of the matter. Order XLI, rule 32 (section 577 of the old Code), enacts that "the judgment (of the Appellate Court) may be for confirming, varying or reversing the decree from which the appeal is preferred." Section 107, clause (1) (section 582 of the old Code), provides "subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—(a) to determine a case finally, (b) to remand a case; (c) to frame issues and refer them for trial; (d) to take additional evidence or to require such evidence to be taken" Clause (2) says "subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction *in respect of suits instituted therein.*" Section 108 extends the provisions of the Code relating to appeals to appeals (a) "from appellate decrees, and (b) from orders made under this Code or under any special or local law in which a different procedure is not provided" Order XLIII, rule 2, makes the rules of Order XLI applicable to appeals from orders. It is quite clear that the *Civil Procedure Code* has accepted and carried out the well-established principle that an appeal is the continuation of the proceedings in the Original Court, that those proceedings are removed to the Court of Appeal and that the proceedings in the Appellate Court are in the nature of a re-hearing. In the case of second appeals no doubt the High Court does not possess plenary powers of dealing with the case and it cannot be said in such cases that the cause is re-heard in full but this does not affect the general principles regulating the functions of an Appellate Court or the powers and duties of a Court of First Appeal See *The Queen* v. *Madhub Chunder Giri Mohunt*(1) and *Goomanee*(2) where the functions of a Court of Appeal in

(1) (1874) 21 W.R., 13 at p. 14 (Cr. R.) (2) (1872) 17 W.R., 59 (Cr. R.).

criminal cases are explained. *Kirani Ahmedula* v. *Subabhat* (1) relates to the functions of the Appellate Court in cases where a discretionary power is vested in a Court. An Appellate Court is entitled to take cognisance of facts which occurred subsequent to the decision of the first Court. See *Sakharam Mahadev Danage* v. *Hari Krishna Danage*(2) and *Ram Pershad Ojha* v. *Bhurosa Koonwar*(3). No doubt there are express provisions restricting the powers even of a Court of First Appeal such as in the matter of the right to admit additional evidence, but such restrictive provisions are mere rules of procedure similar to provisions relating to procedure in the Court of First Instance. In *Kristnama Chariar* v. *Mangammal*(4), BHASHYAM AYYANGAR, J., observes at page 95: "When an appeal is preferred from a decree of Court of First Instance, the suit is continued in the Court of Appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of Appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit whether that be one confirming, varying or reversing the decree of the Court of First Instance." Later on he says: "When an appeal is preferred, the Court of Appeal is really seized of the whole suit though the relief given by it will be limited to the portion of the decree appealed against or objected to under section 561, Civil Procedure Code." The same principle is adopted with regard to the functions of the Court of Appeal in England. Order LVIII, rule 4 of the Judicature Act lays down that the Court of Appeal has the same power of drawing inferences, etc., as the High Court. 36 and 37 Victoria, Chapter 66, Section 75, enacts that for all purposes incidental to hearing and determination of any appeal within its jurisdiction and the management, execution and enforcement of any judgment or order made on such appeal and for the purposes of any other authority expressly given to the Court of Appeal it shall have all the powers, authority and jurisdiction vested in the High Court of Chancery. Order XLI, rule 33, enacts that the Appellate Court should pass the order which the first Court should have passed and has full power to pass such other order as may be necessary to do justice between the parties before it.

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(1) 1884 I.L.R., 8 Bom., 28.
(2) (1882) I.L.R., 6 Bom., 113.
(3) (1868) 9 W.R., 328.
(4) (1903) I.L.R., 26 Mad., 91.

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Walter Clark, the learned author of the article on Appeal and Error in the Cyclopædia of American Law and Procedure, Volume II, observes at page 516 that in its original and technical sense "An appeal was a proceeding, introduced into equity practice from the Civil law, by which the whole cause was removed from a lower to an Appellate Court, and there tried *de novo* upon evidence newly introduced, being subjected to a new and final determination as if it had not been tried before, and without any reference to the conclusion of the inferior Court. The object of the common law writs of error was to review and correct any error of law committed in the proceedings." The learned author points out that the appeal established by statute in most of the States of the United States has some of the characteristics both of the equitable remedy of an appeal and of the writ of error In India a first appeal is similar to the equitable remedy of an appeal in England The Appellate Court indeed has not got to and cannot re-hear the suit *de novo* upon fresh evidence and without any reference to the conclusion of the inferior Court. The extent of its powers is fully described in the Civil Procedure Code. The provisions in the Code that I have already referred to, conclusively show that its functions and powers are similar to those of the first Court. When, therefore, a suit has been disposed of by the first Court and an appeal is preferred, the Court of Appeal is seized of the cause and has the powers and duties of the first Court. It must of course be remembered that all appeals are not appeals in which the whole cause in the first Court is brought before the Appellate Court. While the cause still remains in the Court of First Instance particular proceedings before it may be brought before the Appellate Court. Such matters are set out in section 104 and Order XLIII, rule 1, of the Civil Procedure Code. For instance, if there is an appeal against an order appointing or refusing to appoint a receiver the suit in which the question arises remains in the hands of the first Court and only the proceedings relating to the appointment of the receiver are removed to the Appellate Court; and the powers possessed by the Appellate Court, similar as they are to those of the first Court, would relate only to the proceedings removed to it. If the consequence of an order passed by the first Court is to bring the proceedings there to a close then the appeal to the Appellate Court has the effect of bringing up

the whole cause before it. Where a suit has been dismissed by the first Court on a preliminary point and an appeal is lodged against the dismissal, the suit itself is before the Court of appeal. That this is the effect according to the contemplation of the legislature is clear from the provisions of Order XLI, rule 23, and from section 107 already referred to. The former provision gives the Appellate Court, where the decision of the first Court on a preliminary point is reversed, power *if it thinks fit* to remand the case while the latter provision invests it with plenary powers to deal with the appeal in any other manner if it thinks fit to do so. It may determine the case finally, frame issues and refer them for trial and take additional evidence or require such evidence to be taken in the exercise of its ample discretion; and clause (2) of section 107 invests it with all the powers of the first Court. A remand is to be made only if the Appellate Court thinks fit to do so according to Order XLI, rule 23. Notwithstanding therefore that the decision of the first Court was confined to the adjudication of a preliminary point and the appeal is against that adjudication, the Appellate Court is seized of the whole cause. When the Court of First Instance holding that it had no jurisdiction to try a suit, returns the plaint for presentation to another Court its order terminates the proceedings in the suit before it. The order is tantamount to a dismissal of the suit for all practical purposes; the object of returning the plaint is merely to enable the plaintiff to present the same instrument in another Court and avoid the payment of fresh Court fees, a concession made to him on the ground that he has already paid court-fees for the complete adjudication of the cause. If there were no provision in the Code for the return of the plaint and the Court dismissed the suit on the ground of want of jurisdiction the appeal against the dismissal would be dealt with under Order XLI, rule 23. In consequence of the concession made in plaintiff's favour allowing the return of the plaint to him it was found necessary to provide specially for an appeal against the order. But all this does not alter the substantial character of the order returning a plaint on the ground of absence of jurisdiction in the first Court or of the appeal against such order. The suit being at an end so far as the first Court is concerned and nothing being left there the appeal has the effect of removing the whole cause to the Appellate Court. If the Appellate Court decides that

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a question would lead to a fresh adjudication between the parties but need not necessarily result in a failure of justice. Whether their Lordships meant no more than that an error which need not lead to a failure of justice would not be a good ground for interference, it is difficult to say. The High Courts have sometimes laid down that gross and palpable errors leading to grave and manifest injustice may justify interference consistently with the decision of the Privy Council. See *Dwarka Nath Sen* v. *Kesory Lal Goswami*(1) and *Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi*(2). STRAIGHT, J., indeed went further and held the opinion that any error which could be rectified in Second Appeal would also be a proper ground for interference under section 115 of the Civil Procedure Code. See *Badami Kuar* v. *Dinu Rai*(3). This is not reconcilable with the decision of the Privy Council; see *Kali Charan Sirdar* v. *Sarat Chunder Choudhry*(4), *Duraisami Reddi* v. *Muthial Reddi*(5) and *Subramaniya* v. *Munusawmi*(6) We are of course bound to presume that the Judicial Committee had full regard to the history of the legislation on the point, including the facts that section 622 of Act VII of 1877 did not contain the words "or to have acted in the exercise of its jurisdiction illegally and with material irregularity" and that these words were inserted by section 92 of the Amending Act XII of 1879. It appears to me to be quite possible that what their Lordships meant to lay down was that the object of the amended section was to confer a discretionary power on the High Court to correct manifest injustice brought about by palpable errors and that the High Court should not interfere on the mere ground of an error of law in the decision of the lower Courts. The powers conferred on the High Court under section 115 are similar to those possessed by the High Courts in England to prevent injustice by the writs of *certiorari*, prohibition and mandamus. I do not propose to review the decisions which have attempted to place a meaning or no meaning on the expression "acting illegally," as I am prepared to hold that this Court has power to interfere under the first part of section 115. But it may be taken to be

(1) (1910) 14 C.W.N., 703.
(2) (1896) 1 C.W.N., 617.
(3) (1886) I.L.R., 8 All., 111.
(4) (1903) I.L.R., 30 Calc., 397.
(5) (1908) I.L.R., 31 Mad., 458.
(6) (1908) 18 M.L.J., 249.

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well-established that the decision of the Privy Council will not justify the refusal to give any effect to the words "acting illegally" and that it would not be right to confine the right to interference to cases of irregularity in procedure where the first part of the section would not be applicable. In *Kristamma Naidu* v. *Chapa Naidu*(1), COLLINS, C.J., MUTHUSWAMI AYYAR, J., and SHEPHERD, J., held that a perverse decision on a question of law or procedure, that is, a conscious departure from some rule of law or procedure would amount to acting illegally or with material irregularity. BEST, J., held that if the Court itself took a point of law in appeal without affording the parties an opportunity of proving what was necessary to meet it, that would be an irregularity within the meaning of section 622 and that an inadvertent admission of an appeal that is time-barred would be an illegality within the section. DAVIES, J., was of opinion that interference under the section should be confined to cases where the illegality or irregularity is such as might occasion a substantial failure of justice. I do not think that the case can be taken to have laid down an exhaustive definition of the causes which would justify an interference under the section. Cannot an error of law which makes the Court confer jurisdiction on a subordinate Court, be taken to amount to "acting illegally in the exercise of jurisdiction?" Such an error is of the most serious kind affecting what is regarded as the vital point in all litigation I should be disposed, if necessary, to say that an erroneous holding on such a point would amount to "acting illegally in the exercise of jurisdiction." But, I think it is unnecessary to place reliance on the latter part of section 115 to justify the interference of the High Court in such a case. My answer to the second question referred to the Full Bench is in the affirmative for the reasons given above

SADASIVA AYYAR, J.

SADASIVA AYYAR, J—In the order of reference to the Full Bench, I have set out my reasons for doubting the correctness of the decisions which have shown an inclination to hold

(a) that the words "acted illegally" in the old section 622 [new section 115, clause (*b*)] might include cases of mere erroneous decisions on questions of law, and

(1) (1894) I.L.R. 17 Mad., 410 (F.B.)

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(*b*) that if the erroneous decision of law related to the question of the jurisdiction of a Court *other than that of the Court which gave the erroneous decision* it might be even brought under clauses (*a*) and (*b*) of section 115 which use the words "to have exercised a jurisdiction not vested in it by law" and "to have failed to exercise a jurisdiction so vested."

My doubts have been only confirmed by the arguments advanced before the Full Bench. Section 115 seems to me to permit the High Court to interfere only on three specific grounds, viz.—

(*a*) where the Court whose decision is sought to be revised has exercised a jurisdiction not vested in it by law,

(*b*) where it has failed to exercise a jurisdiction so vested, or

(*c*) where it has acted in the exercise of its jurisdiction illegally or with material irregularity.

Now, in the present cases, the Appellate Court had jurisdiction and was bound to hear the appeal preferred to it from the order of the District Munsif returning the plaint to be presented to the proper Court. The party aggrieved by the District Munsif's order was entitled under Order XLIII, clause 1 (*a*), to appeal to the Appellate Court. The Appellate Court was bound in the exercise of its jurisdiction to come to a conclusion whether the Munsif was right or wrong in returning the plaint to be presented to another Court. To arrive at either conclusion clearly involves the arriving at a finding as to jurisdiction *or want of jurisdiction in the District Munsif to try the suit* himself. I am perfectly clear that clauses (*a*) and (*b*) of section 115 can only apply *to the jurisdiction of the Court whose order or decree is sought to be revised to pass such order or decree* and not to its decision on the jurisdiction of some other Court. I entirely agree with the observations of MACLEAN, C.J., in *Mathura Nath Sarkar* v. *Umesh Chunder Sarkar*(1) on this point and of Mr. Justice MILLER in *Chindan* v. *Kunhiraman*(2) quoted in my order of reference. The argument that as every Court has jurisdiction to decide as a preliminary question its own jurisdiction before going into the other

(1) (1896) 1 C.W.N., 626. (2) Civil Revision Petition No. 612 of 1911.

questions in the case, clauses (*a*) and (*b*) of section 115 would become unmeaning and useless does not in the least impress me as creating any difficulty, for, the revising Court does not and need not deal with the *preliminary opinion* of the revised Court giving itself jurisdiction but with the decree or order of the revised Court which was passed after it erroneously gave itself jurisdiction and which decree or order was really passed without jurisdiction though the revised Court might have erroneously thought that it had jurisdiction. Whether the revised Court considered at all the question whether it had jurisdiction or ignored the point altogether, the revising Court can come to its own conclusion and set aside the decree or order passed without jurisdiction.

I also feel great difficulty in following the argument that where the Appellate Court deals with an appeal from an order of the Munsif returning a plaint to be presented to the proper Court and comes to an erroneous decision, it (the Appellate Court) wrongly gives *itself* or withholds from *itself* jurisdiction over the trial of the suit, simply because its order decides that the Munsif has, or has not, jurisdiction to try the suit.

I think that the Privy Council case *Amir Hassan Khan* v. *Sheo Baksh Singh*(1) followed by the Full Bench of the High Court in *Kristamma Naidu* v. *Chapa Naidu*(2), is binding on us, that these decisions if loyally followed, do not empower us to interfere in revision with orders and decrees of the lower Courts which merely involve an erroneous decision of law (whether the law relates to a question of *res judicata* as in the Privy Council case or to the jurisdiction of some other Court as *in this case*) and that while we may be *reasonably* astute in trying to get round precedents if parties would be left entirely remediless otherwise, we could not get over the plain implications of the Privy Council decision. Especially in cases of orders passed in matters which are really or substantially of an interlocutory character and which leave room for parties to come in the regular course before us at later stages, should we refuse to clutch at revisional jurisdiction. In the present case, the lower Court's decision as to the Munsif's jurisdiction, assuming it for argument's sake to be erroneous, can be set aside when

(1) (1885) I.L.R., 11 Calc., 6 (P.C.) (2) (1894) I.L.R., 17 Mad., 410 (F.B.).

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the matter is brought before us on second appeal after the Munsif decides the suit in obedience to the Subordinate Judge's appellate order now sought to be revised.

I shall further make a short reference to some of the latest cases before concluding. In *Venkatasubbiah* v. *Seshachellum*(1) it was held that the District Munsif's order refusing to allow amendment of a plaint cannot be revised under section 115. In *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka*(2) an erroneous decision as to limitation was held not revisable. In *Ramjas Agarwalla* v. *India General Navigation and Railway Company, Ld.*(3), the refusal to frame and try a requisite issue was held revisable. In *Venkata Subramaniam* v. *Kanchi Raju*(4), ABDUR RAHIM, J., refused to interfere in revision where the lower Court had misconstrued section 87 of the Negotiable Instruments Act.

In the result, I would give the following answer to the questions referred to the Full Bench On the first question, the words "acted illegally" mean giving a wilfully perverse decision on a question of law as stated in *Kristamma Naidu* v. *Chapa Naidu*(5) and not a mere erroneous decision on a question of law On the second question, I hold that the erroneous decision of the Appellate Court on the question of the jurisdiction of the first Court does not come under any of the three clauses (*a*), (*b*) and (*c*) of section 115, that the appellate Court cannot, by any reasonable use of language, be held in such a case to have exercised a jurisdiction not vested in it (the appellate Court) by law or to have failed to exercise a jurisdiction so vested (in itself) and that according to the cases—*Amir Hassan Khan* v. *Sheo Baksh Singh*(6) and *Kristamma Naidu* v. *Chapa Naidu*(5)—it cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction.

N.R.

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(1) (1912) 23 M.L.J., 136. (2) (1912) I.L.R., 39 Calc., 473.
(3) (1912) 16 C.W.N., 421. (4) (1911) 12 I.C., 138.
(5) (1894) I.L.R., 17. Mad., 410 at p. 415 (B.F.)
(6) (1885) I.L.R., 11 Calc., 6 (P.C.)

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

RAJAMMAL (PLAINTIFF),

v.

NARAYANASAMY NAICKER AND ANOTHER (DEFENDANTS).*

1914, October 6 and 7 December 18 and 1915 March 3.

Presidency Small Cause Courts Act (XV of 1882), sec. 19, cl (s)—Jurisdiction—Unsuccessful claim proceedings—Suit to recover moveable property attached by the Presidency Small Cause Court or for payment of its value—Not a suit for a mere declaration—The Small Cause Court Rules—Claim Petitions—Civil Procedure Code (Act V of 1908).

A suit by the unsuccessful party in claim proceedings to recover moveable property attached by the Presidency Small Cause Court or for the payment of its value is not excluded from the jurisdiction of the Presidency Small Cause Court under section 19, clause (s) of the Act, as a suit for a declaratory decree. The statutory suit to establish his right given to the unsuccessful party in claim proceedings under the Code involves in every case a prayer for the setting aside of a summary order of a Civil Court, this being so, such a suit cannot be regarded as a suit for a mere declaration

Phul Kumari v *Ganshyam Mitra* (1908) I L R., 35, Calc., 202 at p 205 (P C.), followed.

The Small Cause Court rules reproduce the provisions of the Civil Procedure Code as to claim petitions and cases under them must be governed by the same considerations.

Case stated under section 69 of the Presidency Small Cause Courts Act XV of 1882 by the Registrar of the Court of Small Causes, Madras, in Suit No. 3117 of 1913. The facts of the Referred Case and the questions referred are clearly set out in the first paragraph of the judgment of OLDFIELD, J.

The facts of the case appear from OLDFIELD, J.'s order of reference to the Full Bench.

P. Sambanda Mudaliar for the plaintiff

C. Pattabhirama Ayyangar for the first defendant

This case came on for hearing before OLDFIELD and TYABJI, JJ., who in referring the case to a Full Bench made the following orders.—

OLDFIELD, J.—The facts, as submitted, are that the first defendant in execution of his decree attached moveable property, as belonging to the second defendant, his judgment-debtor. The plaintiff claimed unsuccessfully and then brought the

OLDFIELD, J

* Referred Case No. 7 of 1913

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present suit for the return of the property or payment of its value by the first defendant. The property is in the custody of the Court. The questions referred are—

(1) Is the suit maintainable?

(2) Is the plaintiff bound to ask for an express declaration of her right to the property?

(3) Is the suit one contemplated by Order XXI, rule 53, of the Small Cause Court Rules and is it cognizable by the Small Cause Court?

It is to be observed first that Questions 1 and 2 may, for the purpose of the reference, be treated as alternative. The object is to determine the form in which the plaintiff should ask for relief, and the Court, to be determined with reference to that form, which can give it. If she is bound to ask for a declaration and cannot obtain one in a Small Cause Court, she will not be able to alter the latter fact by asking also for a decree for possession, which such a Court ordinarily could give, because she either is obliged or chooses to do so.

The first defendant's objection to the suit as framed is shortly that the plaintiff's claim for recovery of property from a person who is not in possession of it, is meaningless and not maintainable. *Contra*, it is urged that in fact the first defendant is in possession of it through the attaching Court, since the Court holds it on his behalf, either generally or as his agent. This view is not tenable. Two respects only have been referred to, in which the possession of the Court resembles that of an agent, that (1) its officers would be liable to the first defendant in case the property were lost or damaged through their negligence, (2) the first defendant can at any time terminate the Court's possession by withdrawing his attachment. But as regards (1) the liability to the first defendant would be only for such proportion of the value of the property, not exceeding the amount of his decree, as might have been recoverable by its sale, the second defendant being entitled to recover also, in case the first defendant's claim did not exhaust the whole value; and as regards (2), though the first defendant could terminate the Court's custody at his option, he could not himself obtain possession, since it would revert to the person from whom it was taken. In other respects the attempt to represent the Court's possession as that of the

first defendant's and did not come into the Court's possession as his; and he would not suffer, except indirectly and in the event of his not being able to recover his decree amount otherwise, by its loss or deterioration in circumstances in which no compensation could be claimed. Nor, the analogy with agency failing, is the contention that the Court's custody is in some less specific way equivalent to the first defendant's better established. For the distinctions drawn between the former and the custody of an agent are equally applicable to any more general relation which can be suggested. The difficulty in the plaintiff's way is still that attachment does not affect ownership and that the Court, though it holds the property at the creditor's instance, holds it in no way at his direct disposal or more for his benefit than for that of the debtor, to whom it belongs and whose debt it is to discharge. It is not necessary to decide whether the Court's custody is *sui generis* or is covered by any of the general legal descriptions of possession. It is sufficient that the property has not been shown to be in the possession of the first defendant. He, therefore, cannot be sued for its recovery. The alternative is that the plaintiff must establish her right against him by a suit for a declaration.

The Madras cases are consistent with this. The first referred to here—*Janakiammal* v. *Vithenadien*(1)—is no doubt in plaintiff's favour. Its authority is, however, doubtful, because the report does not refer explicitly to the Court's custody of the property and because the case was not argued. The next—*Booche Naidoo* v. *Lutchmcepaty Naidoo*(2)—is not in point, because the Court's custody had ceased on the sale of the attached property to the second defendant, from whom possession or the value was claimed. *Narainan* v *Nilakandan Nambudri*(3) was decided under the Code of Civil Procedure, and the property being immoveable, the Court's custody was not in question. The decision, however, laid down generally that an unsuccessful claimant cannot ask for the discharge of the order of attachment in his suit, but must obtain a declaration and carry it to the attaching Court which will act on it. The point actually decided was that the plaintiff was not bound to ask for

(1) (1870) 5 M H C R., 191 (2) (1873) M H C R., 20

(3) (1882) I.L.R., 4 Mad., 131.

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specific relief in the shape of a discharge of the attachment, besides a *declaration regarding it or the ownership of the* property; and it is to be presumed that any contention regarding specific relief at the hands of the defendants would have been similarly negatived. In *Naranayyan* v. *Nageswarayyan*(1), the Court no doubt said generally that a plaintiff in a suit under section 283 of the Civil Procedure Code, could ask for specific relief as well as a declaration. But this statement had no bearing on jurisdiction or the facts of the case which do not appear to have included possession by an attaching Court. The two next decisions are greatly relied on by the plaintiff. In *Mahomed Koya* v. *Kasmi*(2), decided under the Provincial Small Cause Courts Act, it was held consistently with the first defendant's present argument that the plaintiff was not bound to sue for recovery of the moveables under attachment and had sued rightly for a declaration. But reliance has been placed on the words "if plaintiff had sued for recovery of the property, the suit would be cognizable by a Court of Small Causes." They are, however, followed immediately by others, which show that this statement was conditional on the circumstances enabling the plaintiff to sue for possession *at all and that* they in fact did not do so, because the property was in the possession, not of any private person, but of the Court, which could not be sued. Next in *Ambu* v. *Ketlilamma*(3) immoveable property was in question and there was therefore no possession by an attaching Court, the property being in fact in possession of an auction-purchaser. The plaintiff had already sued once under section 283 of the Code of Civil Procedure, and the question was whether she could sue again after the sale for possession. The observations of MUTHUSWAMI AYYAR, J., regarding the claimant's right to sue once only after her title has been declared are therefore not now relevant. They were disapproved in *Kunhamma* v. *Kunhunni*(4), but finally approved in the Full Bench Case of *Kristnam Sooraya* v. *Pathma Bee*(5). But the last mentioned decision really did no more than endorse the learned Judge's opinion that section 42 of the Specific Relief Act does not take away the plaintiff's right to sue only for a

(1) (1894) I.L.R., 17 Mad., 383. (2) (1886) I.L.R., 9 Mad., 206.
(3) (1891) I.L.R., 14 Mad., 23. (4) (1893) I.L.R., 16 Mad., 140.
(5) (1906) I.L.R., 29 Mad., 161 (F.B.).

declaration under section 283 of the Code of Civil Procedure and in no way authorized the principle on which the plaintiff's argument depends, that independently of the circumstances of the case and the nature of the possession, in which the disputed property is, a suit for possession with or without a prayer for declaration is the proper remedy. As to that, the current of Madras authority is in the first defendant's favour.

So also in Calcutta and Allahabad. In *Shiboo Narain Singh* v. *Mudden Ally, Natabar Nandi* v. *Kali Dass Pal*(1), section 283 of the Code of Civil Procedure was in question and the Court was dealing directly with a suit against a purchaser in possession. It therefore held that a suit for possession or the value of the property would lie. But in doing so, it distinguished between such a case and one similar to *Ram Dhun Biswas* v. *Kefal Biswas*(2) or that now before us in which no sale had taken place and a declaration had therefore to be asked for. This decision is explained by the Allahabad High Court in the Full Bench case of *Godha* v. *Naik Ram*(3). In it a claim to property in the possession of the Court was in question, and a conclusion consistent with that already based on Madras authorities was reached. The expression of dissent at the end of the judgment from the Madras view can be accounted for by the fact that only the two earliest cases above referred to were considered and the *facts in the later were misunderstood.*

On the other hand, the plaintiff is no doubt entitled to rely on the most recent case in Bombay. The earlier cases, *Nathu Ganesh* v. *Kalidas Umed*(4) and *Gordhan Prema* v. *Kasandas Balmukundas*(5), are also in her favour, though they are of small weight, since neither was decided after argument. But in *Raghunath Mukund* v. *Sarosh K. R. Kama*(6) the Court held that a suit for possession would lie against the attaching creditor although a claim had been made and failed and that no declaration need be asked for. It was regarded as conclusive that "the direct object of a claimant whose goods have been attached by the Sheriff is to get his goods released from attachment and not merely to have it declared that they are his." It can only be

(1) (1881) I.L.R., 7 Calc., 608.
(2) (1868) 10 W.R., 141.
(3) (1885) I.L.R., 7 All., [illegible] (F.B.)
(4) (1878) I.L.R., 2 Bom., [illegible].
(5) (1879) I.L.R., 3 Bom., 179.
(6) ([illegible]) I.L.R., 33 Bom., 306.

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replied that this is irreconcilable with the view taken by this Court in *Narainan* v. *Nilakandan Nambudri*(1) and the procedure laid down therein as appropriate.

In these circumstances in accordance with general principles and the balance of authority including that of this Court, question 1 must be answered in the negative and question 2 in the affirmative.

The decision renders it unnecessary to answer question 3 as it stands. For the suit, as brought, is not such as Order XXI, rule 53 and the facts authorize. It may however be observed that there is no reason why the suit for a declaration contemplated by Order XXI, rule 53, should not be covered, like other suits for declaration, by section (19) (*s*) and excluded from the Court's jurisdiction. It is not necessary to go through the different codes, Small Cause Courts Acts and Rules, since they all provide in practically identical terms for a suit to establish the claimant's right. It would be useless to follow the learned Judges in their conjectures as to the intention of the Legislature in using those words, since no certain basis for such conjectures has been suggested. A more legitimate ground of decision is the fact that in the Provincial Small Cause Courts Act in force before 1887, suits for declaratory decrees were excepted generally from the small cause jurisdiction, whereas, in Act IX of 1887, suits for declarations other than suits under sections 283 and 332 of the Code of Civil Procedure were excepted by Schedule II, article 19, and suits under those sections were excepted specifically by article 20. This is not significant, as the plaintiff contends, as a special treatment of such suits for the provincial Courts, but rather as indicating the manner in which the term "suits for declaratory decrees" should be understood, with *reference to its use in a similar enactment*. It would *serve* no useful purpose to go through the authorities again with regard *to* this point. In those in which conflict between ordinary and small cause jurisdiction is in question, the decision depends *on* the presence or absence of an obligation to ask for a *declaration* and to get the adverse order on the plaintiff's claim petition set aside. It is with reference to the existence of that obligation that a conclusion must be reached, Order XXI, rule 53, providing

(1) (1882) I.L.R., 4 Mad., 131.

only for the suit, but not specifying the *forum* in which it should be brought. If, therefore, question 3 is really whether a person in plaintiff's position can sue in the Small Cause Court, it must be answered in the negative.

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As my learned brother differs, the case must be placed before a Full Bench for disposal.

TYABJI, J.

TYABJI, J.—The present suit must, it seems to me, be considered, by reason of the allegations in the plaint, as set out in the reference to us, to be one for "the establishment of a right" under Order XXI, rule 53 of the Small Cause Courts Rules (corresponding to Order XXI, rule 63 of the Civil Procedure Code). It does not appear whether the Order and rule are specifically mentioned in the plaint; but the circumstances alluded to in rule 53 are set out and there seems no doubt that the plaintiff and all concerned considered the suit to be instituted under the said rule. In none of the numerous reported cases where similar allegations were made, has any question been raised about the suit being for the establishment of the right, under the rule or the corresponding sections. See for instances prayer (*d*) in *Kishori Mohun Rai* v. *Hursook Dass*(1) affirmed in *Kissorimohun Roy* v. *Harsukh Das*(2), and the prayers in *Phul Kumari* v. *Ghanshyam Misra*(3).

The attachment and unsuccessful claim affect the rights of the parties not only as to limitation, but also, it seems to me, by giving rise to a new cause of action "to establish the right which he" (the unsuccessful claimant) "claims to the property in dispute." See *Godha* v. *Naik Ram*(4) (STRAIGHT, OLDFIELD, BRODHURST and TYRELL, JJ.) and *Phul Kumari* v. *Ghanshyam Misra*(3).

Though this cause of action is similar to that on which a suit for a declaratory decree is based [Presidency Small Cause Courts Act, section 19 (*s*)], yet it is different in the following, and perhaps other, respects:—

(1) The granting of a declaration falling as it does under section 42 of the Specific Relief Act is discretionary: establishing

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(1) (1886) I.L.R., 12 Calc., 696 at p. 697.
(2) (1890) I.L.R., 17 Calc., 436 at pp. 437 and 441 (P.C.).
(3) (1907) I.L.R., 35 Calc., 202 (P.C.).
(4) (1883) I.L.R., 7 All., 152 at pp. 156 and 159 (F.B.).

the right is not discretionary. *Raghunath Mukund* v. *Sarosh K. R. Kama*(1) (FARRAN, C.J., and STRACHEY, J.).

(2) A suit for "establishment of right" is not subject to the rule contained in the last cited section that if the plaintiff, being able to seek further relief than a mere declaration, omits to do, the declaration cannot be granted; *Dabholkar* v. *Balkrishna Mahadev Gadre*(2), (WESTROPP, C.J., M. MELVILL, J., F. D. MELVILL, J.), *Kristnam Sooraya* v. *Pathma Bee*(3), WHITE, C.J., SUBRAMANYA AYYAR and DAVIES, JJ.), adopting MUTHUSWAMI AYYAR, J.'s view in *Ambu* v. *Ketlilamma*(4) and overruling COLLINS, C.J., and WILKINSON, J., in *Kunhiamma* v. *Kunhunni*(5) though further and consequential reliefs *may* be prayed for and granted. *Sadu Bin Raghu* v. *Ram Bin Govind*(6) and *Naranayyan* v. *Nageswarayyan*(7).

(3) "A suit for establishing a right of the kind contemplated" in the section or rule in question "seeks not only a declaration of the plaintiff's right, but also substantial consequential relief in the setting aside or restoration of the attachment." *Dayachand Nemchand* v. *Hemchand Dharamchand*(8) (see the question referred to the High Court at page 517); and the suit to establish a right has been considered as distinct from one for a declaration (though as the result of a strict construction of a fiscal enactment like the Court Fees Act, the stamp duty on the two suits may be the same: *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni*(9) and *Phul Kumari* v *Ghanshyam Misra*(10).

(4) "The direct object of a claimant whose goods have been seized by the Sheriff is to get his goods released from attachment, and not merely to have it declared that they are his. In substance the suit is for the goods, though as a matter of form the decree may contain a declaration. * * * It would be an error to call a suit intended to have such a result a suit for a declaration:" *Raghunath Mukund* v. *Sarosh K. R. Kama*(1). Such a suit therefore though it may not be "a suit for possession of personal property pure and simple"—*Makund Lal* v. *Nasir-ud-din*(11)

(1) (1899) I.L.R., 23 Bom., 266 at pp. 270, 271.
(2) (1880) I.L.R., 4 Bom., 520.
(3) (1906) I.L.R., 29 Mad., 151 (F.B.)
(4) (1891) I.L.R., 14 Mad., 23.
(5) (1893) I.L.R., 16 Mad., 140.
(6) (1892) I.L.R., 16 Bom., 608.
(7) (1894) I.L.R., 17 Mad., 389.
(8) (1880) I.L.R., 4 Bom., 515 at p. 521.
(9) (1885) I.L.R., 9 Bom., 20.
(10) (1907) I.L.R., 35 Calc., 202 (P.C.).
(11) (1882) I.L.R., 4 All., 416.

and *Ilahi Bakhsh* v. *Sita*(1)—yet it differs from it merely by reason of the attachment, and may therefore "be properly regarded as a suit "for personal property:" *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram*(2) (MELVILL and PINHEY, JJ.) and *Pagi Partap Hamir* v. *Varajlall Mulchand*(3) (SARGENT, C.J. and KEMBALL, J.). Nor does the section (or rule) "prevent a tribunal before which such a party" (i e. "against whom an order upon an application under that section has been made") "might have brought his suit, if there had not been any application made under that section, from entertaining it," per WESTROPP, C.J. and MELVILL, J., *Nathu Ganesh* v *Kalidas Umed*(4) and *Gordhan Pema* v. *Kasandas Balmukundas*(5) (MELVILL and KEMBALL, JJ.).

(5) The suit to establish the right supplies the absence of any provision by which a Court other than a Court of Appeal or a High Court may discharge an order for attachment. "It is in substance to reverse the order of the Court out of which the execution issued." *Alexander Mitchell* v. *Mathura Das*(6). The effect of a judgment in such a suit is "to supersede" the order on the claim petition, and "to render it altogether inconclusive;" *Kissorimohun Roy* v. *Harsukh Das*(7), Lord WATSON speaks of the "decree" of the Subordinate Judge dismissing the respondents' claim." I have substituted "order;" *Sadu bin Raghu* v. *Ram bin Govind*(8). This jurisdiction may be exercised according to *Narainan* v. *Nilakandan Nambudri*(9), by a Court whose jurisdiction is inferior to that of the Court which issued the order for attachment; see also *Krishnappa Chetty* v. *Abdul Khader Saheb*(10). The Allahabad High Court on the other hand considered that this would be so inconvenient as to justify their differing from the Madras and Bombay High Courts. *Godha* v. *Naik Ram*(11).

(6) Attachment of moveable property is for the purposes of a suit to "establish the right" not equivalent to dispossession; *Pagi Partap Hamir* v. *Varajlall Mulchand*(3), following

(1) (1883) I.L.R., 5 All., 462. (2) (1880) I.L.R., 4 Bom., 503
(3) (1884) I.L.R., 8 Bom., 259. (4) (1878) I.L.R., 2 Bom., 365.
(5) (1879) I.L.R., 3 Bom., 179.
(6) (1886) I.L.R., 8 All., 6 at pp. 9 and 11 (P.C.).
(7) (1890) I.L.R., 17 Calc., 436 at pp. 441 and 442 (P.C.).
(8) (1892) I.L.R., 16 Bom., 608 at p. 614. (9) (1882) I.L.R., 4 Mad., 131.
(10) (1913) 26 M.L.J., 449 at p. 456.
(11) (1885) I.L.R., 7 All., 152 at p. 154. (F.B.)

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the right is not discretionary. *Raghunath Mukund* v. *Sarosh K. R. Kama*(1) (FARRAN, C.J., and STRACHEY, J.).

(2) A suit for "establishment of right" is not subject to the rule contained in the last cited section that if the plaintiff, being able to seek further relief than a mere declaration, omits to do, the declaration cannot be granted; *Dabholkar* v. *Balkrishna Mahadev Gadre*(2), (WESTROPP, C.J., M. MELVILL, J., F. D. MELVILL, J.), *Kristnam Sooraya* v. *Pathma Bee*(3), WHITE, C.J., SUBRAMANYA AYYAR and DAVIES, JJ.), adopting MUTHUSWAMI AYYAR, J.'s view in *Ambu* v. *Ketlilamma*(4) and overruling COLLINS, C.J, and WILKINSON, J., in *Kunhiamma* v. *Kunhunni*(5) though further and consequential reliefs *may* be prayed for and granted. *Sadu Bin Raghu* v. *Ram Bin Govind*(6) and *Naranayyan* v. *Nageswarayyan*(7).

(3) "A suit for establishing a right of the kind contemplated" in the section or rule in question "seeks not only a declaration of the plaintiff's right, but also substantial consequential relief in the setting aside or restoration of the attachment." *Dayachand Nemchand* v. *Hemchand Dharamchand*(8) (see the question referred to the High Court at page 517) ; and the suit to establish a right has been considered as distinct from one for a declaration (though as the result of a strict construction of a fiscal enactment like the Court Fees Act, the stamp duty on the two suits may be the same : *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni*(9) and *Phul Kumari* v *Ghanshyam Misra*(10).

(4) "The direct object of a claimant whose goods have been seized by the Sheriff is to get his goods released from attachment, and not merely to have it declared that they are his. In substance the suit is for the goods, though as a matter of form the decree may contain a declaration. * * * It would be an error to call a suit intended to have such a result a suit for a declaration :" *Raghunath Mukund* v. *Sarosh K. R. Kama*(1). Such a suit therefore though it may not be "a suit for possession of personal property pure and simple"—*Mukund Lal* v. *Nasir-ud-din*(11)

(1) (1899) I.L.R., 23 Bom., 266 at pp. 270, 271.
(2) (1880) I.L.R., 4 Bom., 529. (3) (1906) I.L.R., 29 Mad., 151 (F.B.)
(4) (1891) I.L.R., 14 Mad., 23. (5) (1893) I.L.R., 16 Mad., 140.
(6) (1892) I.L.R., 16 Bom., 608. (7) (1894) I.L.R., 17 Mad., 389.
(8) (1880) I.L.R., 4 Bom., 515 at p. 521. (9) (1885) I.L.R., 9 Bom., 20.
(10) (1907) I.L.R., 35 Calc., 202 (P.C.) (11) (1882) I.L.R., 4 All., 416.

alleges that his goods have been wrongly attached. The distinction where the suit is by a decree-holder who asks for his judgment-debtor's rights to be established is very clearly pointed out in *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram*(1). But I need not express any opinion as to a decree-holder's suit, and I do not intend to do so, nor in any way to conclude myself with reference to a suit different from the present one, either as regards the plaintiff's position, or the *forum*, or the cause of action. (B) The same view is the only one that seems to me to be reconcilable with the decisions of the Madras High Court in *Janakiammal* v. *Vithenadien*(2), *Booche Naidoo* v. *Lutchmeepaty Naidoo*(3) and *Davud Beg* v. *Kullappa*(4). There is one other decision of this Court to which I shall refer later. (C) In Calcutta *Woomesh Chunder Bose* v. *Muddun Mohun Sircar*(5) *per* STEER and JACKSON, JJ. and *Ram Dhun Biswas* v. *Kefal Biswas*(6) *per* PEACOCK, C.J. and MITTER, J., together contain the same principles as prevail in Bombay; though a third decision *Moozdeen Gazee* v. *Dinobundhoo Gossamee*(7) *per* L. S. JACKSON and GLOVER, JJ., misapplied the second decision, as was pointed out in *Shiboo Narain Singh* v. *Mudden Ally, Natabar Nandi* v. *Kali Dass Pali*(8). There may, however, be some doubt as to the applicability of the last case to the present question, as, though the observations seem directly in point, the property there concerned was no more under attachment, but was being followed in the hands of the execution purchaser; and the Court held that the judgment-debtor and decree-holder were not proper parties to the suit. See however the cases cited in paragraphs numbered (4) and (6) above. (D) The Allahabad High Court has expressly dissented from the view taken in Bombay and Madras and held that such a suit as the present is not cognizable by the Small Cause Court; *Godha* v. *Naik Ram*(9).

With reference to the case last cited, I may point out (*a*) that the Allahabad High Court has no original civil jurisdiction and there is no Presidency Small Cause Court; and (*b*) that

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(1) (1880) I.L.R., 4 Bom., 503.
(2) (1870) 5 M.H.C.R., 191.
(3) (1875) 8 M.H.C.R., 36
(4) (1888) I.L.R., 11 Mad., 264.
(5) (1865) 2 W.R., 44.
(6) (1868) 10 W.R., 141.
(7) (1870) 13 W.R., 92.
(8) (1881) I.L.R., 7 Calc., 608.
(9) (1885) I.L.R., 7 All., 152 (F.B.)

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Chhaganlal Nagardas v. *Jeshan Rav Dalsukhram*(1). The attaching creditor is responsible for the property while it is under attachment—*Kissorimohun Roy* v. *Harsukh Das*(2).

(7) The phrase "suit to establish his right construed in its narrowest sense does not exclude a suit in which reliefs consequential upon a declaration are expressly prayed for. If the phrase is more largely construed, even a suit to obtain partition and separate possession may not inaptly be described as a suit to establish his right:" *Sadu bin Raghu* v. *Ram bin Govind*(3). This case refers to the various reliefs which have been either actually granted in a suit to establish a right on the ground that the other reliefs (though not expressly prayed for) are included in, or flow from the establishment of the right; or have been considered as capable of being asked as consequential relief, e.g.

(a) setting aside the sale: *Bank of Hindustan, etc.* v. *Premchand et al*(4).

(b) directing the money to be restored; *ibid.*

(c) recovery of the attached property from the purchaser; *Jetti* v. *Sayad Husein*(5); see note to *Venkapa* v. *Chinbasapa*(6).

(d) setting aside or restoration of the attachment: *Dayachand Nemchand* v. *Hemchand Dharamchand*(7).

(e) replacing the plaintiff in possession of the property in question: *Dabholkar* v. *Balkrishna Mahadev Gadre*(8).

(f) protection from sale: *Ram Prasad* v. *Sukh Dai*(9).

(g) partition and separate possession; *Sadu bin Raghu* v. *Ram bin Govind*(3).

In the result: (A) a series of the most distinguished Judges of the High Court of Bombay have consistently held that where a suit is instituted under the circumstances referred to in Order XXI, rule 53, of the Small Cause Courts Rules, its maintainability in that Court is affected neither by section 19 (s) of the Presidency Small Cause Courts Act nor by section 42 of the Specific Relief Act, but depends on the character and value of the property, provided that the plaintiff is the person who

(1) (1880) I.L.R., 4 Bom., 503.
(2) (1890) I.L.R., 17 Calc., 436 at pp 441 and 442 (P.C.).
(3) (1892) I.L.R., 16 Bom., 608 at p. 615.
(4) (1868) 5 Bom., H.C.R., 83 at p. 93.
(5) (1880) I.L.R., 4 Bom., 4, at p. 23, (note).
(6) (1880) I.L.R., 4 Bom., 21.
(7) (1880) I.L.R., 4 Bom., 515 at p. 521.
(8) (1880) I.L.R., 4 Bom., 529.
(9) (1880) I.L.R., 2 All., 720 (F.B.)

In *Mahomed Koya* v. *Kasmi*(1), MUTHUSWAMI AYYAR and HUTCHINS, JJ., held that a Small Cause Court could not make a declaration that moveable property "which had been attached in execution of a decree" was not liable to be sold for the judgment-debt created by the decree. The *ratio decidendi* seems to have been that the suit was one merely for a declaration, that section 42 of the Specific Relief Act was not in the plaintiff's way because section 283—the equivalent to Small Cause Court Order XXI, rule 53—permitted him simply "to establish his right". It is expressly stated that if "he had sought recovery of the property, there is no doubt that the suit would be cognizable by a Court of Small Causes." The present suit is for the recovery of the property. It is true that it is also stated that "the property was not in the possession of any private person, and he could not sue the Court which attached it." This sentence taken by itself is opposed to the view that the plaintiff can sue for possession while the property is under attachment. But its rigour is somewhat modified by the remark a little before. "We do not think he was *bound* to sue for possession"—which might imply that he could have sued for possession. See also the cases cited in paragraphs numbered (4), (6) and (7) above.

It must, however, be admitted that the remark that the property after attachment is not in the possession of any private person and the Court could not be sued, is opposed to the suit being treated as one for possession. But if that remark is to be given its full effect to the extent of disallowing the jurisdiction of the Small Cause Court in the present case, it seems to me to be opposed to the decisions in *Janakiammal* v. *Vithenadien*(2), *Booche Naidoo* v. *Lutchmeepaty Naidoo*(3) and to the trend of the decisions of the Privy Council and of all the Courts except that of Allahabad. I do not think any such result was intended to be imported into the remark. It may be that the decision merely permitted remedies in either Court, the choice depending upon the relief sought, a result which was contemplated with equanimity in *Davud Beg* v. *Kullappa*(4), in a matter not so dissimilar as to offer no analogy. The decision was perhaps not

(1) (1886) I.L.R., 9 Mad., 206 (2) (1870) 5 M.H.C.R., 191.
(3) (1875) 8 M.H.C.R., 36. (4) (1888) I.L.R., 11 Mad., 264

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unaffected by the principle which is now embodied in the last words of section 21 of the Civil Procedure Code.

It may be, on the other hand, that if the Judges had heard the arguments based on their remark, they would have been not unwilling to adopt the language of a very distinguished Judge who once said: "An extra-judicial remark by myself does occur in that case, and to that remark the District Judge has assigned too much importance. The remark would have been better unmade:" *Dayachand Nemchand* v. *Hemchand Dharamchand*(1). *Per* WESTROPP, C.J.

I shall now deal with the arguments in the learned third Judge's judgment which I am unable to agree with my learned brother in endorsing. If, he says (1) the suit is for possession, it must fail, because the defendants are not in possession; (2) if it is for a declaration, it is not cognizable by the Small Cause Court: (3) if it is for the value of the property, it must fail, because a decision in favour of the plaintiff would keep the attached property for ever in suspense, inasmuch as it would be obviously improper to let the plaintiff have both the property itself and its value, and it would be equally against principle and good conscience to let a person other than the plaintiff take away or deal with property which has been established to be the plaintiff's.

The answer to the first two alternatives seems to me that the suit is neither exactly for possession nor purely for a declaration: it is a suit on a special cause of action and according to the decisions of this and of the Bombay High Court, its maintainability and *forum* are governed by somewhat special rules.

With reference to the third alternative,—

(a) The learned Chief Judge and the second Judge shrewdly suspect that if the decree is given, as prayed for, for the return of the property or in the alternative its value, then the defendants will somehow procure delivery of the property to the plaintiff. The learned Judges support their surmise by the experience of what has happened in the case of other defendants in a similar plight.

(b) Nor do I see any great difficulty in the plaintiff's being enabled (should she succeed in establishing her right) to make

(1) (1880) I.L.R., 4 Bom., 515 at p. 526.

the same use of the decree as is referred to in *Narainan* v. *Nilakandan Nambudri*(1) (*per* TURNER, C.J. and MUTHUSWAMI AYYAR, J.).

(c) In this connection, I do not see what difference is made by the *forum* in which the right is established; nor why the property should remain in suspense only if the Small Cause Court passes the decree.

(*d*) Sir CHARLES FARRAN, C.J. and STRACHEY, J, thought the decree of the Small Cause Court, as a matter of form, might contain a declaration, *Raghunath Mukund* v. *Sarosh K. R. Kama*(2); but if that is obnoxious to section 19 (*s*), a clause may be inserted in the decree "establishing the plaintiff's rights." The form of the decree rests with the Court.

For these reasons, I would answer the reference by saying (1) that the suit as framed is maintainable; (2) the plaintiff is not bound to ask for an express declaration of her rights, but that the decree may contain a declaration to that effect; and (3) the suit falls under Order XXI, rule 53 and is cognizable by the Small Cause Court.

The reference will be referred to a Full Bench as my view differs from that of my learned brother.

P. Sambanda Mudaliyar for the plaintiff:—The suit is brought under Order XXI, rule 53 (Rules framed by the High Court) and the question is whether such a suit is one of a declaratory nature. All *declaratory suits* are exempted from the jurisdiction of the Presidency Small Cause Court under section XIX, clause (*s*) of Act XV of 1882. The corresponding provision in the Provincial Small Cause Courts Act (Act IX of 1887) is clause 19 of the second schedule. See also clause 20 Such suits are exempted by the Provincial Small Cause Courts Act. The question is whether they are to be exempted under the Presidency Small Cause Courts Act.

This is not a mere suit for declaration. Question of *title* has to be gone into, but that is only as an auxiliary relief; the principal relief is the recovery of the property. Where declaration is merely auxiliary to the principal relief claimed, the suit is not one for a merely declaratory decree. All the Madras

(1) (1882) I.L.R., 4 Mad., 131. (2) (1899) I.L.R., 23 Bom., 266 at p. 270

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decisions are in my favour, so also are the Bombay decisions and most of the Calcutta decisions. Allahabad cases are against me. The practice in Madras has all along been as I contend for.

The authorities are:—In Madras, *Mahomed Koya* v. *Kasmi*(1) and *Janakiammal* v. *Vythinadien*(2), in Bombay, *Raghunath Mukund* v. *Sarosh K. R. Kama* (3) (Question No. 2 in the reference).

In Calcutta, *Akbar Ali* v. *Jezuddin*(4) per GARTH, J.

The distinction between pure declaratory suits and suits for the recovery of possession is pointed out in *Nathu Ganesh* v. *Kalidas Umed*(5) and is followed in *Gordhan Pema* v. *Kasandas Balmukundas*(6).

[SADASIVA AYYAR, J.—I do not know it the principle applied is correct.]

[WALLIS, C.J.—The actual decision is that the suit is within the jurisdiction of the Small Cause Court.]

[SADASIVA AYYAR, J.—Speaking for myself, the Privy Council decision in *Phul Kumari* v. *Ghanshyam Misra*(7) seems to lay down the correct principle and this is referred to in *Krishnappa Chetty* v. *Abdul Khader Saheb*(8). The suit is one to set aside a summary decision.]

C. Pattabhirama Ayyangar for the first defendant:—

Mahomed Koya v. *Kasmi*(1) is really in my favour. See page 208. The question is, in whose possession is the property attached? The possession is with the Court.

[WALLIS, C.J.—The fact that possession is with the Court does not affect the claimant's right The Privy Council has decided that it is a suit to set aside a summary order. Why should we look at it from a different point of view? If the decree is to set aside an order, it cannot be a declaratory decree.]

Narainan v. *Nilakandan Nambudri*(9) and *Mahomed Koya* v. *Kasmi*(1) are in my favour. See also *Shiboo Narain Singh* v. *Mudden Ally*, *Natabar Nundi* v. *Kali Dass Pali*(10). If necessary, I shall refer to the Allahabad decisions.

P. Sambanda Mudaliyar was not heard in reply.

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(1) (1886) I.L.R., 9 Mad., 206. (2) (1870) 5 M.H.C.R., 191 at p. 192.
(3) (1899) I.L.R., 23 Bom., 266. (4) (1882) I.L.R., 8 Calc., 399 at p. 400.
(5) (1878) I.L.R., 2 Bom., 365 at p. 366.
(6) (1879) I.L.R., 3 Bom., 179. (7) (1908) I.L.R., 35 Calc., 202 (P.C.).
(8) (1913) 26 M.L.J., 449. (9) (1882) I.L.R., 4 Mad., 131 at p. 133.
(10) (1881) I.L.R., 7 Calc., 608.

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This REFERENCE coming on for hearing the Court expressed the following

OPINION.—We think that this suit is not excluded from the jurisdiction of the Small Cause Court under section 19 (s) of the Presidency Small Cause Courts Act as a suit for a declaratory decree. Their Lordships of the Judicial Committee have recently pointed out in *Phul Kumari* v. *Ghanshyam Misra*(1) that the statutory suit to establish his right given to the unsuccessful party in claim proceedings under the Code involves in every case a prayer for the setting aside of a summary order of a Civil Court. This being so, such a suit cannot in our opinion be regarded as a suit for a mere declaration. The Small Cause Court Rules reproduce the provisions of the Code as to claim petitions, and cases under them must be governed by the same considerations. We may further observe that our decision is in accordance with the well established practice under which suits of this nature arising out of orders made by the Presidency Small Cause Court have always been brought in that Court and not in the High Court or the City Civil Court.

C.M.N

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar

1913 October 23 and 1915, March 3, 22 and 26

R SRINIVASA IYENGAR (PETITIONER), APPELLANT,

v.

S. K. M. R. M RAMASWAMI CHETTIAR BY AGENT SOMASUNDARAM CHETTIAR (RESPONDENT), RESPONDENT.*

Letters Patent (Madras), sec. 15—"Judgment"—Provincial Small Cause Courts Act (IX of 1887), sec. 25, order of a single Judge rejecting a revision petition under—Appealability.

The order of a single Judge of the High Court rejecting a petition to send for the records and to revise the judgment of the lower Court exercising Small Cause Court jurisdiction is a "judgment" within the meaning of section 15 of the Letters Patent and is therefore appealable, it is immaterial whether before such refusal, the records were called for or notice issued to the other side

Chappan v. *Moidin Kutti* (1899) I.L.R., 22 Mad, 68 (F.B.) and *Tuljaram Row* v. *Alagappa Chettiar* (1912) I.L.R., 35 Mad., 1 (F.B.), followed

Venkatarama Ayyar v. *Madalai Ammal* (1900) I.L.R., 23 Mad., 163 and *Puthukudi Abdu* v. *Parakka Kunhikutti* (1904) I.L.R., 27 Mad., 340, overruled.

(1) (1905) I.L.R., 35 Calc., 202 at p. 205 (P.C.).

* Letters Patent Appeal No. 152 of 1913.

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In matters of discretion such as this, the Court will not ordinarily interfere on appeal though it has jurisdiction to do so.

Golding v *Wharton Salt Works Company* (1876) 1 Q B D 374, followed.

APPEAL under clause 15 of the Letters Patent against the judgment of MILLER, J., who dismissed on 23rd October 1913 under Order XLI, rule 11, Civil Procedure Code, Civil Revision Petition No. 110 of 1913 (*Srinivasa Iyengar* v. *Ramaswami Chettiar*).*

The facts of this case are clearly set out in the Order of Reference to the Full Bench.

S. T. Srinivasagopalachariar for the appellant.

G. S. Ramachandra Ayyar for the respondent.

SESHAGIRI AYYAR AND NAPIER, JJ.

This Letters Patent Appeal came on for hearing before SESHAGIRI AYYAR and NAPIER, JJ., who made the following ORDER OF REFERENCE TO THE FULL BENCH. This ORDER was delivered by

SESHAGIRI AYYAR, J.—In this case Mr. Justice MILLER sitting in the Admission Court rejected the petition filed by the petitioner to revise the order of the Subordinate Judge exercising Small Cause Court jurisdiction. The question for consideration is whether the said order of the learned Judge is a *judgment* within the meaning of section 15 of the Letters Patent. On the principle of *stare decisis*, I am inclined to the view that it is a judgment: but as my learned brother takes the contrary view, it is desirable that the question should be referred for the decision of a Full Bench. The point on which the opinion is requested is "whether the order of a single Judge of the High Court rejecting a petition to send for the records and to revise the judgment of the lower Court exercising Small Cause Court jurisdiction is a judgment within the meaning of section 15 of he Letters Patent"

S. T. Srinivasagopalachariar for the appellant.

The question is whether a judgment of a single Judge dismissing a Civil Revision Petition is a "judgment" within the meaning of section 15 of the Letters Patent.

[WALLIS, C.J.—Is not that question settled ?]

I submit that it is settled by the decision in *Tuljaram Row* v. *Alagappa Chettiar*(1).

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* Civil Revision Petition under section 25 of Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of A. S. BALASUBRAHMANIA AYYAR, the Subordinate Judge of Kumbakonam, in Small Cause Suit No. 1922 of 1912. This Civil Revision Petition was dismissed by MILLER, J.

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).

[WALLIS, C.J.—What is the nature of the order that is the subject matter of the Letters Patent Appeal ?]

It is a "discretionary order" but that has nothing to do with the question which your Lordships are called upon to decide.

[WALLIS, C.J.—In *Tuljaram Row* v. *Alagappa Chettiar*(1) don't the learned Judges say that even interlocutory orders are "judgments" ? Would an order refusing "Interrogatories" be a judgment ? I want to know the principle.]

If the effect of the order is to shut out evidence, then the order would be a "Judgment."

[WALLIS, C.J.—But refusal to order "Interrogatories" does not shut out evidence—On what principle do the learned Judges base their decision in *Tuljaram Row* v. *Alagappa Chettiar*(1) ?]

Refers to page 13. KRISHNASWAMI AYYAR, J., agrees with the Chief Justice absolutely. There are some earlier cases such as 3 Madras referred to in the Full Bench judgment.

[WALLIS, C.J.—We had better hear the other side. Naturally we don't want to differ from what has been laid down in *Tuljaram Row* v. *Alagappa Chettiar*(1). Consistently with this judgment can we hold that in the present case there is no "judgment" ?]

G. S. Ramachandra Ayyar for the respondent.

I submit your Lordships can. Under section 25 the High Court may *call for* the records and then *revise* them. In this case the Court refused to call for the records. There was no hearing on the merits. I submit this is not a judgment.

The latest cases are *Puthukudi Abdu* v. *Puvakka Kunhi kutti*(2), *Chinnasami Mudali* v. *Arumuga Goundan*(3), and *Venkatarama Ayyar* v. *Madalai Ammal*(4). *Puthukudi Abdu* v. *Puvakka Kunhikutti*(2), was a case like the present one. The petition was dismissed when it came on for admission, in *Venkatarama Ayyar* v. *Madalai Ammal*(4). In *Chinnasami Mudali* v. *Aurumuga Goundan*(3), the petition was dismissed after notice. The Full Bench Case *Tuljaram Row* v. *Alagappa Chettiar*(1) does not notice *Puthukudi Abdu* v. *Puvakka Kunhikutti*(2). Further that case does not hold that a refusal to call for the records is a

(1) (1912) I.L.R., 35 Mad., 1 (F.B.) (2) (1904) I.L.R., 27 Mad., 343
(3) (1904) I.L.R., 27 Mad., 432 (4) (1900) I.L.R., 23 Mad., 169

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Per SADASIVA AYYAR and SRINIVASA AYYANGAR, JJ.—Clause (2) of section 213 saves the Civil Court's jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies such as injunction, declaration, possession, etc.

Per SADASIVA AYYAR, J.—The proviso forming clause (3) of section 213 takes away the jurisdiction of the Civil Court even in respect of cases claiming other redress than pecuniary damages if the redress of damages had been already claimed by the plaintiff in a suit filed before the Collector under clause 1 of section 213.

Quære —Whether the remedy by a suit in the Collector's Court to set aside a distress under section 95 can be availed of by a Government ryot's tenant whose moveables have been distrained under section 77 and whether assuming that he could do so, the jurisdiction is an exclusive one in the Revenue Court.

SECOND APPEAL against the decree of T. V. NARAYANAN NAYAR, the temporary Subordinate Judge of Coimbatore, in Appeal No. 20 of 1913, preferred against the decree of T. N. LAKSHMAN RAO, the Additional District Munsif of Tiruppur, in Original Suit No. 858 of 1910.

The facts of this case are clearly set out in the Order of Reference of NAPIER, J., to the Full Bench.

N. Srinivasacharya for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondent.

The Second Appeal came on for hearing before SADASIVA AYYAR and NAPIER, JJ., who made the following ORDERS OF REFERENCE TO THE FULL BENCH.

NAPIER, J.

NAPIER, J.—This is an appeal from a judgment of the temporary Subordinate Judge of Coimbatore dismissing a suit brought by one Narayanaswamy Aiyar, a sub-lessee of certain ryotwari lands against the ryotwari owners to recover damages for an alleged illegal distraint by the defendants for rent, the ground for the dismissal being that the District Munsif's Court had no jurisdiction to entertain the suit.

The plaintiff together with his immediate lessor had previously instituted a suit in the Revenue Court against the same two defendants under section 95 of Madras Act I of 1908 praying for the cancellation of the attachment of the crops and costs and such further and other relief as the Court might deem fit. The Deputy Collector directed that one Palani Mudali, the other co-lessor of the plaintiff, should be added as plaintiff,

and this was done. Subsequently the three plaintiffs withdrew their suit stating that they intended to bring a fresh suit for damages before the Civil Court.

The lower Appellate Court held on the construction of section 213 and the schedule of the Madras Estates Land Act that the Civil Court had no jurisdiction.

The Madras Estates Land Act (Act I of 1908) was passed to amend and declare the law relating to the holding of land in estates. An estate is defined by section 3 of the Act as being the whole or any part of any permanently-settled estate or zamindari, any unsettled palaiyam or jaghir, certain plots in village inams and any portion of such villages. Admittedly land held under ryotwari tenure does not come within the definition of an estate. We find, however, that one chapter of the Act has been made partially applicable to such holdings. This is chapter VI, which deals with the recovery of rent by suit or by distraint and sale of moveable properties or of the holding. Section 77 of that chapter entitles a landholder to bring a suit before the Collector for the recovery of the arrear of rent and also to distrain the produce of the land or trees in the defaulter's holding. The distraint complained of in this suit was of the produce in the defaulter's holding, though the crops distrained belonged to the sub-lessee.

Section 96 entitles a defaulting ryot or cultivator to file a suit before the Collector to set aside the distraint within 15 days from the date of the service of notice by the sale officer on the defaulter under section 95. It was under this provision that *the lessee from the ryot and his sub-lessee brought their suit in* the Deputy Collector's Court. Section 134 is as follows:—"The provisions contained in this chapter for the recovery of rent by distraint and sale of moveable property shall apply, as far as may be, to the recovery of rent by a land-owner under the ryotwari settlement from a tenant from whom he has taken a written agreement." The first thing to be noticed is that section 134 does not extend to a ryotwari land-owner the whole of the rights given by chapter VI. It does not entitle him to bring a suit before the Collector to recover his rent. Nor does it entitle him to exercise the powers given to a landholder of selling his holding. The omission of these two powers of land-holder from the section throws, in my opinion, considerable light on the

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extent to which the other sections of the chapter are applicable. The Revenue Court has no jurisdiction to entertain a suit for rent and it has no jurisdiction to permit the sale of the holding; that is to say, where the remedy requires the intervention of the Collector, the procedure is not applicable to ryotwari holdings. No permission or intervention of a revenue officer is required for the exercise of the right of distraint and it is only after the property has been distrained and it is sought to recover the amount by the sale of the property that any public officer intervenes. That is the sale officer referred to in section 79, a statutory official created by Act VII of 1839. This officer's position is analogous to that of a sheriff with regard to sales in execution. Section 2 of the Act referred to is as follows:—"All Tahsildars shall be vested with powers of Commissioners for the sale of property distrained for arrears of rent or of revenue." His functions have always been the same whether he was selling the property taken by the process of distress under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) or the Revenue Recovery Act (Madras Act II of 1864) (vide section 2 of the former Act and section 9 of the latter). It is therefore clear that so far as the procedure for recovery of arrears by distraint is concerned there is no intervention by the Collector. Turning again to section 134 of the Madras Estates Land Act, we find that the provisions applicable are limited to those for the recovery of rent and they are made applicable by sub-clause 2 to the recovery of rent. No section in this chapter which does not provide for the recovery of rent is applicable to the case of ryotwari tenants and no portion of any section which does not deal with the recovery of rent is applicable either; and further the language being "shall apply to the recovery of rents by a land-owner," any provision under which a person whose property has been distrained can seek relief is not applicable either, such provision not being one for the recovery of rent by a land-owner. This conclusion based on the strict language of the section is, in my opinion, fortified by the examination of the procedure in the remaining sections. In my view all the section does is to make statutory provision for the exercise of the right of distraint by a ryotwari land-owner and to provide certain formalities for the protection of the lessee. It was not intended to give the Revenue Court any jurisdiction to entertain a suit either by the

land-owner to recover the rent or by the tenant to set aside the distraint. I now turn to the other provisions of the Act. Section 189 provides that a Collector shall hear and determine all suits and applications of the nature specified in parts A and B of the schedule. The schedule contains an enumeration of suits. One of them is by a ryot to set aside distress under section 95. This description obviously does not apply to a ryotwari tenant, for admittedly he is not a ryot within the meaning of the Act. And it is a fair observation that the failure to provide for a suit by any other person to set aside a distress is an indication that the procedure under section 95 was not intended to be made applicable to persons other than ryots. The last description in schedule A is a suit for damages not otherwise provided for. The Subordinate Judge applies section 213 to this description of suit—the language of section 213 is "any person deeming himself aggrieved by any proceeding taken under the colour of this Act, or by neglect or breach of any of its provisions shall be at liberty to seek redress by filing a suit for damages before the Collector"—and holds that section 189 ousts the jurisdiction of the Civil Court with reference to any dispute or matter in respect of which such suits might be brought. In my opinion, this is giving too wide a meaning to the words "for damages not otherwise provided for" Section 213 itself does not bar the right of action in a Civil Court, unless that right of action is taken out of the jurisdiction of the Court by the Act. If the words in the schedule are to be given the wide meaning contended for, then the provisions of sub-sections (2) and (3) of section 213 are nugatory. Therefore some limitation must be put on the words "damages not otherwise provided for." It is extremely difficult to say what those limitations are and I do not propose to consider any case other than the one before us.

As pointed out above, nothing but the provisions laying down the procedure for distress is incorporated in the law governing the relations between a ryotwari land-owner and his tenant. It seems to me, therefore, that the legislature, which refrained from extending the right of suit under section 95 to such a tenant, cannot have intended to make the Collector's Court the sole Court in which a tenant could seek damages for an illegal distraint. The suit under section 95 is one to contest the distraint In nature it does not differ from one for damages; and as the

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former is not extended to the ryotwari tenant, I cannot think that the legislature intended to bar his suit in the ordinary Court by the wide words "for damages not otherwise provided for" in the schedule. I am inclined to the view that the schedule suits are all suits with reference to land in an estate. As the matter, however, is not free from doubt, and as my learned brother feels more difficulty in the matter than I do, I agree that the following question be referred to a Full Bench.

"Is a suit by the tenant of a ryotwari land-owner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops of the produce of land or trees, in a defaulter's holding solely cognisable by the Revenue Court?"

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I also think that it is appropriate that the question should be settled by a Full Bench. While section 78 (paragraph 1) of the old Act VIII of 1865 allowed an unqualified right of resort to the Civil Court to obtain damages for acts "professedly done under the authority" of that Act, notwithstanding the "summary suit" remedy given by section 49 of that Act to be filed before the Collector for that same relief of damages, section 213, clause 2 of the Estates Land Act, gives a right of action in the Civil Court only in cases "not taken out of its" (the Civil Court's) "jurisdiction by this Act." Further, suits before the Collector are not distinguished by the designation of "summary" suits in the new Act, that is, distinguished from suits before the Civil Court. It seems also clear that resort to Civil Courts was intended by the new Act to be discouraged as far as possible. Suits which are not for *damages*, though arising from acts professedly done under the statute lie, no doubt, ordinarily in the Civil Courts: see *Gouse Mohideen Sahib* v. *Muthialu Chettiar*(1).

N. Srinivasacharya for the appellant.—I submit that the Civil Court has jurisdiction. Chapter VI, section 134 of the Estates Land Act applies to ryotwari land-owners and provides for distraint of arrears for rent. If this section stood alone, there is no difficulty for me but the Subordinate Judge refers to section 213 of the Act and schedule A, clause 21. According to the Subordinate Judge section 213 read with section 189 would take the case out of the jurisdiction of the Civil Courts.

(1) (1914) 14 M.L.T., 523; s.c. 26 M.L.J., 36.

[WALLIS, C.J.—The question is whether there is not a concurrent jurisdiction under section 213 and whether it has been taken away by section 189.]

There is concurrent jurisdiction. Refers to section 91 of the Act.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondents.—The two sections for construction are sections 189 and 213 of the Estates Land Act. If section 213 stood alone there is no difficulty and Civil Court will have jurisdiction. But the effect of section 213 is taken away by section 189 provided there is no other section of the Act which will keep alive the Civil Courts' jurisdiction. To such a case like this clause 2 of section 213 does not apply because section 189 takes it out of its operation. Clauses 2 and 3 of section 213 do not mean that the legislature had any specific cases in view when they were enacted.

There are no direct authorities on the point. *Zamindar of Ettayapuram* v. *Sankarappa Reddiar*(1) decides that common law remedies co-exist along with the remedy given by section 78 of the Rent Recovery Act (VIII of 1865).

This is a suit for damages for distraint in excess of the statutory powers. Section 213 refers to "any person," i.e., he may be a tenant or sub-tenant or anyone else.

N. Srinivasacharya in reply.—It is conceded that the suit might be brought before the Collector. The question is whether the concurrent jurisdiction of the Civil Court is taken away.

[WALLIS, C.J.—Provisoes are sometimes unnecessary and unmeaning.]

Maxwell, page 467.—Provisoes are sometimes added to prevent unnecessary apprehensions

Section 134 is the only section in the Madras Estates Land Act that applies to ryotwari tenants.

[WALLIS, C.J.—Section 134 makes section 77 and other following section applicable to ryotwari tenants.]

Zamindar of Ettayapuram v. *Sankarappa Reddiar*(1) says that when a privilege is given to the ryotwari tenants, existing rights

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(1) (1904) I.L.R., 27 Mad., 483 at p. 493 (F.B.)

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are not taken away. Bengal Tenancy Act is also based on a similar principle Even under the Madras Rent Recovery Act (VIII of 1865) the ryotwari tenants had a cumulative remedy (see section 49). Section 78 of the same Act saves the jurisdiction of the Civil Courts.

[SADASIVA AYYAR, J.—Section 49 of the Rent Recovery Act is different from section 189 of the Estates Land Act—the latter takes away the jurisdiction of the Civil Courts.]

[WALLIS C.J.—Section 78 of the Rent Recovery Act saves the unlimited jurisdiction of Civil Courts in such cases whereas section 189 cuts down the jurisdiction of Civil Courts]

This Reference coming on for hearing, the Court expressed the following OPINION :—

WALLIS, C.J.

WALLIS, C.J.—I do not think that the fact the proceedings for the recovery of rent by distraint and sale of moveable property which have given rise to this suit, were taken by a land-owner under ryotwari settlement pursuant to section 134 of the Madras Estates Land Act, or the fact that the present suit was instituted in respect of proceedings so taken not by a tenant of such land-owner but by a sub-tenant makes any difference, because in my opinion the effect of section 134 is to enable such a land-owner though not governed by the general provisions of the Act to avail himself of the summary remedy thereby provided for the recovery of rent, and the effect of section 213 sub-section (1) is to give "any person deeming himself aggrieved by any proceedings taken under the colour of this Act" a right to sue for damages before the Collector, words which are sufficient to give the Collector jurisdiction in a suit of this nature if filed before him

The question is as to whether suits as to which jurisdiction is conferred upon the Collector under section 213 (1) are withdrawn from the jurisdiction of the Civil Courts by section 189.

Sub-sections (2) and (3) of section 213 seem at first sight to suggest that it was contemplated that there should be concurrent jurisdiction in the Collector and the Civil Court in suits falling under sub-section (1), but as against this we have the express provisions of section 189 which after collecting in schedules A and B all the suits and applications to be entertained by the Collector mentioning in each case the governing

section goes on to provide explicitly that no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made. These provisions are express and I cannot find anything repugnant to them in the terms of section 213 which would justify us in holding that suits which fall under sub-section 1 of that section are triable concurrently by the Civil Court. It is, I think, immaterial whether the result of so holding is to leave little or no effective operation for sub-sections (2) and (3), for these sub-sections are in the nature of provisoes, and as pointed out in *West Derby Union* v. *Metropolitan Life Assurance Society*(1), it would not be legitimate to cut down the operative portion of section 189 to which these provisoes do not in terms apply merely because otherwise the provisoes would be "meaningless and even senseless" What seems to me probable in this case is that sub-sections (2) and (3) which were drafted in place of sections 49 and 78 of the old Act were retained by inadvertence after the jurisdiction of the Civil Court had been taken away by section 189 in this present form. After all both sub-section (2) of section 213 and section 78 of the old Act are nothing but statements of a well-known rule of statutory construction that the creation of new jurisdiction does not affect previously existing jurisdiction in the absence of express provision. I desire to say, though the point in my opinion does not arise for decision, that the effect of provisions of sub-section (2) is not to preserve a concurrent jurisdiction in the Collector in the case of suits under section 91, in my opinion suits under section 91 are exclusively within the jurisdiction of the Civil Court and do not come within the provisions of sub-section (1) of section 213 giving the Collector jurisdiction, because I think that apart from section 91 no suit would lie to call in question lawful orders of the Collector passed under section 89 or 90 on the ground that the plaintiff was aggrieved by such lawful orders The proceedings contemplated under section 213 (1) are in my opinion unlawful proceedings done under the colour of the Act

Next as regards sub-section (3), I find it difficult to accept the suggestion that the legislature went to the trouble of

(1) (1897) A.C., 647

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enacting sub-section (3) for the purpose of saving the right to sue in a Civil Court for reliefs other than damages in respect of causes of action as to which suits for damages lie before the Collector under sub-section (1) even if sub-section (3) as drafted *permits of such suits. These considerations here do not affect* my judgment in the order in question and I would answer the reference in the affirmative.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—It seemed to be admitted in the arguments on both sides that clause (2) of section 213 of the Estates Land Act and the proviso which forms clause (3) of the same section are somewhat ambiguously worded.

Reading however section 213 (1), section 189 and clause (2) of schedule A together, I feel little doubt that the present suit (which is a suit seeking redress *by way of damages* and brought by a person feeling himself aggrieved by proceedings taken under the colour of sections 77 and 134 of the Act) has been taken away out of the jurisdiction of the Civil Court. Clause 2 of section 213 preserves the Civil Court's jurisdiction only in cases "not taken out of its jurisdiction by the Act" and suits *for damages* brought on particular causes of action are so taken away by section 189 of the Act read with section 213, clause (1) and schedule A, 21. In other words, clause 2 of section 213 saves the Civil Court's jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies (such as injunction, declaration, possession, etc), if any, open to the plaintiff under the ordinary law. Similar provisions in other rent, revenue and similar special Acts showing a reluctance on the part of the legislature to take away the jurisdiction of Civil Courts over suits involving claims for other than pecuniary damages while conferring jurisdiction on Revenue Courts to entertain suits for the award of pecuniary damages in particular cases, can, it seems to me, be quoted in support of the above view. The proviso forming clause 3 of section 213 takes away the jurisdiction of the Civil Court even in respect of cases claiming other redress than pecuniary damages if the redress of damages had been already claimed by the plaintiff in a suit filed before the Collector under clause 1 of section 213.

After giving my best consideration to the whole matter, I agree with my Lord that the present suit is exclusively cognizable

by the Revenue Court. It is unnecessary for the decision of this case to express a final opinion on the questions whether the remedy by a suit in the Collector's Court to set aside a distress under section 95 can be availed of by a Government ryot's tenant whose moveables have been distrained under section 77 and whether assuming that he could do so, the jurisdiction is an exclusive one in the Revenue Court, schedule A, clause 10, referring only to a suit by a "ryot" under section 95, and the word "ryot" being defined in clause 15 of section 3 of the Act so as to exclude a Government ryot's tenant from its connotation.

SRINIVASA AYYANGAR, J.—Defendants Nos. 1 and 2 who are landowners under ryotwari settlement with the Government availing themselves of the powers given them under section 134 of the Madras Estates Land Act, distrained the crops on the land of the plaintiff, their tenant. The distrained crops were subsequently sold. The plaintiff complains that the distraint was illegal and files this suit for damages in the District Munsif's Court, Tirupur. The question is whether a Civil Court has jurisdiction to entertain a suit of this description. The solution depends on the correct interpretation of sections 213 and 189 of the Estates Land Act. Clause 1 of section 213 which corresponds to section 49 of the repealed Rent Recovery Act, Madras Act VIII of 1865, gives jurisdiction to Revenue Courts to entertain suits for damages filed by persons deeming themselves aggrieved by any proceedings taken under colour of the Act That the present suit is a suit of that nature scarcely admits of doubt and the plaintiff, if he had chosen, could have filed this suit before the Collector. But this would not take away the jurisdiction of the ordinary Civil Courts and clause 2 of section 213 which corresponds to the first clause of section 78 of the repealed Act provides that "this section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act." Now section 189 of the Act takes away the jurisdiction of the Civil Courts in respect of suits of the nature specified in part A of the schedule to the Act and suits of the nature now in question are specified in the schedule (see No. 21 of the schedule) The words of the section are quite clear and unambiguous, and if the matter had rested there, there could be no doubt that a Civil Court could not take cognizance of this suit. But it is said that this construction renders the proviso to section 213 meaningless, because there can

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hardly ever be a case to which it would apply. I think it quite possible to give a meaning to the proviso consistent with the construction I put on section 189. Persons deeming themselves aggrieved by proceedings taken under colour of the Act are not confined to relief by way of damages. They may be entitled to ask for other reliefs such as an injunction, a declaration, or recovery of the specific property. See *Zamindar of Ettayapuram* v. *Śankarappa Reddiar*(1). Even if the appellant is correct in his contention that the proviso would be rendered nugatory by the construction I put on section 189, following the principle of the decision in *West Derby Union* v. *Metropolitan Life Assurance Society*(2), I should still come to the same conclusion as the words of section 189 are quite clear and unambiguous.

I agree to the answer to the reference.

C M.N.

APPELLATE CIVIL.

Before Sir Arnold White, Kt., Chief Justice, and Mr. Justice Sankaran Nair.

1913. December 10, 12, 15 and 16.

THE MERCANTILE BANK OF INDIA, LIMITED, MADRAS, AND ANOTHER, APPELLANTS,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND TWO OTHERS, RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), sec. 57—Intimation to the creditor that debtor is about to suspend payment—Transfer of goods to creditor thereafter, but before the filing of a petition for declaration of insolvency, not a bona fide *transfer*—Bona fides, *a requisite under section 57 of the Act.*

After receiving notice from the debtor's agent that the debtor was going to suspend payment, a creditor took, on the day previous to the debtor's filing a petition in insolvency, possession of the debtor's goods by virtue of a letter of lien given by the debtor to secure past and future advances and over-drafts.

Held, affirming the decision of WALLIS, J, (*a*) that giving notice to a creditor that the debtor is about to suspend payment is an act of insolvency, (*b*) that though by the transaction of taking possession of the goods, the creditor became the transferee of the goods, he was not a *bona fide* transferee for value

(1) (1904) I.L.R., 27 Mad, 483 (F B). (2) (1897) A.C, 647.

* Original Side Appeal Nos. 28 and 50 of 1912.

within section 57 of the Presidency Towns Insolvency Act (III of 1909) as the act of taking possession was after knowledge of the act of insolvency and (c) that, though the body of section 57 of the Act has not expressly prescribed that the transfer should be *bona fide* yet *bona fides* is legally necessary to claim the benefit of the section.

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Per Curium: The provisions and the wording of the Presidency Town Insolvency Act being almost the same as those of the English Bankruptcy Act, the rulings of the English courts on the latter Act are to be followed in interpreting the Indian Act.

Obiter A mere intimation to a creditor by the debtor or his agent that the debtor is insolvent does not amount to an act of insolvency.

APPEAL from the order and judgment of WALLIS, J., in the Insolvency Jurisdiction of the High Court in Insolvency Petition No. 302 of 1911.

The necessary facts are given in the following judgment of WALLIS, J.:—

This case comes on on a notice of motion taken out by Messrs. Rosham M. A. Manulla Hussain Saib & Company, merchants, in the insolvency of M. Venkatasami Naidu & Sons, for an order declaring them the owners and entitled to the possession of 33 bundles of skins lying in the insolvents' godowns and in the custody and possession of the Official Assignee at the date of the application.

This notice was served upon the Official Assignee and also upon the Mercantile Bank who at the time of the petition had put up their boards on the godowns containing the skins and claim to be entitled under certain letters of lien which have been exhibited in this case After evidence was heard at considerable length, on the application of the counsel for the Official Assignee, the matter was adjourned, because the insolvents had not yet filed their schedule or been publicly examined. Subsequently one of them has been publicly examined, one of them has died and the other has left the jurisdiction on the pretext of health. It is not now suggested that there is anything to be gained by further adjourning the case and I proceed to deal with it.

The Official Assignee disputed not only the title of the present applicants to the 33 bundles of skins, but also disputed the right of the Mercantile Bank to rank as secured creditors, not only in respect of these 33 bundles but also as regards the other skins which were in the godowns at the date of the order and which are covered by the letters of lien in favour of the Mercantile Bank.

First as regards the claim of the applicants to these 33 bundles of skins their case is that these 33 bundles were never sold by them to the insolvent so as to pass the property to the insolvent, that in accordance with a well known usage of trade they merely

sent the 33 bundles to the insolvents' premises "on inspection" and that it was only after assortment and weighment that the price would be fixed and the transaction completed. And they say that no such weighment or fixing of the price ever took place before the date of the insolvency. On other hand the case of the other parties is that there was a completed sale to the insolvents on the Saturday preceding the insolvency and that under that sale the property passed. If that be so it will be unnecessary to consider what was the exact usage and the effect of such usage in the case.

On a consideration of the oral and documentary evidence his Lordship held as follows :—

On the whole, I have come to the conclusion that these goods were sold in the ordinary course of business on the Saturday and that the property had passed to the insolvents before the date of the insolvency.

That being so, I am relieved from the necessity of considering the effect of a good deal of evidence which was adduced as to the usage in the trade and as to whether there was not such a well-established usage that skins should be left in the godowns of dealers like the insolvents subject to approval, as to rebut any inference that such goods were in the order and disposition of the insolvents. As the point has been argued before me, I will only say, without deciding it, that I think the applicants *did* adduce a considerable amount of evidence which was calculated to rebut any inference that the goods were necessarily the property of the insolvents, supposing there had been no sale.

The test, as far as I know, appears to me to be this, whether persons acquainted with the manner in which this particular kind of business is carried on would be justified in thinking that this particular class of goods in the insolvents' godowns were the property of the insolvents.

That really disposes of the first half of the case and I have now to deal with what are perhaps even more difficult circumstances of the second half of the case. That is to say, the contest between the Official Assignee on the one hand and the Mercantile Bank on the other. As I have already said, the Mercantile Bank had letters of lien over the goods in the godowns of the insolvents in Madras and also in the godown at Kodambakkam, and the effect of the letters of lien was, in my opinion, to make them "true owners" of the goods within the meaning of those words as used in section 52, sub-section 2 (c) of the Presidency Towns Insolvency Act, which provides that "The property of the insolvent shall comprise the following particulars, . . . all goods being at the commencement of the

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insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." I think it cannot be questioned that on the morning of the Tuesday, which was the day immediately preceding the filing of the petition, these goods were "in the order and disposition of the insolvents by consent and permission of the true owner (the Mercantile Bank) under such circumstances that the insolvents were the reputed owners thereof." However, in order that the order and disposition clause should take effect, it is necessary that the goods should be in the order and disposition of the insolvents *at the commencement* of the insolvency. The policy of the Insolvency Act is to prevent unfair dealings on the eve of insolvency by making the insolvency relate back to the first act of bankruptcy, and where it has been found that scope was left for any sort of unfair dealing the legislature has in the latter Acts, met that by adding to the list of acts of bankruptcy. Thus, in the Act of 1883 two new acts of bankruptcy were created, namely, giving fraudulent preference and giving notice of intention to suspend payment. The provisions of the English Bankruptcy Act of 1883 have been reproduced in the Indian Act. "If, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would under this or any other enactment in force, be void as a fraudulent preference if he were adjudged an insolvent," and "If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." These new acts of bankruptcy have been included in the present Act and the result of them is that the commencement of the bankruptcy is antedated to the time when such acts of bankruptcy are committed. In the present case it is alleged that what happened amounted to acts of bankruptcy under each of those heads, namely, fraudulent preference and giving notice of intention to suspend payment. With regard to the latter I think the test which has to be applied is that which was laid down by Lord WATSON in *Crook* v. *Morley*(1):—"My Lords, the Bankruptcy Act, 1883, does not prescribe any form of words for a notice under section 4 (1) (*h*)" (i e, the intention to suspend payment). "It therefore appears to me that any notice will be sufficient for the purposes of sub-section (*h*) which is expressed in terms calculated to convey to its recipients the information that their debtor has suspended or is about to suspend payment of his debts." And Lord BOWEN in an earlier case has observed that each case with

(1) (1891) A.C., 316 at p. 322

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regard to this must be tried upon its own facts and that it would be disastrous if the Court were to attempt to decide each case with reference to the facts of all the other cases which had preceded it. I must therefore deal with this case with reference to its facts only.

[After a consideration of the evidence his Lordship proceeded as follows:—]

Now it is in evidence that that communication was made by Mr. Short to the Bank at the time when he was acting as Solicitor and therefore as agent of the insolvents and after communication with the insolvents. It is also plain that the object of the notice was that the Bank might take possession of the goods under the lien and so to avoid the operation of the order and disposition clause when the petition was filed.

It is quite clear that what the Bank did was immediately to put up the board on the Madras godown and motor out and put up the board on the Kodambakkam godown. And the conclusion that I had come to, is that what they understood from Mr. Short was that there was not a moment to be lost in putting up their board. I think also, that a good deal more was understood than was expressed and the question is whether what happened did not really amount to a notice by the insolvents to the Bank, who were their creditors, that they were about to suspend payment of their debts On a full consideration of the case, I have come to the conclusion that that is the proper inference to draw from what passed. Further it is a mere attempt to evade the Act for a trader who has decided to file his petition forthwith to send warning to a creditor to remove his goods by an emissary who refuses to give any reasons for the warning; and such a transaction must, I think, be treated on the same footing as if the emissary had told the creditors the real reason, namely, that the trader was intending to file his petition. If that is so, the result is that the goods become affected by the order and disposition clause, because, at the giving of that notice which was the commencement of the bankruptcy, the goods were in the order and disposition of the insolvents, and the boards had not yet been put up and the goods had not been taken into possession of the Bank who were the true owners

However, that does not dispose of the case, because Mr. Grant says that this was a protected transaction or dealing within the meaning of section 57 of the Insolvency Act. Now section 57 is as follows:—"Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency any contract

or dealing by or with the insolvent for valuable consideration provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor." It would be enough to take this dealing out of the protection, to hold that this was a fraudulent preference within the meaning of section 56 which provides that "Every transfer of property with a . . . . view of giving preference . . . . shall be deemed fraudulent and void." It may, however, be said that in this case there was no transfer of property because the property all along was the property of the Bank and that most there was a transfer of possession and there may therefore be difficulty in relying upon the facts as amounting to a fraudulent preference to take the case out of the protection of section 57. As regards another part of the section I may point out that in this Act and in the Provincial Insolvency Act there is a departure from the provisions of the English Bankruptcy Act, because the English Bankruptcy Act, section 49, only protects transaction of this character if (1) the dealing or transaction takes place before the date of the receiving order, and (2) the person (other than the debtor) with whom the dealing or transaction was entered into, has not, at the time of such dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time." If therefore the law in India under this Act were the same as it is in England, my finding that the communication by Mr Short amounted to an act of bankruptcy would be sufficient to dispose of the case But the Indian legislature has altered this for reasons which I must say are not at all satisfactory to my mind, seeing that, as far as my experience goes all unfair dealings on the eve of insolvency at the expense of the general body of creditors require to be guarded against as stringently in this country as elsewhere We have however to apply the rule enacted by the legislature that the protection shall apply *provided* that there was no notice of the presentation of the insolvency petition, and of course in the present case there was no notice, at the time when Mr. Short made this communication, that the insolvency petition has been presented—which is what is meant by the "presentation of the insolvency petition." The unfair dealings which require to be guarded against are likely to occur before notice of the actual presentation of the petition, and the provision would have most unfortunate effects in protecting large numbers of questionable dealings, were it not for the operation of another principle It is well established that the protection afforded by this and the corresponding

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regard to this must be tried upon its own facts and that it would be disastrous if the Court were to attempt to decide each case with reference to the facts of all the other cases which had preceded it. I must therefore deal with this case with reference to its facts only.

[After a consideration of the evidence his Lordship proceeded as follows:—]

Now it is in evidence that that communication was made by Mr. Short to the Bank at the time when he was acting as Solicitor and therefore as agent of the insolvents and after communication with the insolvents. It is also plain that the object of the notice was that the Bank might take possession of the goods under the lien and so to avoid the operation of the order and disposition clause when the petition was filed.

It is quite clear that what the Bank did was immediately to put up the board on the Madras godown and motor out and put up the board on the Kodambakkam godown. And the conclusion that I had come to, is that what they understood from Mr. Short was that there was not a moment to be lost in putting up their board. I think also, that a good deal more was understood than was expressed and the question is whether what happened did not really amount to a notice by the insolvents to the Bank, who were their creditors, that they were about to suspend payment of their debts On a full consideration of the case, I have come to the conclusion that that is the proper inference to draw from what passed. Further it is a mere attempt to evade the Act for a trader who has decided to file his petition forthwith to send warning to a creditor to remove his goods by an emissary who refuses to give any reasons for the warning; and such a transaction must, I think, be treated on the same footing as if the emissary had told the creditors the real reason, namely, that the trader was intending to file his petition. If that is so, the result is that the goods become affected by the order and disposition clause, because, at the giving of that notice which was the commencement of the bankruptcy, the goods were in the order and disposition of the insolvents, and the boards had not yet been put up and the goods had not been taken into possession of the Bank who were the true owners.

However, that does not dispose of the case, because Mr. Grant says that this was a protected transaction or dealing within the meaning of section 57 of the Insolvency Act. Now section 57 is as follows:—"Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency any contract

or dealing by or with the insolvent for valuable consideration provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor." It would be enough to take this dealing out of the protection, to hold that this was a fraudulent preference within the meaning of section 56 which provides that "Every transfer of property with a . . . view of giving preference . . . . shall be deemed fraudulent and void." It may, however, be said that in this case there was no transfer of property because the property all along was the property of the Bank and that most there was a transfer of possession and there may therefore be difficulty in relying upon the facts as amounting to a fraudulent preference to take the case out of the protection of section 57. As regards another part of the section I may point out that in this Act and in the Provincial Insolvency Act there is a departure from the provisions of the English Bankruptcy Act, because the English Bankruptcy Act, section 49, only protects transaction of this character if (1) the dealing or transaction takes place before the date of the receiving order, and (2) the person (other than the debtor) with whom the dealing or transaction was entered into, has not, at the time of such dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time." If therefore the law in India under this Act were the same as it is in England, my finding that the communication by Mr. Short amounted to an act of bankruptcy would be sufficient to dispose of the case But the Indian legislature has altered this for reasons which I must say are not at all satisfactory to my mind, seeing that, as far as my experience goes all unfair dealings on the eve of insolvency at the expense of the general body of creditors require to be guarded against as stringently in this country as elsewhere. We have however to apply the rule enacted by the legislature that the protection shall apply *provided* that there was no notice of the presentation of the insolvency petition, and of course in the present case there was no notice, at the time when Mr. Short made this communication, that the insolvency petition has been presented—which is what is meant by the "presentation of the insolvency petition." *The unfair dealings which require to be* guarded against are likely to occur before notice of the actual presentation of the petition, and the provision would have most unfortunate effects in protecting large numbers of questionable dealings, were it not for the operation of another principle. It is well established that the protection afforded by this and the corresponding

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sections extends only to *bona fide* transactions; and therefore the result of the Indian legislation is that, instead of having, as in England, a simple rule to apply, namely, to find out whether at the time of the transaction there was or was not notice of an available act of bankruptcy, the Indian Courts are left, as the English Courts seen to have been formerly left to decide what may be a very troublesome question indeed—whether or not the transaction was a *bona fide* one? It is well settled that, although the words *bona fide* no longer appear in the body either of the English section 49 or the Indian section 57 but only in the marginal note, yet it is only *bona fide* transactions that are protected. I am not going to attempt to lay down any definition as to what would amount to a *bona fide* transaction and what would not. But I think one may safely say this, that a transaction which is not only designed to defeat the operation of the Bankruptcy Law but also in itself amounts to an act of bankruptcy, cannot be considered to be *bona fide*. And that is the case here. The question of course is what the Court will regard as *bona fide, not what any private individual or even any solicitor advising his client may have thought; and on a consideration of the whole circumstances,* I am constrained to say that I am *not able to regard* this transaction as a *bona fide* one or as entitled to the protection of section 57. And, if not, then the case comes within the operation of section 52.

Several cases were cited and I have carefully read them. But there are only two which seem to me to have much bearing on this point and they were unfortunately both cases which arose under the Act of 1869 before "giving fraudulent preference" and "giving notice of an intention to suspend payment" were made acts of bankruptcy. Therefore, those were cases in which the transactions or dealings in question had not the effect of advancing the commencement of the bankruptcy so as to bring the order and *disposition clause into force.* The first case was *In re Wright, Ex parte Arnold*(1). There a solicitor gave notice to a creditor, the holder of a bill of sale, that he was about to file a petition for the insolvent under the liquidation clause of the Bankruptcy Act; and thereupon the creditor at once seized the goods. It was found that this letter was sent out by the solicitor, without any special instructions from his client, to several creditors and in the ordinary course of business without any intention of giving special preference to the particular creditor. Lord Justice MELLISH says: "*If the letter had been sent with the express intention of giving warning to the creditor to come and take possession,* I am disposed to think that the trans-

(1) (1876) 3 Ch. D, 70.

action would not have been in good faith. But it is not necessary to decide this point, as the evidence shows that the letter was sent in good faith" and he went on to say that as the law then stood, the letter could not be held to amount to an act of bankruptcy, as of course it would now. And Lord Justice JAMES says: "I had at first a suspicion that the letter of the 9th of Mach was really an invitation on the part of the debtor, that it was tantamount to his saying, I am about to become a bankrupt, come and take possession of the property before I do so. If the thing had originated with the debtor, if it had been a purely voluntary act on his part, I should have had grave doubts whether the transaction could have been supported. But the evidence which has been given today shows, in my opinion, that everything was done *bona fide* and the transaction cannot therefore be impeached." The next case I myself called attention to is *Ex parte Symmons. In re Jordan*(1). I am now clearly of opinion that this case is not an authority under the present Bankruptcy Act because there also the taking possession was before the commencement of the bankruptcy as the law then stood, so that the order and disposition clause had no application, and this is the ground upon which the case was decided But the law is now entirely different, because giving notice of an intention to suspend is made an act of bankruptcy, and the reason why it was made an act of bankruptcy is explained by Lord MACNAGHTEN in *Clough* v *Samuel*(2). He says 'Before the year 1883,' Mr. Yate Lee is reported to have said, 'it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors, that was felt to be unfair, and the object of the new Act was to meet the evil by making the notice of a suspension a new act of bankruptcy in order to prevent these unfair dealings.' I do not, of course, cite this passage as an authoritative exposition of the meaning of the legislature, although it seems to have been accepted by the Court, and the learned counsel, as some of your Lordships may remember, was a gentleman of great experience in bankruptcy and the author of a well-known treatise on the subject. But I cannot conceive that this enactment could have had any other origin or any other purpose." Now it is worthy of note that this case *Ex parte Symmons. In re Jordan*(1) is not cited by Lord Justice WILLIAMS in his book nor is it cited in Halsbury's "Laws of England" and *In re Wright. Ex parte Arnold*(3) is only cited on another point.

(1) (1880) 14 Ch. D., 693. (2) (1905) A.C 442 at p. 446.
(3) (1876) 3 Ch. D., 70.

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I am therefore of opinion that for the reasons which I have already given, this transaction cannot in law be regarded as a *bona fide* transaction or within the protection of section 57.

The result is that the application made by the applicants and also the claim set up by the Mercantile Bank fails. Each claim must be dismissed with costs in favour of the Official Assignee.

Thereupon both the applicants and the Mercantile Bank preferred these appeals.

N. Grant and *M. D. Devadoss* for the appellant (the Mercantile Bank).

D. Chamier and *R. N. Aingar* for the second respondent (Rosham and Company).

W. Barton for the first respondent (Official Assignee).

WHITE, C.J.

WHITE, C.J.—I think in this case we may apply the observation made by Lord Justice WILLIAMS in one of the cases cited in the course of the argument: it is a difficult case both on the facts and on the law.

The first question we have to consider is, did the property in these skins pass from Messrs. Rosham M. A. Mannulla Hussain Saib Company to the insolvents before the commencement of the insolvency?

[After stating that the insolvents filed their petition for insolvency on the 20th December 1911 His Lordship, on a consideration of the oral and documentary evidence on this point, held, as follows:—]

On the whole, as regards this question of fact, I am not prepared to differ from the conclusion at which Mr. Justice WALLIS arrived, that the property in these goods did pass to the insolvents before the commencement of the insolvency. If the property passed to the insolvents it is not necessary to consider whether Messrs Rosham and Company were the true owners of the goods and whether the goods were in the possession of the insolvents with their consent within the meaning of section 52 of the Indian Insolvency Act. It is also unnecessary for us to consider whether the evidence which was relied upon by Messrs. Rosham and Company as evidence of custom is sufficient to oust the operation of reputed ownership.

I now pass to the case as between the Official Assignee and the Mercantile Bank and I deal with that case on the assumption that the property in the goods as between Messrs. Rosham and Company and the Official Assignee passed to the insolvents

before the commencement of the insolvency. The question we have to consider with reference to the case as between the Official Assignee and the Mercantile Bank is—are the Bank entitled to the possession of these goods by virtue of their letters of lien and by virtue of what they did in pursuance of their letters of lien, as against the general body of creditors? The first point to consider is, did Mr. Short's statement to the *manager of the Bank amount to an act of insolvency within the* meaning of section 9 (*g*) of the Insolvency Act? I do not think it was seriously contended that Mr. Short was not the agent of the insolvents. But the question is, did Mr. Short's statements to the representative of the Bank amount to a notice that the insolvents had suspended or were about to suspend payments of their debts? It is not suggested that Mr. Short said in so many words "My clients Venkatasami Naidu and Sons are about to suspend payment." It is a matter of inference. Mr. Grant has contended that instead of drawing the inference which the Official Assignee asks us to draw we might just as well draw the inference that all that Mr. Short gave notice of, to put it at the highest, was that Venkatasami Naidu and Sons were insolvent, and he relies on *Clough* v. *Samuel*(1) as showing that this is not an act of insolvency. I agree: an intimation to a creditor that a debtor is insolvent is, in my opinion, not an act of insolvency. But I think we have something more in this case. I think the most reasonable inference to be drawn is that Mr. Short intended to convey to the manager of the Bank the intimation and the manager of the Bank knew that Mr. Short's intention was to convey the *intimation—that the insolvents were about to suspend payment* of their debts. In this connection it is material to observe that immediately on the receipt of the information the Bank did an act by putting up their board on the premises of the insolvents the effect of which was to put it out of the power of the insolvents to continue to carry on business. This to my mind suggests that the manager of the Bank knew that Mr. Short intended to convey to him not only that Venkatasami Naidu and Sons were in embarrassed circumstances but that they were about to suspend payment. I do not deny that this is a matter of inference and I think we may perhaps be going further than

(1) (1905) A.C., 442.

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sent the 33 bundles to the insolvents' premises "on inspection" and that it was only after assortment and weighment that the price would be fixed and the transaction completed. And they say that no such weighment or fixing of the price ever took place before the date of the insolvency. On other hand the case of the other parties is that there was a completed sale to the insolvents on the Saturday preceding the insolvency and that under that sale the property passed. If that be so it will be unnecessary to consider what was the exact usage and the effect of such usage in the case.

On a consideration of the oral and documentary evidence his Lordship held as follows :—

On the whole, I have come to the conclusion that these goods were sold in the ordinary course of business on the Saturday and that the property had passed to the insolvents before the date of the insolvency.

That being so, I am relieved from the necessity of considering the effect of a good deal of evidence which was adduced as to the usage in the trade and as to whether there was not such a well-established usage that skins should be left in the godowns of dealers like the insolvents subject to approval, as to rebut any inference that such goods were in the order and disposition of the insolvents. As the point has been argued before me, I will only say, without deciding it, that I think the applicants *did* adduce a considerable amount of evidence which was calculated to rebut any inference that the goods were necessarily the property of the insolvents, supposing there had been no sale.

The test, as far as I know, appears to me to be this, whether persons acquainted with the manner in which this particular kind of business is carried on would be justified in thinking that this particular class of goods in the insolvents' godowns were the property of the insolvents.

That really disposes of the first half of the case and I have now to deal with what are perhaps even more difficult circumstances of the second half of the case. That is to say, the contest between the Official Assignee on the one hand and the Mercantile Bank on the other. As I have already said, the Mercantile Bank had letters of lien over the goods in the godowns of the insolvents in Madras and also in the godown at Kodambakkam, and the effect of the letters of lien was, in my opinion, to make them "true owners" of the goods within the meaning of those words as used in section 52, sub-section 2 (c) of the Presidency Towns Insolvency Act, which provides that "The property of the insolvent shall comprise the *following* particulars, . . . all goods being at the commencement of the

insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." I think it cannot be questioned that on the morning of the Tuesday, which was the day immediately preceding the filing of the petition, these goods were "in the order and disposition of the insolvents by consent and permission of the true owner (the Mercantile Bank) under such circumstances that the insolvents were the reputed owners thereof." However, in order that the order and disposition clause should take effect, it is necessary that the goods should be in the order and disposition of the insolvents *at the commencement* of the insolvency. The policy of the Insolvency Act is to prevent unfair dealings on the eve of insolvency by making the insolvency relate back to the first act of bankruptcy, and where it has been found that scope was left for any sort of unfair dealing the legislature has in the latter Acts, met that by adding to the list of acts of bankruptcy. Thus, in the Act of 1883 two new acts of bankruptcy were created, namely, giving fraudulent preference and giving notice of intention to suspend payment. The provisions of the English Bankruptcy Act of 1883 have been reproduced in the Indian Act. "If, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would under this or any other enactment in force, be void as a fraudulent preference if he were adjudged an insolvent," and "If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." These new acts of bankruptcy have been included in the present Act and the result of them is that the commencement of the bankruptcy is antedated to the time when such acts of bankruptcy are committed. In the present case it is alleged that what happened amounted to acts of bankruptcy under each of those heads, namely, fraudulent preference and giving notice of intention to suspend payment. With regard to the latter I think the test which has to be applied is that which was laid down by Lord WATSON in *Crook* v. *Morley*(1):—"My Lords, the Bankruptcy Act, 1883, does not prescribe any form of words for a notice under section 4 (1) (*h*)" (i.e., the intention to suspend payment). "It therefore appears to me that any notice will be sufficient for the purposes of sub-section (*h*) which is expressed in terms calculated to convey to its recipients the information that their debtor has suspended or is about to suspend payment of his debts." And Lord BOWEN in an earlier case has observed that each case with

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(1) (1891) A.C., 316 at p. 322.

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regard to this must be tried upon its own facts and that it would be disastrous if the Court were to attempt to decide each case with reference to the facts of all the other cases which had preceded it. I must therefore deal with this case with reference to its facts only.

[After a consideration of the evidence his Lordship proceeded as follows:—]

Now it is in evidence that that communication was made by Mr. Short to the Bank at the time when he was acting as Solicitor and therefore as agent of the insolvents and after communication with the insolvents. It is also plain that the object of the notice was that the Bank might take possession of the goods under the lien and so to avoid the operation of the order and disposition clause when the petition was filed.

It is quite clear that what the Bank did was immediately to put up the board on the Madras godown and motor out and put up the board on the Kodambakkam godown. And the conclusion that I had come to, is that what they understood from Mr. Short was that there was not a moment to be lost in putting up their board. I think also, that a good deal more was understood than was expressed and the question is whether what happened did not really amount to a notice by the insolvents to the Bank, who were their creditors, that they were about to suspend payment of their debts. On a full consideration of the case, I have come to the conclusion that that is the proper inference to draw from what passed. Further it is a mere attempt to evade the Act for a trader who has decided to file his petition forthwith to send warning to a creditor to remove his goods by an emissary who refuses to give any reasons for the warning, and such a transaction must, I think, be treated on the same footing as if the emissary had told the creditors the real reason, namely, that the trader was intending to file his petition. If that is so, the result is that the goods become affected by the order and disposition clause, because, at the giving of that notice which was the commencement of the bankruptcy, the goods were in the order and disposition of the insolvents, and the boards had not yet been put up and the goods had not been taken into possession of the Bank who were the true owners

However, that does not dispose of the case, because Mr. Grant says that this was a protected transaction or dealing within the meaning of section 57 of the Insolvency Act. Now section 57 is as follows:—"Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency any contract

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or dealing by or with the insolvent for valuable consideration provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor" It would be enough to take this dealing out of the protection, to hold that this was a fraudulent preference within the meaning of section 56 which provides that "Every transfer of property with a . . . . view of giving preference . . . . shall be deemed fraudulent and void." It may, however, be said that in this case there was no transfer of property because the property all along was the property of the Bank and that most there was a transfer of possession and there may therefore be difficulty in relying upon the facts as amounting to a fraudulent preference to take the case out of the protection of section 57. As regards another part of the section I may point out that in this Act and in the Provincial Insolvency Act there is a departure from the provisions of the English Bankruptcy Act, because the English Bankruptcy Act, section 49, only protects transaction of this character if (1) the dealing or transaction takes place before the date of the receiving order, and (2) the person (other than the debtor) with whom the dealing or transaction was entered into, has not, at the time of such dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time." If therefore the law in India under this Act were the same as it is in England, my finding that the communication by Mr. Short amounted to an act of bankruptcy would be sufficient to dispose of the case. But the Indian legislature has altered this for reasons which I must say are not at all satisfactory to my mind, seeing that, as far as my experience goes all unfair dealings on the eve of insolvency at the expense of the general body of creditors require to be guarded against as stringently in this country as elsewhere. We have however to apply the rule enacted by the legislature that the protection shall apply *provided* that there was no notice of the presentation of the insolvency petition, and of course in the present case there was no notice, at the time when Mr. Short made this communication, that the insolvency petition has been presented—which is what is meant by the "presentation of the insolvency petition." The unfair dealings which require to be guarded against are likely to occur before notice of the actual presentation of the petition, and the provision would have most unfortunate effects in protecting large numbers of questionable dealings, were it not for the operation of another principle. It is well established that the protection afforded by this and the corresponding

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I am therefore of opinion that for the reasons which I have already given, this transaction cannot in law be regarded as a *bona fide* transaction or within the protection of section 57.

The result is that the application made by the applicants and also the claim set up by the Mercantile Bank fails. Each claim must be dismissed with costs in favour of the Official Assignee

Thereupon both the applicants and the Mercantile Bank preferred these appeals.

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WHITE, C.J.

WHITE, C J.—I think in this case we may apply the observation made by Lord Justice WILLIAMS in one of the cases cited in the course of the argument: it is a difficult case both on the facts and on the law.

The first question we have to consider is, did the property in these skins pass from Messrs. Rosham M. A. Mannulla Hussain Saib Company to the insolvents before the commencement of the insolvency?

[After stating that the insolvents filed their petition for insolvency on the 20th December 1911 His Lordship, on a consideration of the oral and documentary evidence on this point, held, as follows:—]

On the whole, as regards this question of fact, I am not prepared to differ from the conclusion at which Mr. Justice WALLIS arrived, that the property in these goods did pass to the insolvents before the commencement of the insolvency. If the property passed to the insolvents it is not necessary to consider whether Messrs Rosham and Company were the true owners of the goods and whether the goods were in the possession of the insolvents with their consent within the meaning of section 52 of the Indian Insolvency Act. It is also unnecessary for us to consider whether the evidence which was relied upon by Messrs. Rosham and Company as evidence of custom is sufficient to oust the operation of reputed ownership.

I now pass to the case as between the Official Assignee and the Mercantile Bank and I deal with that case on the assumption that the property in the goods as between Messrs. Rosham and Company and the Official Assignee passed to the insolvents

before the commencement of the insolvency. The question we have to consider with reference to the case as between the Official Assignee and the Mercantile Bank is—are the Bank entitled to the possession of these goods by virtue of their letters of lien and by virtue of what they did in pursuance of their letters of lien, as against the general body of creditors? The first point to consider is, did Mr. Short's statement to the manager of the Bank amount to an act of insolvency within the meaning of section 9 (*g*) of the Insolvency Act? I do not think it was seriously contended that Mr. Short was not the agent of the insolvents. But the question is, did Mr. Short's statements to the representative of the Bank amount to a notice that the insolvents had suspended or were about to suspend payments of their debts? It is not suggested that Mr. Short said in so many words "My clients Venkatasami Naidu and Sons are about to suspend payment." It is a matter of inference. Mr. Grant has contended that instead of drawing the inference which the Official Assignee asks us to draw we might just as well draw the inference that all that Mr. Short gave notice of, to put it at the highest, was that Venkatasami Naidu and Sons were insolvent; and he relies on *Clough* v. *Samuel*(1) as showing that this is not an act of insolvency. I agree: an intimation to a creditor that a debtor is insolvent is, in my opinion, not an act of insolvency. But I think we have something more in this case. I think the most reasonable inference to be drawn is that Mr. Short intended to convey to the manager of the Bank the intimation and the manager of the Bank knew that Mr. Short's intention was to convey the intimation—that the insolvents were about to suspend payment of their debts. In this connection it is material to observe that immediately on the receipt of the information the Bank did an act by putting up their board on the premises of the insolvents the effect of which was to put it out of the power of the insolvents to continue to carry on business. This to my mind suggests that the manager of the Bank knew that Mr. Short intended to convey to him not only that Venkatasami Naidu and Sons were in embarrassed circumstances but that they were about to suspend payment. I do not deny that this is a matter of inference and I think we may perhaps be going further than

(1) (1905) A.C., 442.

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section 94." On the authority of that case I hold that this transaction or dealing, which took place on the 19th of December, was a transaction with the insolvent for valuable consideration. Mr. Chamier has ingeniously tried to distinguish the facts of the present case on the ground that here all that the bank had power to do under the letters of lien was to call upon the debtor to deliver the goods whereas *In re Wright, Ex parte Arnold*(1), the creditor had power to take possession. But for the purposes of the question we have to decide, I think, with all respect to Mr. Chamier, that this is a distinction without a difference. If this transaction with the insolvents was for valuable consideration, the bank is not hit by the proviso because they had no notice of the presentation of a petition, since no insolvency petition had been presented.

Then we come to the question of *bona fides*. That seems to me to be the most difficult point in the case. In the corresponding section of the English Act of 1849 and of the English Act of 1869 we find the word 'bona fide' or words to that effect, in the body of the section. In section 49 of the English Act of 1883 and in section 57 of the Indian Act we do not find the word 'bona fide,' although we find it in the marginal note. It seems to me a reasonable view, a view which I at one time in the course of the argument was disposed to take, that the only question of *bona fides* which could arise in connection with the construction of section 57 of the Indian Act would be the question whether the transaction was a real transaction, and, if so, whether it was protected by the words of the section. It may be argued with some force that a transaction, which may be contrary to the policy of the Bankruptcy law, is a good transaction unless it can be impugned under some express statutory enactment. But, having regard to the English authorities, I do not think we can take this view. I need scarcely say that when we are construing an Act which in many instances is taken, word for word, from an English Act and when we are dealing with a branch of law which is essentially English law, though we may not be actually bound by, yet we ought certainly to pay the greatest respect to, the decisions of the English Court of Appeal. Our attention has been called to authorities to show that the Court is bound to consider whether a transaction is contrary to the policy of the

(1) (1876) 3 Ch D., 70.

Bankruptcy law, although it does not come within the four corners of any particular section. I propose to deal with the authorities very shortly.

Mr. Justice WALLIS referred to the observations of the Court of Appeal in *In re Wright, Ex parte Arnold*(1). They are *obiter* and they were no doubt made in a case decided at a time when giving notice that a man was going to suspend payment was not in itself an act of bankruptcy.

We have also some other authorities. There is *In re Slobodinsky, Ex parte Moore*(2) in which we find very strong observations of Mr. Justice WRIGHT, on page 525: "The effect of the trustee's title by relation back under section 43 is excluded by section 49 of the Bankruptcy Act, if there has been a contract, or conveyance, or assignment for valuable consideration, provided that the transferee has not at the time notice of any available act of bankruptcy; and although the words "in good faith" do not occur in the section they must be deemed to be inserted, because in all former Acts those words have been inserted, and it has been since held that the omission was not intended to make any difference, and that the person who takes the conveyance of a debtor's property cannot claim the benefit of section 49 if he had notice of anything wrong or anything that really put him upon enquiry." We have *In re Jukes, Ex parte Official Receiver*(3), a decision to the effect that a creditor who takes a transfer of the whole of the property of his debtor in payment of a past debt with notice that there are other creditors, cannot be said to be acting in good faith and is therefore not entitled to the protection of section 49 of the Bankruptcy Act. No doubt in this case the transaction was held bad as a fraudulent preference. Mr. Justice WRIGHT in distinguishing *Shears* v. *Goddard*(4) says with reference to the purchasers there: "They were purchasers in good faith and for valuable consideration. But I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole of the property of his debtor in payment of a past debt, and knowing that there are other creditors he cannot be said to be acting in good faith. On the whole, therefore, I hold that the transaction in this case is not protected by section 49 of the Act."

(1) (1876) 3 Ch.D., 70.
(2) (1903) 2 K.B., 517.
(3) (1902) 2 K.B., 58.
(4) (1896) 1 K.B., 406.

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section 94." On the authority of that case I hold that this transaction or dealing, which took place on the 19th of December, was a transaction with the insolvent for valuable consideration. Mr. Chamier has ingeniously tried to distinguish the facts of the present case on the ground that here all that the bank had power to do under the letters of lien was to call upon the debtor to deliver the goods whereas *In re Wright, Ex parte Arnold*(1), the creditor had power to take possession. But for the purposes of the question we have to decide, I think, with all respect to Mr Chamier, that this is a distinction without a difference. If this transaction with the insolvents was for valuable consideration, the bank is not hit by the proviso because they had no notice of the presentation of a petition, since no insolvency petition had been presented.

Then we come to the question of *bona fides*. That seems to me to be the most difficult point in the case. In the corresponding section of the English Act of 1849 and of the English Act of 1869 we find the word 'bona fide' or words to that effect, in the body of the section. In section 49 of the English Act of 1883 and in section 57 of the Indian Act we do not find the word 'bona fide,' although we find it in the marginal note. It seems to me a reasonable view, a view which I at one time in the course of the argument was disposed to take, that the only question of *bona fides* which could arise in connection with the construction of section 57 of the Indian Act would be the question whether the transaction was a real transaction, and, if so, whether it was protected by the words of the section. It may be argued with some force that a transaction, which may be contrary to the policy of the Bankruptcy law, is a good transaction unless it can be impugned under some express statutory enactment. But, having regard to the English authorities, I do not think we can take this view. I need scarcely say that when we are construing an Act which in many instances is taken, word for word, from an English Act and when we are dealing with a branch of law which is essentially English law, though we may not be actually bound by, yet we ought certainly to pay the greatest respect to, the decisions of the English Court of Appeal. Our attention has been called to authorities to show that the Court is bound to consider whether a transaction is contrary to the policy of the

(1) (1876) 3 Ch D., 70.

transaction was a fraudulent preference. See *Ex parte Symmons. In re Jordan*(1). Then there was a good deal of argument with reference to section 178 of the Contract Act. In the view we take in this case that question does not arise for consideration.

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The result will be that Mr. Chamier's appeal on behalf of Messrs. Rosham and Company and Mr. Grant's appeal on behalf of the bank must both be dismissed but without costs. The Official Assignee will be allowed to take his costs out of the estate; costs on the original side scale.

Sankaran Nair, J.

SANKARAN NAIR, J.—I concur.

Messrs. Wilson and *Duke*, attorneys for the Mercantile Bank.

S. Subbayya Chetti, attorney for the first respondent.

Messrs. Grant and *Greatorex*, attorneys for the second respondent.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Kumaraswami Sastriyar.

1914. January 20 and 21.

MAHARAJA RAJA SAHIB MAHARBAN DOSTAN SRI RAJU MAHARAJA SREE ROW SIR VENKATASWATHA CHALAPATHY RANGA ROW BAHADUR, K.C.I.E., MAHARAJA OF BOBBILI, AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

W. S. VENKATARAMANJULU NAIDU AND SEVEN OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Alienation of a share of a member of a joint Hindu family—No right to alienee for mesne profits from the date of alienation till suit for partition

A purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant in common with the other members and hence he is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition.

Nanjaya Mudali v. Shanmuga Mudali (1914) 26 M.L.J., 570, followed.

The *obiter dicta* in *Aiyyagiri Venkataramayya v. Aiyyagiri Ramayya* (1902) I.L.R., 25 Mad., 690, *Chinnu Pillai v. Kalimuthu Chetti* (1912) I.L.R., 35 Mad., 47 and *Subba Row v. Ananthanarayana Ayyar* (1912) 23 M.L.J., 64, disapproved and not followed.

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(1) (1880) 14 Ch.D., 693.

* Appeal No. 177 of 1910.

MAHARAJA OF BOBBILI v. VENKATA-RAMANJULU NAIDU.

APPEAL against the decree of D. G. WALLER, the Acting District Judge of Chingleput, in Original Suit No. 3 of 1908.

The facts of the case appear from the judgment.

P. Narayanamurthi for the appellants.

T. Rangachariar for the respondents Nos. 2 and 3.

V. Somayya for the sixth respondent.

T. V. Muthukrishna Ayyar for respondents Nos. 7 and 8.

WALLIS, C.J. AND KUMARASWAMI SASTRIYAR, J.

The judgment of the court was delivered by WALLIS, C.J.—This is an appeal by an auction-purchaser of an undivided share belonging to a co-parcener against the decree of the District Judge of Chingleput disallowing his claim for mesne profits in the suit filed by him for partition and delivery of the share purchased.

The appellant rests his case on two grounds. The first is that the members of the family of the co-parcener whose share he purchased were divided in status and that he is consequently entitled to mesne profits and secondly that in any event he is entitled as a tenant in common with the other co-parceners to mesne profits in respect of the share which he purchased.

As regards the first contention there is no oral evidence on record. The appellant relies on Exhibits A and B as showing that the person whose share he purchased was divided in status from the other members of his family. Exhibit A is an affidavit filed by one of the members in a previous suit. The inference required to be drawn from Exhibit A is that the parties were divided in status but reading the affidavit as a whole it seems to us that the dispute was about the management of the properties. It does not appear that there was any decision in the suit in which Exhibit A was filed that the members were divided in status and we do not see how the allegation of one member in a previous suit could be taken to be conclusive in the matter. Exhibit B does not help the appellant as it specifically recites that the incumbents "are undivided members and that they are entitled to the shrotriem village" and we are therefore of opinion that it has not been shown that the appellant's predecessor in title was divided in status from the other co-parceners.

The real question is whether a purchaser of an undivided share is entitled to mesne profits as against the co-parceners

from the date of his purchase up to the date of the plaint. So far as we are aware there is no authority of any High Court in which the matter has been discussed and decided nor has it ever been the practice to allow mesne profits in such cases. Such authorities, as there are, seem to be the other way. In *Narayan bin Babagi* v. *Nathaji Durgaji*(1) it was assumed that in a suit by a purchaser from an undivided co-parcener for recovery of the share of his vendor mesne profits should not be granted and their Lordships reversed the decision of the District Judge awarding mesne profits in the suit.

The ground on which the appellant claims mesne profits is that the transfer to him effects a severance of the co-parcenary as regards that share and makes him a tenant in common of the share which his vendor had at the date of the alienation and that the right to mesne profits is a necessary incident to the right of property in which a person is interested as tenant in common. Reference has been made to *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2), *Chinnu Pillai* v. *Kalimuthu Chetti*(3) and *Subba Row* v. *Ananthanarayana Ayyar*(4).

There are no doubt *dicta* in these cases that where a co-parcener makes an alienation of the whole or portion of his share "the estate that is transferred to and vested in the alienee is not an equitable interest as understood in English law but a legal estate which has to be reduced to possession by the alienee standing in the shoes of the transferor and effecting a partition on the footing on which the family and the property both stood at the time of the transfer." This view has been dissented from in *Manjaya* v. *Shanmuga*(5) where Justices SANKARAN NAIR and BAKEWELL held that an alienation of an undivided share by a member of a joint family does not put an end to the joint tenancy and that the alienee does not become a tenant in common with the other co-parceners, but he is only entitled in equity to enforce his rights in a suit for partition.

We are inclined to the view taken in *Manjaya* v. *Shanmuga*(5). The right of the alienee to enforce partition does not

(1) (1904) I.L.R., 28 Bom., 201.
(2) (1902) I.L.R. 25 Mad., 690.
(3) (1912) I.L.R., 35 Mad., 47.
(4) (1912) 23 M.L.J., 64.
(5) (1914) I.L.R., 38 Mad., 684.

MAHARAJA OF BOBBILI v. VENKATA-RAMANJULU NAIDU.

WALLIS, C.J. AND KUMARA-SWAMI SASTRIYAR, J.

rest on any text of the Hindu law but on the equitable doctrine that a purchaser for value should be allowed to stand in his vendor's shoes and work out his rights by a partition and it seems to us that the doctrine need not be extended beyond what is absolutely necessary to enable the vendee to work out his rights. In the suit for partition which may be filed by the alienee it may be that the property conveyed to him falls to some other co-parcener and it is difficult to see how this fact could be reconciled with the theory that by purchase he becomes entitled to a vested interest in the share of his co-parcener in the property alienated as from the date of the alienation.

There are also clear authorities that the mere fact that a co-parcener makes an alienation does not put an end to the status of the co-parcenary as between himself and the other members of his family and if this be so it would be unfair that the other members of the family should be required to bear the expenses of the alienating co-parcener and the members of his family and also to set apart a portion of the income of the properties for meeting the claim of the alienee.

It is argued that the purchaser who paid consideration would be kept out of the fruits of his purchase should mesne profits be not given to him but the remedy is obviously in the purchaser's hands as it is open to him to file a suit for partition immediately after the purchase.

Viewing the case from the mere standpoint of hardship we think that the balance is in favour of the members of the joint family. The observations of the learned Judges who took part in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1), *Chinnu Pillai* v. *Kalimuthu Chetti*(2) and *Subba Row* v. *Anantha-narayana Ayyar*(3) as regards the alienee being a tenant in common and not merely entitled to an equity are *obiter dicta* and we are of opinion that the broad proposition enunciated in those cases is not supported by any text in Hindu law, and we are not prepared to follow it. It is difficult to reconcile it with the decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(4), *Hardi Narain Sahu* v. *Ruder Perkash Misser*(5) and

(1) (1902) I.L.R., 25 Mad., 690 at p. 698. (2) (1912) I.L.R., 35 Mad., 47.
(3) (1913) 23 M.L.J., 64. (4) (1880) I.L.R., 5 Calc., 148.
(5) (1884) I.L.R., 10 Calc., 626.

Ramkrishore v. *Jayanarayan*(1). The Privy Council has decided that the alienee in possession is liable to be ejected at the instance of the co-parceners who are not bound by the alienation. We are of opinion that the mere fact of a person purchasing a share of a co-parcener in joint family properties would not entitle him to mesne profits as against such other members of the family and that the purchaser would be in no higher position than his alienor who under Hindu law would not under ordinary circumstances be entitled to demand an account of the past profits. The appeal fails and is dismissed with costs.

The memorandum of objections has not been argued and has been dismissed with costs.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914 September 7, 8 and 30.

P. JAGANNAIKULU *et al* (DEFENDANTS), APPELLANTS,

v.

THE MANAGER OF NANDIGAM ESTATE (PLAINTIFF IN ALL THE CASES), RESPONDENT IN ALL THE CASES.*

Madras Local Boards Act (V of 1884), sec. 73—Mortgagee with possession, whether intermediate holder—His right to recover rent.

A mortgagee with possession is an intermediate tenant-holder within the meaning of section 73 of the Local Boards Act (V of 1884), and is entitled to recover rent by summary process. The tenant's liability to pay him is not abrogated by a contract to which he was not a party.

SECOND APPEALS against the decrees of Diwan Bahadur O. V. KUMARASWAMI SASTRIYAR, the District Judge of Ganjām, in Appeals Nos. 253 to 255, 258 to 262, 280 to 300 and 429 to 433 of 1912, respectively, preferred against the decrees of K. NAGESWARA RAO, the Special Deputy Collector, Estates Land Suits, Chicacole, in Summary Suits Nos. 228, 230, 231, 225, 227, 229, 232, 240, 215, 217, 219, 222 to 224, 226, 233 to 239, 241, 216, 218, 220, 221 and 242 of 1912.

(1) (1913) I.L.R., 40 Calc., 966.

* Second Appeals Nos. 2112 to 2139 of 1913.

JAGANNAIKULU v. MANAGER OF NANDIGAM ESTATE.

The Court of Wards on behalf of the minor Zamindar of Nandigam filed suits to recover one-half of the land-cess paid by the estate to the Government. The defendant-ryots pleaded that they paid the half-share of the land-cess to the mortgagee in possession and that the zamindar was not entitled to recover it from them. The Court of Special Deputy Collector at Chicacole held that the mortgagee in possession was holder of an undertenure within the meaning of section 73 of the Madras Local Boards Act and by the terms of the mortgage-deed, the right to recover half share of the land-cess was vested in him and dismissed the suits; on appeal the Ganjam District Court held that a mortgagee with possession for a fixed term was not an intermediate landholder or a mortgagee with possession an undertenure so as to give the mortgagee the right to levy land-cess from the ryots. He accordingly reversed the decrees of the lower Court and passed a decree for the plaintiff in each of the suits. The defendants in the above suits preferred these Second Appeals.

K. Srinivasa Ayyangar and *M. Purushothama Nayudu* for the appellants.

Dr. S. Swaminadhan for the respondent.

OLDFIELD, J.

OLDFIELD, J.—The appellants are defendants, tenants of an estate of which plaintiff is the Court of Wards Manager. The question is whether defendants are bound to pay plaintiff the portion of the road cess, for which they are responsible under section 73, Madras Local Boards Act (V of 1884, amended by VI of 1900) or can and should pay a mortgagee under Exhibit I. The lower Appellate Court has held that they must pay plaintiff with reference to the terms of both Exhibit I and section 73.

The material portions of section 73 provide that (1) every landholder must pay the tax (except that leviable on water tax which is not in question here) directly to Government; (2) the landholder can recover a specified portion of the tax from "any person, holding lands with or without right of occupancy as an intermediate landholder on an undertenure created, continued or recognized by the landholder"; (3) the intermediate land holder can recover from the tenants occupying the land half the tax payable by the landholder in respect of that land.

Some attempt was made to argue that the mortgagee under Exhibit I was a transferee of the title to the mortgaged property

and therefore became the landholder during the term of the mortgage. But this does not appear to have been put forward in the lower Courts. The property is part of a permanently-settled zamindari, and it is not alleged that it has been separately registered. In Exhibit I moreover the mortgagor, plaintiff's predecessor, expressly undertook to continue the payment of peshkash. In these circumstances attention may be confined to the plea that the mortgagee is an intermediate landholder.

The lower Appellate Court has first held generally that the mortgagee is not an intermediate landholder within the meaning of the Act, but has given no general reason for doing so. To us it is clear that a mortgagee with possession is as much a landholder as any lessee and that he is intermediate between plaintiff and his tenants. Our difficulty is caused by the further reference to an undertenure. That expression is not defined in the Local Boards Act; nor, so far as we have been shown, is it part of the legal or revenue phraseology of this Presidency. It is argued on the one hand that an undertenure involves the idea of a tenancy, a holding under a landlord for rent or service, and therefore cannot include a mortgagee with possession. On the other hand it may be said that it involves only a holding and is not restricted to holdings of any particular description. And this is in accordance with the only other use of the word in India, to which we have been referred, that in sections 3 and 5, Bengal Tenancy Act (VIII of 1885), where a tenure is defined as the interest of a tenure holder or undertenure holder, and a tenure holder as meaning primarily "a person, who has acquired from a proprietor a right to hold land for the purpose of collecting rents or establishing tenants on it." This definition is wide enough to cover the mortgagee in the present case, since under Exhibit I he was put in possession to collect rents and profits estimated at an amount, which would extinguish the debt within the term fixed. Mortgagees in possession, equally with lessees, are entitled to recover rent by summary process, *Vellaya v. Tarura*(1); and it is a further reason for adopting defendants' construction that in accordance with it the amendment of the Act in 1900 would afford a comprehensive remedy for the

(1) (1883) I.L.R., 5 Mad., 74.

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mischief, against which that amendment must be supposed to have been directed, by protecting tenants against the landholder's separate demands for cesses in mortgaged as well as leased estates; for no reason has been suggested for the restriction of the protection afforded to the latter. So far then as argument can be based on the wording of section 73, the conclusion must be that the mortgagee is an intermediate landholder and defendants are entitled to pay him.

The learned District Judge next dealt with Exhibit I, laying stress on the absence of reference to payment of cess and the exclusion of the mortgagee's liability for taxes and holding that "assuming the mortgagee is an intermediate landholder within the meaning of section 73, the right to receive one-half of the cess from the tenant is dependent on the liability of the landlord (or presumably the intermediate landlord) to pay it and his having paid the whole cess." But in construing Exhibit I, it is to be remembered that it is dated 1897, before any explicit liability for any part of the cess was placed on the intermediate landholder by Act II of 1900 and before the tenant's right to pay him was recognized by statute; and accordingly no clear recognition of that right is to be looked for in the document. One of its terms is no doubt that plaintiffs' predecessor shall pay the peshkash to Government and it is not contended that that does not cover the payment of cesses payable with it. But, if the landholder is liable directly to Government for cesses under Exhibit I, that is only what section 73 provides; and his being so cannot affect the right of the tenant to pay the intermediate landholder or the landlord's duty to recover from the latter, referred to later in the section. There is further underlying this argument and that based on Exhibits III, IV and VI, to which reference will be made, the fallacy involved in the failure to recognize that section 73 in its amended form confers a right on the tenant. When it has been found that an intermediate landholder, such as the section contemplates, exists, that right cannot be affected by a contract, such as Exhibit I, between plaintiff's predecessor and a third party, the mortgagee. Nor, created (as it is) unconditionally, can it depend on any payment having been made by the former to Government or by the latter to the former. It is accordingly immaterial whether plaintiff is entitled to be reimbursed by the mortgagee the sums, which (it is not

denied) he has paid Government or whether, as defendants contend, he is not entitled to reimbursement under the terms of Exhibit I.

At this point plaintiffs' contention that the change in the law effected by Act VI of 1900 cannot modify the relation between him, his mortgagee and defendants, created by Exhibit I in 1897 calls for notice. It is of course the case that the rights of the parties to a contract are to be judged by their intention at its date and "by that law, by which they intended or rather may justly be presumed to have bound themselves." *Lloyd* v. *Guibert*(1). But this principle can affect only the parties. It cannot affect strangers to the contract, such as defendants, or deprive them of statutory rights.

Plaintiff relies next on the fact that in Original Suit No. 54 of 1905 he was refused a decree against the mortgagee for the amount of the payments he had made to Government for cess for certain faslis prior to those now in question It is not clear how this was relied on in the lower Appellate Court. But it is not alleged that this decision is *res judicata* between plaintiff and the present defendants, who were not parties to it. Here argument is based on the principle stated in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar*(2) and *Ramamurti Dhora* v. *The Secretary of State for India in Council*(3), that judgments, whether *in rem* or *in personam* establishing a relation between the parties to them, are conclusive against third parties in the absence of fraud on the latter; and that principle must be accepted by this Court, though its validity was doubted in *Peari Mohun Shaha* v. *Durlavi Dassya*(4). There is however the fundamental objection to its application to the present case that it extends only to adjudications, which would be *res judicata* between the parties to them, and that the judgment in Original Suit No. 54 was not of that description. It has not been printed, but the lower Appellate Court's account of it, on which we must depend, shows that the mortgagee, who succeeded, could not have appealed against the merely incidental finding on the point now in question and that that finding dealt, not with defendant's statutory right, but with the existence of an assignment to the mortgagee of the right to collect from them.

(1) (1865) 6 B. & S., 100. (2) (1910) I.L.R., 34 Mad., 453.
(3) (1913) I.L.R., 38 Mad., 141. (4) (1913) 18 C.W.N., 954.

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it is not alleged to have been separately registered and the land tax is specially payable by the mortgagor. The deed refers to itself as "Khanda Gutta [which literally means 'fixed rent'] *deed with possession*" and also as "mortgage with possession." This contention therefore cannot succeed. It does not seem to have been put forward in the lower Courts.

Therefore whether the plaintiff can recover the half cess payable by the tenants depends solely upon whether the mortgagee answers to the description of an intermediate landholder. All the rest of the arguments addressed to us or contained in the judgments of the lower Courts centre round this one question.

The expression "intermediate landholder" appears from section 73 to connote: (*a*) the holding of land, (*b*) as an intermediate landholder, (*c*) on an undertenure, (*d*) created continued or recognised by a landholder, (*e*) payability by him of kattubadi jodi, poruppu or quit rent, (*f*) that when he exists the tenant is his tenant. The last appears from the second proviso.

The expression intermediate landholder indicates *primâ facie* a person who is (1) a landlord of the tenants, (2) a tenant of the ultimate landholder. His dual capacity is recognised in the direct reference to undertenure, and the assumption that rent is payable by him on the one hand and by the fact that the tenants are referred to as his tenants on the other. It is also referred to in *Nalliyappa Pillian* v. *Ambalavana Pandara Sannadhi*(1) for another purpose. It is true that, if no rent is payable by the intermediate landholder to the landholder, there is no insurmountable difficulty in working out the provisions of the section; the intermediate landholder will in that case have to pay the whole tax to the landholder, or in other words bear the whole tax himself.

With reference to the expression "undertenure" I have been unable to come across its use or recognition in any English or American text-books on the law relating to landlord and tenant, or anywhere else except in the Bengal Tenancy Act (Bengal Act VIII of 1885). The definition contained in that Act has been cited by my learned brother; it consists of the equivalent of (*d*), (*a*) and (*f*) above, with reference to which there is no dispute before us. The expression "undertenure" is evidently not used in section 73 in a sense cognate to

(1) (1904) I.L.R., 27 Mad., 465 at pp. 469 and 470 (F.B.)

"undertenure," which would mean the holding of a tenant under a tenant, or an underlessee. Still inasmuch as in accordance with the strict terminology of English law even a free-holder is a tenant holding a tenement on a tenancy, an undertenure may with sufficient accuracy be taken to refer to a holding under that of the landholder.

Five other considerations have been suggested to us, three as having some relevance to the connotation of the term intermediate landholder, and two as otherwise affecting the rights of the parties.

First there is a remark of the District Judge on which a good portion of his judgment is based: "Assuming the mortgagee was an intermediate landholder within the meaning of section 73 the right to recover one-half of the cess from the tenant is (he says) dependent on the liability of the landlord to pay it and on his actually having paid the whole cess." This remark has reference to the nature and incidents of the rights concerned. It seems to me necessary to direct attention to the component parts of the three relationships on which the section is explicitly based, and then to annex rights to the holders of the respective relationships. Considered with reference to the two relationships entitling a right to claim half the tax, in the case of the landholder the District Judge's remark may be correct; the first proviso refers to the tax paid by the landholder for payment of which the section specifically provides. But the remark is obviously inapplicable to the intermediate landholder. His right does not depend on his liability to pay the tax. He does not in any case "actually pay the whole cess": he pays the whole less a deduction calculated on the rent payable by him; and he pays not to the Collector, but to the landholder. The learned District Judge's remark, therefore, coupled as it is with the assumption that the mortgagee is an intermediate landholder seems to me, with the greatest respect, to be unsupportable. The Act provides for the payment of the tax and its apportionment amongst the three persons by reference to their bearing certain relationships to the land and to each other. The payment of the tax to the Government is not laid down as an element in the definition or connotation of any of those relationships and the existence of the relationship is the only condition precedent to the right to recover half of the cess. The payment has been imposed on him who

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bears one of the relationships, viz., that of landholder, and the liability on the others is quantified by the amount paid or payable by the landholder. The recovery of half of the cess is not dependent on the landholder's liability to pay it, in any sense except that where no cess is payable the portion recovered from the tenant is half of nothing.

Secondly, in an earlier portion of his judgment the District Judge has remarked that "there is no transfer of property" (to the present mortgagee) "as in the case of an English mortgage or of a mortgage by conditional sale" and that therefore the mortgagee cannot in the present case be considered to be an intermediate landlord. With great respect I am unable to follow this. Assuming that there is no such transfer of property as is referred to, I do not find that as an ingredient in the notion of an intermediate landlord.

Thirdly, it is suggested that if it is shown that as between the mortgagor and mortgagee the former cannot recover anything from the latter, it must be decisive of the question whether the tenants must pay to the one or to the other. That in my opinion is not the case. It is true that the law assumes (1) that the intermediate landholder recovers half of the tax from the tenants, (2) that he pays something to the landholder; and these two matters are connected with each other and (to the extent stated above) with (3) the landholder's liability to pay the whole tax to the Government. But I apprehend that by the terms of his contract with the intermediate landholder the landholder could either release to the intermediate landholder his right to recover the portion of the tax which the law empowers the landholder to recover or reserve that right to himself, and the release or the reservation might be either express or it may be implied from the fact that all rights other than those referred to are either expressly released or reserved [*Cf. Nikka Mal* v. *Gardner*(1)]. If the right to recover half the cess from the tenant had been purported to be reserved by the landholder to himself, there might have arisen a question whether the tenants would not even in that case be justified in paying it to the intermediate landholder. I shall refer to the legal aspect of this question under the fourth head to which I have alluded. But here I must

(1) (1879) I.L.R., 2 All., 193.

state that in my opinion the contract of 1897 contained no reservation express or implied of the right arising from the amendment of the Act in 1900.

On the other hand, the landholder may, it is not disputed validly, agree to allow the intermediate landholder to retain the portion of the tax recovered from the tenant and apply it towards any sum that may be due to him from the mortgagor: and that is what is alleged here on behalf of the tenants. But though the question whether or not such an agreement express or implied relating to the application of the money exists between the mortgagor and mortgagee may affect their pockets, it does not affect the question whether the tenants have to pay to the mortgagee in the first instance or directly to the mortgagor. The District Judge's omission to notice this made him consider that there was here something like an "assignment of the statutory right to contribution," alleged, whereas the question is whether the mortgagee or the mortgagor is the person to collect the tenants' contribution: and that depends solely upon whether the mortgagee became by the contract an intermediate landholder.

The further question whether if he became entitled to collect half of the cess, in his capacity as intermediate landholder he was at liberty to retain it himself or was bound to pay it, or account for it to the mortgagor is not relevant to the rights and liabilities existing between the landholder and the tenant. This is illustrated by *Ramavtar* v. *Tulsi Prasad Singh*(1). The fourth *consideration to which I referred above is whether the rights of* the parties are affected by the fact that section 73 was amended after the contract (Exhibit A) was entered into. In the case last cited the statutory right of recovering the cess from the tenants came into being after the contract, in our case the inherence of a right existing at the time of the contract was (by an amendment of *the law, after the contract*) *shifted from the landholder to* the intermediate landholder. I think it unnecessary to consider the general question whether this shifting can be prevented by contract inasmuch as in the present case there is no attempt to do so. But I may point out that the shifting is brought about by the legislature as the effect of a contractual act. It may be that the legislature intended that the parties should

(1) (1911) 14 C.L.J., 297.

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TYABJI, J.

not be at liberty to contract themselves out of this shifting as an incident of a contract, the effect of which apart from this particular term would be to make one of the parties to it an "intermediate landholder"; and that *the reason for this curtailment of the right to contract (if the right is so curtailed) is, as pointed out by my learned brother, to afford a comprehensive remedy for the mischief of the landlord's separate demands for cesses on mortgaged lands.* See also *Vellaya* v. *Tirura*(1). It may be that the legislature left no power to the parties to contract so as to bring about a relationship corresponding in other respects to that of an intermediate landholder without annexing to that relationship the rights under section 73. The question however seems to me to be a large one and I express no opinion on it as it seems to me that it has no bearing on the view I take of the case. My view is that the contract did not expressly or impliedly purport to prevent a shifting of the right, which was brought about by a legislative amendment of the law made three years after the contract had been entered into.

Finally, some arguments before us were apparently based on the assumption (which I cannot grant) that, because in other cases, persons called or calling themselves mortgagees or lessees were, or were not held to be intermediate landholders or farmers of revenue, and because in the present case we speak of a mortgagor and mortgagee, therefore this case must be decided as being governed by those other cases. The decisions cited to us seem to me however to be helpful, not as direct authorities, but as showing in what way the question should be endeavoured to be solved. In *Vellaya* v. *Tirura*(1), a Full Bench pointed out that the question must depend upon the terms of the particular contract giving rise to the relationship between the parties which in that case also was a mortgage. The fact that a deed refers to itself as a mortgage, does not necessarily make it a mortgage,—*Nidha Sah* v. *Murli Dhar*(2): nor does every mortgagee become or cease to become an intermediate landholder because one mortgagee has been held to be so or not to be so. I proceed to deal with the facts of the case and to examine whether the mortgagee answers to the description of an intermediate landholder.

(1) (1882) I.L.R., 5 Mad., 76 at pp. 80, 85 and 86.

(2) (1902) 30 I.A., 54 at p. 58.

The mortgage deed in the present case (1) recites that a sum of Rs. 28,000 was found payable to the mortgagee, on a calculation which was no doubt satisfactory to the parties. It is then said (2) that the rents of the lands in question including therein (a) kattubadis of inams, (b) cists of banjir lands, (c) incomes of banjir lands, (d) fishing tax, (e) etc., are fixed at Rs. 2,600, (3) that the mortgagee "is this day put in possession;" (4) that "the mortgagee shall collect the said lease amount (i.e., the rents above recited) and enjoy the same for twenty-five years . . . bearing the profit and loss thereof; and on the expiry of 25 years put the villages and the document in the mortgagor's possession on the mortgagee recovering the amount due in respect of this bond in full," (5) covenants follow on the part of the mortgagor (i) not to offer to repay the mortgage debt prior to expiry of 25 years, (ii) not to mortgage the villages any further, (iii) to furnish accounts and information, (iv) to transfer an existing lease (which is in evidence as Exhibit III) to the mortgagee. Then after a passage which I shall set out below, (v) the right to sue ryots in his own name is given to the mortgagee, (vi) also to quarry, (vii) finally the mortgagor agrees to pay the peshkash and in default to pay back the mortgagee with interest, (6) the portion above referred to is as follows:—

"As by this khandagutta deed the villages of Dimiladа and Lingulapadu have been given to you for khandagutta to be enjoyed by you for 25 years for the said sum of Rs. 28,000, you shall not plead then (i.e., at the end of 25 years) that anything more is due to you under the document nor shall we contend that the debt has been discharged earlier."

It seems to me that every part of the connotation of the term "intermediate landholder" has its equivalent in the status given to the mortgagee. There might be some doubt as to payment of rent. But section 105 of the Transfer of Property Act recognizes the payment of a premium instead of rent for a lease; and I find it difficult to distinguish from a premium the sum of Rs. 10,000 originally paid by the mortgagee to the mortgagor, which by a calculation that the parties seem to have considered satisfactory, was taken to amount to Rs. 28,000. The relationship of a usufructuary mortgagee is always close to that of a lessee, as may be found by reference to the provisions of the

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Transfer of Property Act regarding them respectively and to the numerous cases before the Courts in which it has had to be determined whether the relationship that has arisen between the parties must fall under the one description or the other. I agree with my learned brother that no aid is to be obtained from Exhibits III, IV and VI for the reasons stated by him.

With reference to Original Suit No. 54 of 1905 on the file of the District Court of Ganjām, we have not the judgment before us. Its contents are however referred to in the judgment under appeal and the parties before us had to restrict their arguments on what the District Judge says regarding it. From his judgment I gather that in Original Suit No. 54 of 1905 (1) the present plaintiff contended that the mortgagee was on the mortgage liable to pay the cess and had failed to pay it, (2) the mortgagee contended on the other hand that (*a*) the cess was payable by the mortgagor, and (*b*) that the half cess recoverable by the mortgagee from the tenants was to be reckoned as part of the income. The only part of the judgment which became res judicata was that the mortgagor was liable to pay the land cess. This is irrelevant to the question before us, viz., whether or not the mortgagee is the intermediate landholder.

I hold therefore that the mortgagee in the present case was an intermediate landholder and as such he and not the mortgagor (the plaintiff) has the right to collect from the tenants the half cess referred to in section 73 of the Local Boards Act. The appeal will succeed with costs in this and the lower Appellate Court. The order of the Special Deputy Collector that each party should pay his own costs in the Court of First Instance will stand.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

PENUMETSA SUBBARAJU (FIRST DEFENDANT), APPELLANT,

v.

VEEGASENA SEETHARAMARAJU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1914
October 28
and
November 5.

Substitution of property and security—Right of purchaser in court-auction to substituted properties—Transfer of Property Act (IV of 1882), ss. 2 (d), 8, 36, 44 and 52—'Contract to the contrary' in section 36 of the Transfer of Property Act.

After a decree for sale on a mortgage, the mortgagor who was in possession gave a lease of his properties to the first defendant for one year from July 1907 to July 1908 with a covenant for payment of the rent on 10th January 1908. In ignorance of this lease and the reservation of a rent the mortgaged properties and the crops were brought to sale in November 1907 and plaintiff purchased the lands together with the crops thereon and the sale was confirmed in December 1907. The crops were harvested in January 1908 by the lessee In a suit by the purchaser, for the rent of the whole year from the mortgagor and his lessee

Held:

(a) that the purchase of the right, title and interest of the mortgagor to the lands and of the standing crops thereon entitled the purchaser to receive the whole rent reserved which was the thing substituted by the mortgagor for the crops,

(b) that sections 8 and 36 of the Transfer of Property Act (IV of 1882) were inapplicable as the purchase was in court-auction,

(c) that a stipulation to pay rent of a year's lease at a particular date is a contract to the contrary within the meaning of section 36 of the Transfer of Property Act (IV of 1882), which enacts that the right to rent as between the transferor and the transferee ordinarily accrues from day to day, and

(d) that the creation of a lease for one year after a suit and decree on mortgage is not affected by the doctrine of *lis pendens* enunciated in section 52 of the Transfer of Property Act (IV of 1882) as such a lease is an ordinary incident of the beneficial enjoyment of a mortgagor allowed to remain in possession.

SECOND APPEAL against the decree of G. KODANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Kistna at Masulipatam, in Appeal No. 225 of 1911 (transferred from the file of N. LAKSHMANA RAO, the Subordinate Judge of Kistna at Ellore, preferred against the decree of T. S. KRISHNA AYYAR, the District Munsif of Narasapur, in Original Suit No. 575 of 1908.

* Second Appeal No. 1290 of 1913.

SUBBARAJU v. SEETHARAMA-RAJU.

The facts of this case appear from the judgment of SADASIVA AYYAR, J.

P. Narayanamurti for the appellant.

The Honourable Mr. B. *N. Sarma* for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The first defendant is the appellant before us. He was the lessee under the defendants Nos. 7 and 8 for the year July 1907 to July 1908 of the plaint lands. The plaintiff purchased in court-auction in November 1907 in execution of a mortgage-decree against the defendants Nos. 7 and 8 (passed so long ago in 1898 or 1899) the plaint lands. The plaintiff purchased not only the lands but also the crops standing thereon. The sale was confirmed in December 1907 under the old Civil Procedure Code. The crops were harvested in January 1908 by the first defendant. The rent reserved by the defendants Nos. 7 and 8 with the first defendant was 212 bastas of paddy and its value is said in the lease-deed to be Rs 1,272 at Rs. 6 per basta or bag. The first defendant paid Rs. 400 of the rent to the defendants Nos. 7 and 8 and carried away the crops in January 1908.

The plaintiffs brought the suit for recovery of Rs. 1,272 (the value of the grain-rent due to the defendants Nos. 7 and 8 by the first defendant) on the allegation that by the plaintiffs' purchase of the land and of the standing crops in November 1907 in Court-auction they (the plaintiffs) became entitled to the crops themselves or, at least, they became entitled to recover the rent of Rs. 1,272, plaintiffs alleging further that the first defendant and the defendants Nos. 7 and 8 colluded together and cut and carried away the crops in January 1908 without paying even the rent of Rs. 1,272 to the plaintiffs. Plaintiffs also claim interest at Re 1 per cent per mensem from the 12th January 1908 till the date of suit (16th of November 1908).

The lower Appellate Court held that the plaintiffs were entitled to at least the rent amounting to 212 bags of grain.

It further held that, though the lease-deed mentioned Rs. 6 per bag as the price, the real price was only Rs. 5 per bag and the price of the 212 bags was therefore Rs. 1,060 and not Rs. 1,272 as claimed in the plaint. It further found that as the defendant No. 1 had paid Rs. 400 to defendants Nos. 7 and 8 who were not entitled to receive it, the defendants Nos. 7 and 8 must be deemed to have had and received it for the plaintiffs. It

therefore gave a decree against the defendants Nos. 7 and 8 for the Rs. 400 received by them out of the rent and it gave a decree for the remaining Rs. 660 out of the Rs. 1,060 against the defendants Nos. 1 to 6. It disallowed the plaintiffs' claim for interest on the ground that the plaintiffs' suit was one for unliquidated damages and not for rent or liquidated damages.

The contentions in appeal are—

(*a*) that the plaintiffs having purchased only the standing crops and the first defendant under his lease-deed having become entitled to the crops as lessee, the plaintiffs purchased nothing. (I should add that this contention is not raised in any of the grounds of the Memorandum of Second Appeal but as a question of law it was allowed to be argued.)

(*b*) that as the plaintiff did not purchase the right of the defendants Nos. 7 and 8 to the rent, they ought not to have been given a decree for the rent and their plaint ought not to have been allowed to be amended into a suit for the amount of the rent.

As regards the first contention it raises the question whether when there has been a court-auction-sale in pursuance of a mortgage decree, the mortgagor in possession could convey to a lessee the right to raise crops on the land and take them away so as to prevent the crops being validly sold in execution of the decree for sale already passed. In *Thakur Prasad* v. *Gaya Sahu*(1), it was held that "a lease of property made by a judgment-debtor against whom a mortgage decree for sale had been made came within the purview of section 52 of the Transfer of Property Act" and that the lessee cannot set up any rights under the lease as against the purchaser in the court-auction-sale held in execution of the mortgage decree. I think, however, that the proposition is stated too broadly in that judgment as it ignores the ordinary incident of the beneficial enjoyment which a mortgagor who is allowed to remain in possession is entitled to have the benefit of. In *Radhika* v. *Radhamani*(2), the learned Judges MUTHUSWAMI AYYAR and HUTCHINS, JJ., stated that "yearly leases and such other acts as are either the necessary or the ordinary reasonable incidents of an interim beneficial enjoyment will not be affected though they were made *pendenti lite*." In

(1) (1898) I.L.R., 20 All., 349.

(2) (1884) I.L.R., 7 Mad., 60 at p. 62.

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(1) (1898) I.L.R., 20 All., 349. (2) (1884) I.L.R., 7 Mad., 56 at p. 92.

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SADASIVA AYYAR, J.

this case I think that the lease in first defendant's favour having been only for one year the decree for sale and the court-auction-sale held in pursuance thereof will not affect the rights of the first defendant lessee to the beneficial enjoyment of the crops. The purchase of the crops therefore by the plaintiff in the court-auction did not give the plaintiff a title to the crops themselves but only what took the place of the right to the crops which would have vested in the mortgagor judgment-debtor if he had not parted with such right. We are unable to accept the contention of Mr. P. Narayanamurti (vakil for the appellant) that because the plaintiff did not purchase the rent which the mortgagor reserved to himself in the place of the right to cultivate and harvest the crops which right he parted with to the lessee, therefore the plaintiff could not obtain the right even to the rent. A purchaser gets title not only to the property purchased but also to whatever has been lawfully substituted for the whole, or part of the property sold to him. The larger right to the owner of a land to the profits, and crops growing on that land includes the smaller right to the rent reserved by him in consideration of his having parted with the right to the crops themselves in favour of lessees. A sale of such larger right conveys a title to the smaller right which had taken the place of the larger right.

The sale in court-auction was made of the larger right to the standing crops as the Court had no notice that a smaller right to rent had been substituted by the judgment-debtor. The right to the rent was a legal incident attached to the right in the property. The entire interest of the mortgagor in the land together with all the legal incidents were intended to be and were in fact sold. The contention based on section 8 of the Transfer of Property Act, namely that the plaintiffs in any case are entitled only to the proportionate rent due after the confirmation of the sale (November 1907) till the end of the tenancy (July 1908) might be met by two answers. One answer is that neither section 8 nor section 36 of the Transfer of Property Act (the latter section providing that rent accrues from day to day) applies to transfers of rights by execution sales [see section 2, clause (*d*) of the Act and *Satyendra Nath Thakur* v. *Nilkantha Singha*(1).] The second answer is that we have to look to

(1) (1894) I.L.R., 21 Calc., 383 at p. 386.

what has to be substituted for the grain profits purchased by the plaintiffs and not what rent he would have been entitled to if the mortgagors had, by a *private* sale sold *the lands alone* on the date of the confirmation of the sale. Further section 36 of Act IV of 1882 about the daily accrual of rent applies only "in the absence of a contract . . . . to the contrary." Here, Exhibit B clearly says that the whole rent shall be payable on the Makarasankranthi day, that is the 10th January 1908 (and in default with interest from that date). When the contract shows that the whole rent accrues on that fixed date it seems to be clearly a contract to the contrary of what is enacted in section 36 and it has been so decided in *Satyendra Nath Thakur* v. *Nilkantha Singha*(1), by NORRIS and BANNERJEE, JJ. I think therefore that though the plaintiff may not be entitled to get the value of the crops themselves harvested and taken away by the lessees, owing rather to the equities in favour of the lessees than to the absence in the plaintiffs of a legal title to the crops, the plaintiffs are entitled to be substituted for the mortgagors in respect of the right to recover the whole rent due by the lessees. This substitution of properties and securities in favour of a person, who, through no fault of his own, is deprived of the original properties and securities, is well known to the law. This principle is embodied in sections 44 and 73 of Act IV of 1882 and is referred to and illustrated by Mr. Justice KRISHNASWAMI AYYAR in *Venkatrama Iyer* v. *Esumsa Rowthen*(2). As the lessees had paid only Rs. 400 of the rent to the mortgagors, the decree for the balance of *Rs. 660* passed in the plaintiff's favour against the lessees was rightly passed. I would therefore dismiss the appeal of the lessee (the first defendant) in Second Appeal No. 1280 of 1913 with costs.

NAPIER, J.

NAPIER, J.—I entirely agree.

N.R.

(1) (1894) I.L.R., 21 Calc., 383 at p. 386.

(2) (1910) I.L.R., 33 Mad., 429 at pp. 434 and 435.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914. October 26 and 27 and November 12.

S. P. ABRAHAM SERVAI (DEFENDANT), PETITIONER,

RAPHIAL MUTHIRIAN (PLAINTIFF), RESPONDENT.*

Limitation—Suit for contribution between joint debtors—Exoneration of defendant by the decree on the ground of limitation—Plaintiff paying the whole decree—Cause of action for contribution only after payment.

The plaintiff and the defendant having each borrowed a certain sum of money from a stranger executed a joint promissory note in 1903 for the total amount in favour of the stranger. After receiving some amounts from both the promisors, the promisee sued them both in 1911 but the decree was for the balance due, only as against the present plaintiff, the present defendant being exonerated on his plea of limitation. After paying the decree amount in March 1912 the plaintiff immediately sued the defendant for contribution.

Held (1) that the right to sue for contribution arose only on plaintiff's payment, (2) that the defendant was liable to contribute in spite of the fact that he was exonerated under the previous decree on the ground of limitation, and (3) that the suit was not barred by limitation, the cause of action having arisen only on the date of plaintiff's payment.

Gardner v. Brookes (1897) 2 Ir R., 6 and *Woolmershausen v. Gullick* (1893) 2 Ch.D., 514, followed.

The liability to contribute is based on an equity arising out of the co-debtor's payment and it has no reference to the original liability to the common promisee.

The *obiter dictum* in page 311 of *Subramania Aiyar v. Gopala Aiyar* (1910) I.L.R., 33 Mad., 308, not followed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of T. JIVAJI RAO, the District Munsif of Srirangam, in Small Cause Suit No. 623 of 1912.

The facts of the case appear from the judgment of OLDFIELD, J.

O. Madhavan Nair and *John Matthai* for the petitioner.

M. O. Parthasarathy Ayyangar and *K. S. Ganesa Ayyar* for the respondent.

OLDFIELD, J.

OLDFIELD, J.—The plaintiff and the defendant in this case were joint executants of a promissory note. It is common ground that each received part of the sum borrowed, and the correctness

* Civil Revision Petition No. 634 of 1912.

of the lower Court's finding as to its division between them and the amount repaid by each cannot be disputed. They were however sued by their creditor for the balance due; and a decree was passed against the plaintiff for the whole the defendant being exonerated on his plea of limitation. The plaintiff satisfied the decree and sues the defendant for contribution. The lower Court held that notwithstanding the defendant's exoneration it was equitable that he should contribute towards the discharge of the common debt. This Civil Revision Petition has been argued against that decision. It has been referred to a bench by a learned Judge sitting in the Admission Court.*

As pointed out by the learned Judge the facts in *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappiah*(1), on which the lower Court relied differed materially from those now in question because in it there was no decision on limitation or any other ground, such as there is here, against any of the defendants and some had not been sued by the creditor. The principle there recognized is merely that liability for contribution between co-contractors is enforceable although the suit to enforce it is brought after a suit on the original liability would be barred. Here the point is that the original liability was held unenforceable against the defendant not only before the present suit was brought but also before the plaintiff was held liable or made any payment.

The argument apart from authority has been presented as follows:—

The defendant has been exonerated; and the debt must have been kept alive against the plaintiff by some act on his part for which it is not suggested that the defendant is responsible. Whether the plaintiff is regarded as the defendant's joint contractor, or as he contends that he should be, as his surety in respect of the amount which he has had to pay on the defendant's behalf, is immaterial, because he could not affect the defendant's position in either capacity.

The debt having been held unrecoverable from the defendant directly it is unjust that it should be recovered from him indirectly in consequence of the plaintiff's conduct, which he did not

* (Referred by Mr Justice SADASIVA AYYAR, the reference is reported in 27 M.L.J., 746:—Ed.)

(1) (1910) M.W.N., 839.

ABRAHAM SERVAI v. RAPHIAL MUTHIRIAN. — OLDFIELD, J.

authorize. This treats the defendant's liability as originating in or at least as depending on the fact that a decree preceded the plaintiff's payment. But on the other side it is contended that it should be placed on a broader basis with reference to an earlier stage in the transaction, the separate contract between the parties, when the debt was incurred, to indemnify each other for any excess payment made by one for the other, which was independent of the creditor's suit and its result. We have to decide which of these views is correct.

There is, so far as we have been shown, no direct Indian authority. But *Subramania Aiyar* v. *Gopala Aiyar*(1) is relied on by the plaintiff, though one portion of the judgment certainly supports the defendant. It is therefore necessary to ascertain what was really decided in it. The plaintiff, a trustee, sued the sons of his predecessor in the trusteeship for damages on account of their father's misfeasance. The limitation applicable was that which would have been applicable to a suit against him. *Periasami Mudaliar* v. *Seetharama Chettiar*(2). The suit against them was therefore barred. The plaintiff also however sued certain sureties against whom (so far as the report shows) the suit was still in time, solely because they had given land as security. It was held that they had not been discharged by the fact that the remedy against their principal had been lost since his liability and therefore theirs to plaintiff were still subsisting: That is intelligible.

But the question there was between the creditor and his debtors, principal and surety, directly, whereas here it is only between the latter, and the case therefore gives no support to this part of the plaintiff's argument. He relies here in fact on an identification of the defendant's liability to the creditor which no doubt is unaffected by the latter's loss of his remedy, with his distinct liability to the plaintiff, which has not been shown to be legitimate and is irreconcilable with other cases he has cited. The relation between the sureties and their principal debtor is in fact dealt with in *Subramania Aiyar* v. *Gopala Aiyar*(1) only *obiter* in the words at page 311—"It has been urged that the surety will be prejudiced if he is liable to be sued, when he cannot have any remedy against the debtor after a suit

(1) (1910) I.L.R., 33 Mad., 308. (2) (1904) I.L.R., 27 Mad., 243 (F.B.).

against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's right by payment or performance as soon as the debtor becomes liable. Section 140 of the Indian Contract Act." This no doubt supports the view, for which the defendant contends. The question however was not before the learned Judges directly, and the authorities relevant to it were not referred to and if the hardship involved and the means of avoiding it are to be considered it may respectfully be suggested that there is no more reason for penalising the surety for not paying and for failure to acquire the right to sue the principal debtor than the debtor for not paying what he primarily was bound to pay. The other cases are *Woolmersharsen* v. *Gullick*(1) and *Gardner* v. *Brooke*(2). They are directly relevant and are in the plaintiff's favour. In the first, the question arose between co-sureties and is dealt with very shortly. The Court inclined to the belief that the statute did not begin to run, until the plaintiff made his payment, but was not obliged for the purpose of the case to decide between that date and the dates on which the amount of his liability was ascertained. That point however was placed beyond doubt as regards this Presidency by *Putti Narayanamurthi Ayyer* v. *Marimuthu Pillai*(3) and is not left open in the second case abovementioned in which the discussion is full and the parties like those before us were joint makers of a promissory note. The reasons for the decision in the plaintiff's favour were that the defendant's liability rested on grounds of equity, independent of the original contract with the creditor, was based on the payment made in discharge of the common obligation and had no existence till that payment was made. These decisions are directly in point and in the circumstances must be followed in preference to the *obiter dictum* above referred to, though it occurs in a judgment of this Court. In accordance with them the conclusion must be in the plaintiff's favour. The civil revision petition is therefore dismissed with costs.

TYABJI, J.—The question before us is whether a joint promisor whose liability to the promisee was kept alive beyond three

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(1) (1893) 2 Ch. D., 514.
(2) (1897) 2 Ir. R., 6.
(3) (1903) I.L.R., 26 Mad., 322.

ABRAHAM SERVAI v. RAPHIAL MOTHIRIAN. —— TYABJI, J.

years from the date of the promissory note and who was consequently compelled to pay by a decree of the Court more than his proportion of the debt to the promisee can sue another joint promisor for contribution though the decree exonerated that other joint promisor from payment on the ground that the debt as against him was barred by limitation.

The facts are as follows:—The plaintiff and the defendant executed a joint promissory note on 25th June 1903. In or before January 1905 the defendant sent Rs. 20 to the plaintiff for part payment to the promisee and the plaintiff paid this sum together with Rs. 58 on his own account. Subsequently the promisee sued both the plaintiff and the defendant for the balance still due. A decree was passed on 5th August 1911 in which the whole balance was ordered to be paid by the present plaintiff and the present defendant was exonerated from all payment, the suit on the promissory note having become barred at the time as against the present defendant. On 9th March 1912 the plaintiff paid the whole of the amount decreed and in the same year sued for contribution from the defendant. His suit was allowed by the District Munsif. This petition raises the question whether the District Munsif was right. Being a suit for contribution between joint promisors (there being no express contract for indemnity between the joint promisors) the case must be governed by sections 42 to 44 of the Indian Contract Act, the effect of which for the present purpose may be stated as follows:—

Where two or more persons have made a joint-promise, in the absence of a contract to the contrary—

(1) As between the joint promisors and the promisee (a) all the joint promisors must fulfil the promise (section 42);

(b) the promisee may compel any one to perform the whole promise (section 43);

(c) a release by the promisee of one joint promisor does not discharge the other or others (section 44, first part).

(2) As amongst the joint promisors themselves, each joint promisor may compel every other joint promisor to contribute equally with himself to the performance of the promise (section 43, paragraph 2). Three incidents connected with the right of contribution are expressly laid down, (a) if any one joint promisor

makes default in contributing the others must bear the loss (section 43, paragraph 3);

(b) section 43 does not derogate from the rights of a surety to recover from his principal payments made on behalf of the principal; and

(c) the release of a joint promisor by the promisee does not free the joint promisor so released, from responsibility to the other joint promisor or joint promisors (section 44, second part).

The right to contribution (as between joint promisors) is referred to in the part of the Act directly applicable as a right "to compel contribution *to the performance of the promise.*"

This may at first sight appear to make the liability to contribute coincident with the performance of the promise. But the duty to contribute is clearly distinct from the duty to pay to the promisee, the first is to the promisor, the second to the promisee; *the right of each joint promisor to claim indemnity does not* consist merely of being subrogated to the right of the original promisee, for though the promisee's rights may have been released, the responsibility to the joint promisor is not annulled (section 44). Following therefore the wording of the Act it may be stated that the right of each joint promisor to compel every other joint promisor to contribute equally with himself to the performance of the promise is unaffected by the mode in which the promisee exercises or fails to exercise his rights (a) to compel all the joint promisors to fulfil the promise (section 42) or (b) to compel any one of them to do so (section 43) or (c) to release one without discharging the other (section 44). An express release by the promisee cannot (on principle even apart from section 44) affect the right of a third person (the joint promisor). The direct liability on the joint promise may thus be expressly annulled, without affecting the collateral liability. It is difficult then to conceive how the promisee's mere omission to sue during the statutory period—an omission which does not destroy even his own right but merely bars his remedy by suit [*Subramania Aiyar* v. *Gopala Aiyar*(1)]—can affect the joint promisor's collateral right.

It seems to me therefore that the District Munsif was right.

The result at which I have arrived agrees with the view of a strong Court of Appeal in Ireland in *Gardner* v. *Brooke*(2)

(1) (1910) I.L.R., 33 Mad., 308. (2) (1897) 2 Ir. R., 6 at p. 11.

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right is analogous to the surety's right of indemnity under section 145, there are distinctions between the two. The right of indemnity referred to in section 145 and the connected sections 126, 131, 133, 147 inheres in a person who contracts with the promisee himself expressly and solely as a surety; in such a case the right to indemnity is implied—section 145. Next there is the case of a person who is a principal joint promisor as between himself and the promisee but as between himself and another joint promisor is (expressly or impliedly) only a surety. The promisee not being privy to the contract of the suretyship between the promisors *inter se*; section 132 Thirdly there is the case of an express contract of indemnity (section 124) as distinct from a promise to indemnify implied by section 145 in a contract of guarantee. All these rights and liabilities are analogous to the one with which we have to deal. But if and in so far as the direct rules contained in sections 42 to 44 are not a sufficient guide, resort should be had, it seems to me, in the first instance, to section 124 which refers to the rights under an express contract to indemnify similar to that which section 43 implies amongst joint promisors, rather than to section 145 which refers to a contract for indemnity implied between a person who contracts expressly and solely as a surety on the one hand and the principal debtor on the other hand; in order to make section 145 applicable to joint promisors the contractual liability of each joint promisor as principal debtor must be assumed to have reference only to a proportionate part of the debt, an assumption that is opposed to section 42.

The next case is *Subramania Aiyar* v. *Gopala Aiyar*(1) which has been already referred to. The question, there, before the Court was whether a surety's liability to the creditor (as defined in section 126) was discharged by the fact that the creditor's suit against the principal debtor was barred by limitation.

That question was answered in the negative. The ground for decision was that though the surety's liability continues only so long as "there is no act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor"

(1) (1910) I.L.R., 33 Mad., 308.

yet it could not be said that the legal consequence of the creditor's forbearance to sue the principal debtor during the period of limitation and the consequent loss of his remedy was a "discharge" of the principal debtor. In dealing with an objection to the result of this reasoning it seems to have been assumed by the Court that the surety's rights against the principal debtor had become barred at the time of the decision, i.e., before the surety had made any payments. It is unnecessary to consider whether this assumption was consistent with the terms of section 145 of the Indian Contract Act, and with the ruling in *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai*(1) where it was held that the cause of action under section 145 does not arise until actual payment by the surety; see also *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappiah*(2) and *Woolmershausen* v. *Gullick*(3). For the remark in *Subrahmania Aiyar* v. *Gopala Aiyar*(4), case based on the assumption just referred to was purely *obiter*, dealing not with the rights of the creditor against the surety which were being adjudicated upon but dealing with the remedy of the surety which might or might not have been barred as against the principal debtor. The circumstances alluded to on page 309 of the report and the fact that some property was given as security seem to have brought about the result that the creditor's remedy was barred against the principal debtor but enforceable against the property given as security. It seems to me that it would be going beyond all the limits of the doctrine of *stare decisis* to consider ourselves bound by an assumption as to a question which is not before the Court, an assumption made merely for the purpose of dealing with an argument that was not accepted.

I agree that the petition should be dismissed with costs.

N. R.

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(1) (1903) I.L.R., 26 Mad., 322.
(2) (1910) M.W.N., 839.
(3) (1893) 2 Ch.D., 514 at p. 529.
(4) (1910) I.L.R., 33 Mad., 308.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Officiating Chief Justice and Mr. Justice Seshagiri Ayyar.

1914. November 5, 6 and 23.

K. MUTHUKARUPPA PILLAI (PLAINTIFF), APPELLANT,

v.

SELLATHAMMAL *alias* KANAKAMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Hindu Law—Stridhanam—Saudayika—Gift of property by a father to his daughter before her marriage—Power of alienation.

A gift of property by a father to his daughter before her marriage is *Saudayika* stridhanam which is at her absolute disposal.

Per SESHAGIRI AYYAR, J.—*Saudayika* stridhanam is gifts from affectionate kindred and includes both *Yautaka* and *Ayautaka* not received from strangers.

Hindu Law texts examined.

Ponnoosawmy Moodelly v. *Soobbaroya Moodelly* (1859) 6 Selwin's S.D.A., Rep., 7, referred to.

Judoo Nath Sircar v. *Bussunt Coomar Roy Chowdhry* (1873) 19 W.R., 264, applied.

Bhau v. *Raghunath* (1906) I L.R., 30 Bom., 229, referred to.

Dantuluri Bayapparaz v *Mallapudi Rayudu* (1865) 2 M.H.C.R., 360, distinguished.

Quære—Whether immoveable property received from the husband should be excluded from this species of disposable property.

APPEAL against the decree of Rao Bahadur C. KRISHNASWAMI RAO, the Subordinate Judge of Trichinopoly, in Original Suit No. 27 of 1912.

The facts necessary for the report appear from the judgment of SESHAGIRI AYYAR, J

S. Srinivasa Ayyangar and *K. Bashyam Ayyangar* for the appellant.

T. Rangachariar, C. Pattabhirama Ayyangar and *N. C. Vijiyaraghavachariar* for the second respondent.

The first respondent, not represented.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The property in dispute was given to the first defendant by her father in 1898 before she was married to the plaintiff: she sold the property to the third defendant in 1912. The plaintiff sues for a declaration that the sale is invalid. The Subordinate Judge dismissed the suit.

There can be no question that if this property is *Saudayika*, the first defendant was entitled to deal with it at her pleasure.

* Appeal No. 239 of 1912.

The main argument, therefore, was directed to showing that the term *Saudayika* does not include gifts prior to marriage. The nature of stridhanam property and its classification with reference to inheritance have given rise to conflicting views. In the Benares School, Courts may be spared a great deal of discussion if the view of the Mitakshara is fully accepted. Vignaneswara commenting on Yagnavalkya's text in Chapter 2, section 11, paragraph 2, says: "That which was given by the father, by the mother, by the husband or by a brother; and that which was presented by the maternal uncles and the rest, at the time of wedding, before the nuptial fire; and a gift on a second marriage or gratuity on account of supersession, as will be subsequently explained in the text, 'To a woman whose husband marries a second wife, let him give, etc.,' (and, as indicated) by the word '*adya*' (and the rest), property obtained by inheritance, purchase, partition, acceptance, finding: all this is stridhanam according to Manu and the rest." From this we might exclude those enumerated in the concluding portion of the paragraph, as the Judicial Committee, though only dealing with a case of property obtained by partition, seem inclined to hold that stridhanam in its narrow sense should be limited to what is mentioned in the previous portion of the paragraph—*Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*(1). If we regard this restricted class as stridhanam property at the absolute disposal of a woman, we can steer clear of many difficulties. There is however an exception as regards gifts from strangers not given at the nuptial fire or during the marriage procession, and acquisitions made by means of mechanical arts by a married woman. They are subject to the control of the husband because the spirit of the Hindu Law is against a married woman receiving gifts from strangers except at the time of marriage or from making acquisitions during coverture as she is expected to give her time and attention solely to the welfare of her husband and children and to the management of the household affairs. I see nothing in the Mitakshara or in the writings of those whose authority is binding in Southern India against accepting this rule as a workable basis. But Courts have taken into account the subdivisions of stridhanam both in relation to inheritance and the power of disposition as

(1) (1911) 39 I.A., 121.

nandai(1), although the commentators may have been wrong in their interpretation of an original text, their opinion should be enforced as having the sanction of usage for it. I do not think there is any force in Mr. Ghose's criticism of this dictum. Those who are conversant with the commentary of Vignanoswara will readily recognise the force of the observations of the Judicial Committee. Yagnavalkya's view is often not traceable in the elaborate discussion carried on by Vignaneswara and in the conclusions at which he arrives. The fact is that commentators felt that any attempt to prescribe rules of inheritance on their own initiative may not find acceptance among the people. They resorted to the device of justifying their position by a reference to the sayings of the Rishis. This led them not unfrequently to depart from the literal meaning of the texts commented upon. They found a body of usage which was not in strict accordance with the Smritis. They had to recognise the force of such usage; but they preferred to say that the usage was within the meaning of the text. The commentaries indicate an attempt to reconcile the text law with the actual usage of the people. The development of Hindu Law is attributable to this progressive instinct. I am therefore willing to accept the position that the interpretation of Katyayana's text by the author of Smrithi Chandrika may be regarded as showing that in his days there was a tendency to put a restrictive interpreation on the term *Saudayika*. Apparently, there was an attempt at this period to put fetters upon the power of disposition possessed by women over their stridhanam. It has to be noted that the passage I have quoted from the Smrithi Chandrika does not express the positive opinion of the author. The conclusion is stated hesitatingly. Moreover later writers have expounded Katyayana differently. The Smrithi Chandrika was written in the thirteenth century. The Madavya written in the fourteenth century and the Saraswathi Vilasa of the sixteenth century which are recognised authorities in Southern India do not accept the views of the author of the Smrithi Chandrika. This shows that the set back in favour of giving the husband larger powers of interference over his wife's property was only temporary. The text itself is clear and its interpretation in works both

(1) (1868) 12 M.I.A., 397.

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SESHAGIRI AYYAR, J.

contemporaneous with and after the "Smrithi Chandrika" has been uniform. (See Madana Parijata, 13th century), page 530, part 2, Setlur's "Hindu Law Books on Inheritance": Vivadaratnakara (14th century), chapter VIII, page 189, *ibid.*; Vivada Chintamani (15th century), page 255, *ibid.*; Dayatattva (16th century), chapter XI, paragraph 3, page 499, *ibid.*; Viramitrodaya (17th century), chapter V, part I, paragraph 5, page 442, *ibid.*) I am therefore of opinion that the views of the author o Smrithi Chandrika are not binding on us in the present day.

It has been argued that as Vignaneswara gives no indication of his opinion regarding the right of disposition possessed by women over Saudayika, he must be taken to be against their having absolute dominion over it. On the contrary the fact that he accepts Katyayana without any comment shows that he found no reason for differing from the sage. The *Futvas* of Pandits have been consistently in favour of giving women absolute power of disposal over Saudayika of the kind mentioned in Katyayana's text. (Vyvastha Dharpana, page 687 to page 692; Vyvastha Chandrika, Book V, chapter II, section 2.) All the modern text writers are in favour of that view. Dr. Gurudoss Banerjee in his learned treatise on "Marriage and Stridhanam" subjects the texts and the commentaries to a very critical examination and comes to the conclusion that Saudayika is at the absolute disposal of the donee.

There are not many cases dealing with this question. Most of the decided cases relate to succession. There is however a direct pronouncement on the point in *Ponnoosawmy Moodelly v. Soobbaroya Moodelly*(1). In *Judoo Nath Sircar v. Bussunt Coomar Roy Chowdhry*(2), to which our attention was drawn by Mr. Ranga Achariyar, it was held by Mr. Justice MITTER that a legacy taken under the will of her father by a woman before her marriage was Saudayika. There is no reason why this principle should not be extended to gifts *inter vivos*. In *Bhau v. Raghunath*(3), the property in dispute was a *Vritti* inherited from the husband; and it was held that it was not Saudayika. Sir LAWRENCE JENKINS quotes the text of Katyayana and says that Saudayika as defined by the sage is at the absolute disposal of a woman. In *Dantuluri Rayapparaz v. Mallapudi Rayudu*(4),

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the actual decision related to the power of a relation to compel a woman to carry out a promise to make a gift of her property. The learned Judges held that "the taking of the woman's property by the plaintiff her kinsmen, is wholly repugnant to the Hindu Law." They also expressed a doubt whether a woman had independent power of disposal during coverture over her stridhanam. The texts bearing upon the subject were not examined and the pronouncement proceeds upon the general theory of the dependence of women in India. With all respect, the learned Judges have not realized that the power of disposition over property given to women under the Hindu Law is greatly in advance of the views held regarding it by other civilized communities. The Hindu Law deals with the dependence of women more as a right inhering in them for protection and as a duty resting upon men than as a disqualification for dealing with property.

Mr. Bhashyam Ayyangar contended that the terms of the deed of gift showed that the property was given only conditionally and consequently it was not Saudayika. He referred to a passage in Viramitrodaya to the effect that conditional and collusive gifts are not stridhanam. No other commentator has been quoted in support of this contention. I feel no doubt that the conditional gift therein referred to is one where a right of reversion is reserved to the donor. It may also include cases of nominal transfers made on the understanding that it should go back to the donor after the contemplated fraud had been accomplished. Nor is there any force in the contention that a gift exceeding 2,000 fanams in value is not to be regarded as stridhanam. As pointed out by Mr. Ranga Achariyar, this may relate to property yielding an annual income of 2 000 *fanams*. It was moreover only intended as a direction to the donor. It may have been due to the belief that women may not be able to manage extensive properties. These considerations can have no weight in these days. The text itself must in my opinion be regarded as obsolete.

The appeal, therefore, fails, and must be dismissed with costs.

WALLIS, OFFICIATING, C.J.—I agree that the appeal must be dismissed with costs and will only observe that considerable gifts by a father to his daughter prior to betrothal would seem not to have been of frequent occurrence in early times, as we do not find them separately dealt with in any of the texts or

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MUTHU-KARUPPA PILLAI v. SELLA-THAMMAL.

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Mr. Bhashyam Ayyangar contended that the terms of the deed of gift showed that the property was given only conditionally and consequently it was not Saudayika. He referred to a passage in Viramitrodaya to the effect that conditional and collusive gifts are not stridhanam. No other commentator has been quoted in support of this contention. I feel no doubt that o conditional gift therein referred to is one where a right of version is reserved to the donor. It may also include cases of ıminal transfers made on the understanding that it should go ıck to the donor after the contemplated fraud had been :complished. Nor is there any force in the contention that a ift exceeding 2,000 fanams in value is not to be regarded as :ridhanam. *As pointed out by Mr. Ranga Achariyar, this may* late to property yielding an annual income of 2 000 *fanams.* was moreover only intended as a direction to the donor. It ay have been due to the belief that women may not be able to anage extensive properties. These considerations can have no eight in these days. The text itself must in my opinion be garded as obsolete.

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MUTHU-KARUPPA PILLAI v. BELLA-THAMMAL.

WALLIS, OFFG. C.J.

commentaries that have been cited before us. In this state of things I do not think that the statement in the Smrithi Chandrika is of the same authority as an express statement that gifts made by a father to his daughter before betrothal are not Saudayika. The author may not have had such gifts in mind when he wrote this passage, and even if he had, his opinion is expressed only tentatively, and cannot in my opinion outweigh the authority of the other texts which have been cited. Lastly if we may look to the reason of the thing, there is no reason why such gifts should be less at the disposal of the wife than gifts made at the time of marriage.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914. November 3 and 24.

NAGARAJA PILLAI AND ANOTHER (PLAINTIFF), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF TANJORE).*

Indian Easements Act (V of 1882), sec. 15—Prescriptive user, period necessary fo —Indian Evidence Act (I of 1872), ss. 123, 124 and 163—Confidential communications, test of.

In a suit to establish right of user by prescription against Government, the plaintiff is bound to prove under the last clause of section 15 of the Indian Easements Act sixty years' user

The Secretary of State for India v. Kota Bapanamma Garu (1896) I.L.R., 19 Mad., 165, distinguished

The object of section 124 of the Evidence Act is to prevent disclosures to the detriment of public interests and the decision as to such detriment rests with the officer to whom the communication is made and does not depend on the special use of the word "confidential."

Venkatachella Chettiar v. Sampathu Chettiar (1909) I.L.R., 32 Mad., 62 followed.

SECOND APPEALS respectively against the decrees of T. A. RAMAKRISHNA AYYAR, the Subordinate Judge of Mayavaram, in Appeals Nos. 39 and 40 of 1912, preferred against the decree of P. V. RAMACHANDRA AYYAR, the District Munsif of Mayavaram, in Original Suit No. 112 of 1909.

The facts of the case are set out in the judgment of OLDFIELD, J.

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* Second Appeals Nos. 747 and 748 of 1913.

T. R. Ramachandra Ayyar for the appellants.

The Government Pleader for the Crown.

T. Ranga Achariyar for the respondents Nos. 1 to 4.

OLDFIELD, J.—The plaintiffs, the appellants, hold survey fields Nos. 46, 63 and 64 of Tirumananjeri village. Of the defendants, the respondents in the two second appeals, the first to ninth and eleventh defendants are ryots, whose alleged interest in the irrigation, the subject of dispute, the Secretary of State, the tenth defendant has protected by the issue of orders in the Revenue Department. It is admitted that the channel immediately adjacent to the plaintiffs' lands is the Mylan channel, belonging to the Cauvery system. But, as the plan, (Exhibit A) shows, there is a short distance to the west the Mangudi Channel in the Vikramanar system. The plaintiffs contended that they were entitled to take water by a *kanni* or subsidiary channel, running east from Mangudi to Mylan and so to their fields, though they would obviously affect the supply from the former, on which first to ninth and eleventh defendants depend, by doing so. The channels are artificial and there is therefore no question of natural right; nor is any grant relied on by plaintiffs. Their case, in favour of which the District Munsif found, was based on prescription, that is, on section 15 of the Indian Easements Act. The lower Appellate Court has held that no prescription was established.

I reserve two objections based on exclusion of evidence, and, subject to them, consider what the lower Appellate Court has found on the facts and what questions are open for argument in second appeal. The points for decision are set out clearly and, it is not disputed, comprehensively in the judgment before us, and the findings on them are that (1) the Mylan channel was plaintiffs' recognized source of irrigation, (2) the *kanni* is not shown to have been in existence before 1883, (3) plaintiffs have since then taken water by it, and (4) such taking created no prescriptive right, because it was not proved to have been open, peaceful or uninterrupted. No objection has been made to the first of these findings. Against the others, it is urged generally that they are vitiated, because they are based on an adoption of the District Munsif's treatment of the oral evidence, which has been misunderstood, inasmuch as one sentence of his judgment has been extracted and regarded as conclusive, though a

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conclusion in the opposite sense was eventually reached. This is not sustainable. For in fact, the District Munsif, after disparaging plaintiffs' oral evidence in the sentence extracted and others, reached his finding with the aid of the documents; and the lower Appellate Court has not professed to adopt that finding or more than the sentence referred to, but has reached its conclusions independently. Those conclusions, so far as they are of fact, must, therefore, be accepted. It is with reference only to the fourth that further argument in second appeal is legitimate. In short, the result is that, the burden of proof of such a user as section 15 of the Indian Easements Act contemplates being on plaintiffs, they have adduced evidence calling for consideration with reference only to their user from 1888 until 1907, when the Revenue authorities first forbade it. The decision must, therefore, turn on the nature of the acts of user found proved by the lower Appellate Court, as fulfilling the requirements of the law, and the sufficiency of the period, over which they extend.

The plaintiffs' case depended on oral evidence, one document, Exhibit B, and the presumption that, as the *kanni* was in existence in 1888, it must have been in use from then onwards. On the oral evidence, the lower Appellate Court was entitled to form and, as already observed, did form its opinion, which is final. It no doubt has not referred separately to the evidence of the existence of remnants of a masonry structure on the ground in 1906; but that evidence was indefinite and there is no reason for doubting that it was considered. As regards Exhibit B, there was ground, referred to in the judgment, on which the lower Appellate Court could treat the mention of a *kanni* in it as open to suspicion. It is urged that there was no evidence to support the conjectural explanation that it was mentioned through the connivance of the village officers. But there was such evidence in the statement of second plaintiff that first plaintiff was a District Board Member, a Municipal Councillor and owner of large property and therefore a person, whom the village officers might be ready to oblige, and in the evidence (Exhibit G) that the village munsif concerned, plaintiffs' witness No. 6, has undergone punishment in consequence of his partiality for plaintiffs in this affair. As regards the lower Appellate Court's refusal to make the presumption proposed, it was for it to estimate the reasons for and against doing so; and it has not been shown that clear

reason was available on plaintiffs' side which it neglected. The further facts, which it detailed, the absence of reference to the *kanni* in accounts, in which it would naturally have been referred to, and the indirect character of plaintiffs' attempts to assert their right, when it was disputed, ending in their obtaining a recognition of the existence of a sluice for the *kanni* from a Public Works subordinate without authority to give it, were legitimate grounds of decision. The suggestion here that the mention of Mylan as the source of plaintiffs' irrigation in the accounts in question, Exhibit XIV, does not negative plaintiffs' right to the *kanni*, because it in fact brought water into Mylan is unsound, because Exhibit XIV specifies not only the channel, but also the irrigation system, which serves each field, and does not specify against plaintiffs' fields the Vikramanar system, to which Mangudi belongs. In these circumstances it cannot be said that the lower Appellate Court has failed to consider plaintiffs' case or considered it on erroneous principles. Its finding that they did not prove an open, peaceful and uninterrupted user from 1888 is one of fact, to which no valid objection has been made good; and it must, therefore, be accepted. It entails that plaintiffs have established no prescriptive right.

Argument was attempted also with reference to the period of user, which plaintiffs were bound to prove, the assumption in the lower Courts having apparently been that sixty years were required. Here it is suggested first, that twelve years would be sufficient, because plaintiffs' masonry sluice above referred to stood on Government land, the border of the Mangudi channel, not on their field and they are in fact claiming a declaration of their right to possession of its site; but this is unsustainable, since their plaint contained no such allegations or prayer. They argue next, that (1) they are bound to prove user for twenty years only, the necessary period against a private party, not sixty, and (2) if sixty years is the period, they have proved a user for a sufficient portion of it to transfer the burden of proof in respect of the remainder. As regards (1) they rely on *The Secretary of State for India* v. *Kota Bapanamma Garu*(1). But that was a suit for possession of land, and it was held only that the sixty years' period under article 149 of Schedule 1 of the Indian Limitation

(1) (1896) I.L.R., 19 Mad., 165.

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Act applied to suits by the Secretary of State, not to suits against him. That decision does not affect the duty of plaintiffs here to prove sixty years' user which is imposed by the last clause of section 15 of the Indian Easements Act, with reference to the transfer of the burden of proof, *Sri Raja Chelikani Rama Rau* v. *Secretary of State for India*(1), *Krishna Aiyar* v. *The Secretary of State for India*(2), and *Venkatarama Iyer* v. *The Secretary of State for India in Council*(3), are relied on. But those cases related to possession and are not in point, and here even if plaintiffs' continuous enjoyment as of right had been established for the period from 1888 to 1907, the date (as appears from Exhibit IX) of the Deputy Collector's order, referred to in the plaint as forbidding it, plaintiffs' argument would still be untenable, since they would not have completed the period of prescription necessary against a private individual. It is then maintained that the burden of proof can be transferred by proof of a shorter period of enjoyment than that necessary for complete prescription with reference to *Ponnusawmi Tevar* v. *The Collector of Madura*(4), and *Rajrup Koer* v. *Abul Hossein*(5). But in them the presumption of a lost grant was the basis of the decision, and here that presumption is negatived by the absence of reference to any grant or its recognition in the records, where it would naturally occur, the paimash, land register, and diglott, Exhibits XV, XIV and XVI. There is, therefore, no reason for dissent from the lower Appellate Court's decision on this ground. The remaining grounds of appeal argued relate to the exclusion of evidence by the District Munsif.

The first complaint is that the supervisor who gave the permission, Exhibit I, for the rebuilding of the plaintiffs' sluice, was not examined. The facts alleged are that he attended the Court on several occasions, that eventually for one hearing he could not attend as he was ill, and that plaintiffs then on 8th September 1911, applied for an adjournment to secure his evidence. On that day defendants had closed their case, after examining witnesses. Plaintiffs had closed theirs on 18th August 1911, so far as appears, without any reservation regarding the supervisor and without insisting on his examination. In

(1) (1910) I.L.R., 33 Mad., 1. (2) (1910) I.L.R., 33 Mad., 173.
(3) (1910) I.L.R., 33 Mad., 302. (4) (1869) 5 M.H.C.R., 6.
(5) (1881) I.L.R., 6 Calc., 394.

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these circumstances the District Munsif was right in refusing to adjourn at the stage, at which he was asked to do so.

The other point taken is of wider importance and is not covered by Indian authority. It is that the District Munsif should have insisted on the production of a report by the Supervisor made to the Sub-Divisional Officer after inspection of the spot, which plaintiffs summoned and in respect of which the tenth defendant, the Secretary of State, claimed privilege under sections 123, 124 and 162 of the Indian Evidence Act, the Chief Engineer stating that public interests would suffer by its production. The District Munsif allowed the objection, when it was made at the hearing for production of documents, with reference to section 124 of the Indian Evidence Act. Before evidence was taken, the High Court refused to interfere with this ruling by way of revision in *Nagaraja Pillai* v. *Vythinatha Iyer*(1). The Court declined to say that the District Munsif erred in holding "that the communication in question being from a subordinate officer, was *prima facie* of a confidential nature." It observed that the petitioners, the plaintiffs, had not asked the District Munsif to take evidence on the point and that the latter's refusal to inspect the document in order to decide it was not shown to have been a wrong exercise of his discretion. On this plaintiffs contend that (1) this Court's order left the question whether evidence should be taken open and the District Munsif erred in disallowing the examination of plaintiffs' witness No. 14 as to the confidential nature of the document, and (2) the document, not being in fact a communication in official confidence, contemplated by section 124, should have been exhibited. Contra reliance is placed on section 167 of the Indian Evidence Act.

The effect of this Court's order can be dealt with shortly. It certainly did not amount to a direction or authorisation to the District Munsif to take evidence; and it contained nothing repugnant to the conclusion, which has been pressed on us, that, if plaintiffs had wanted to adduce evidence, they should have asked leave to do so, when documents were being received and before the order refusing to receiving the document now in question was passed. It is, moreover, not alleged that any notice

(1) (1911) 2 M.W N., 300.

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was given to the tenth defendant of the renewal of the attempt to get it exhibited during the trial, and in the absence of any, that attempt was open to grave objection. And further, even if the claim to raise the question on evidence was not made irregularly, it is contended that the District Munsif was not bound to take any, if he could decide without it, as his order of the 5th August 1910 shows that he did, that the document was a communication in official confidence, whether that decision was well founded is the question raised by plaintiffs' second contention.

The Indian Law as to Government privilege is contained in sections 123, 124 and 162 of the Indian Evidence Act. Of these, section 124 is relied on here and need be considered, plaintiffs' contention regarding it being that the words "communications in official confidence" mean and include only what in official parlance are known as confidential communications, that is, communications which in virtue of some special mark on them or some special direction by their author are to be kept with particular secrecy, and do not include official communications generally, to which only the reticence, expected by every employer of his servants, is applicable. There are, it is contended, two categories, ordinary official communications and communications in official confidence; and it is only to the second that section 124 should be applied, the report now in question belonging to the first.

Plaintiffs have given no valid reason for this interpretation of the section in the shape of authority or otherwise. For in *Beatson* v. *Skene*(1), the existence of any general rule that "all the public documents, including communications to heads of departments, are to be produced and made public, whenever a suitor thinks that his case requires such production" is negatived. On the other hand, it does not appear that their contention represents either certainty or convenience. It is clear that the dominant intention in the section is to prevent disclosures to the detriment of the public interests, and it is settled in this Presidency by *Venkatachella Chettiar* v. *Sampathu Chettiar*(2), that *the decision as to such detriment is to be with* the officer, to whom the communication is made. It is then impossible to reconcile the plaintiffs' interpretation with these

(1) (1860) 5 H. & N., 838. (2) (1909) I.L.R., 32 Mad., 62.

two conclusions. For that interpretation would make the conduct of the author of the communication, his giving or failing to give (perhaps through caprice or negligence), an indication of its confidential character, decisive and enable it to prevail over the opinion of the recipient on the really important point, the effect of the disclosure on public interests. It would be wrong to sacrifice the two definite conclusions reached as to one portion of the section to a doubtful construction of the remainder. That construction, moreover, is not required by the wording. For it rests on the special use of the word "confidential" in official parlance, which there is no reason for assuming that the Legislature had in mind. An easier and more probable explanation of the phrase "official confidence" is afforded by comparison with the references to "professional confidence" in connection with the privilege of legal advisers, as for instance, at Ameer Ali and Woodroffe's "Law of Evidence", First Edition, page 794, Taylor on Evidence, Tenth Edition, page 650, and in *Goodall* v. *Little*(1) and *Ex parte Campbell, In re Cathcart*(2), quoted in *Framji Bhicaji* v. *Mohansing Dhansing*(3). It is true that a pledge of secrecy is referred to in the case last cited. But that reference in no way affects the utility of this comparison for the present purpose or provides an analogy supporting the plaintiffs' argument: for such a pledge is mentioned as material with reference to preliminary and collateral matters, which are outside the general privilege and have no resemblance to the report at present in question. In these circumstances, consideration of the section and of the consequences of the interpretation, for which the plaintiffs contend, lead to the conclusion that the words "communication in official confidence" import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. The question whether such communication was made in the course of such performance is for the Court to decide.

This view is at least consistent with the decisions. The order of this Court (already referred to) in the Revision Petition in the present case does treat the District Munsif's ruling as being that the report was a "communication of a confidential

(1) (1851) 20 L.J. Ch., 132.
(2) (1870) L.R., 5 Ch., 703.
(3) (1894) I.L.R., 18 Bom., 263.

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that, but that it has not been proved that the rights to have the conduit has been exercised openly, peacefully or uninterruptedly.

This finding is conclusive against the plaintiffs. It has however been attacked on several grounds which may be dealt with under three heads.

First, it was argued that the Subordinate Judge did not consider or did not appreciate for himself the oral evidence but mistook the District Munsif's appreciation of it and adopted the view which he mistakenly considered to be that of the District Munsif. This argument is supported merely by seizing hold of an isolated sentence in the Subordinate Judge's judgment, paragraph 11. It seems to me that he appreciated the oral evidence for himself and formed an independent opinion opposed to that of the District Munsif.

The next argument has reference to the presumptions of fact which the learned Subordinate Judge (it is contended) disregarded. There was evidence, however, on both sides, and to the arguments adduced before us under this head the remarks from BOWEN, L.J.'s judgment set out in *Hall* v. *Venkatakrishna*(1), are a sufficient answer. To accede to the arguments of the appellants would be to decide in Second Appeals questions of fact by purporting to lay down on whom the burden of proof lay in a given state of facts or evidence. The question which a Court sitting in Second Appeal has to decide is thus stated by Lord KINNEAR in *Folkstone, Corporation* v. *Brockman*(2): "The question seems to be whether it was still open to the tribunal to draw a further inference of fact one way or the other, or, whether the necessary conclusion was already fixed by a rule of law." The question before the House of Lords then was whether the fact of dedication to the public of a highway had been proved. Lord KINNEAR points out the difference in the words of PARKE, B., between "conclusive evidence" and "evidence on which those who have to find that fact may find that there was a dedication by the owner." "I think," he says later, "it is fallacious to assume dedication on a partial view of the evidence, and only after that has been done to inquire whether conflicting facts are strong enough to dislodge a conclusion already reached" (page 354). "The question is one of fact turning upon probabilities of conduct, which cannot be estimated by

(1) (1890) I.L.R., 13 Mad., 394. (2) (1914) A.C., 338 at p. 349.

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antecedent rules of law" (page 356). "If the strength of the presumption can be increased or diminished according to circumstances, it is for the jury to determine the weight which should be given to it in any particular case (page 357). The course of proceeding which the Court of Appeal followed in the case and which Lord KINNEAR described as falacious is thus referred to by Lord DUNEDIN." They fasten upon certain of the series of separate conclusions of fact which the justices set out. These findings say they amount to a finding of user by the public. User by the public raises a presumption of dedication, and in the other facts found by the justices there is nothing sufficient to rebut the presumption" (pages 374 and 375).

"With deference to the learned judges, I do not think that is the proper way to approach the question and its defect, to my mind, consists in regarding 'user' as an inflexible term, which if found to apply, can lead to only one legal result. User is evidence, and can be no more of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Churiatii, by taking a set of isolated findings, saying that they presumably led to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication" (page 375). He concludes, "unless the evidence points all one way," "in the long run it all comes to this, which is the more probable alternative?" (page 377).

It seems to me that for similar reasons, and as sitting in this Court, I have no jurisdiction to consider questions of fact, it is beyond my province to consider whether in appreciating or weighing the evidence, the lower Appellate Court has applied the presumptions referred to in *Sri Raja Chelikani Rama Rau* v. *The Secretary of State for India*(1), *Krishna Aiyar* v. *The Secretary of*

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(1) (1916) I.L.R., 39 Mad., 1

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State for India(1) and *Venkatarama Iyer* v. *The Secretary of State for India in Council*(2) and *The Secretary of State for India* v. *Kota Bapanamma Garu*(3) and *Ponnusawmi Tevar* v. *The Collector of Madura*(4) in the same manner as I should have done if I had to adjudicate upon the facts. I have no jurisdiction to appreciate for myself the weight to be given to the circumstances on the one side and the other. The legislature has given to the lower Appellate Court the right to pronounce finally on these questions.

In the cases relied upon by the appellant, adverse possession for 20 years or more against the Government had been proved, and the Government had not been able to show that any title in themselves subsisted in the present case; however, the lower Appellate Court has considered the appellant's evidence insufficient to prove that the easement has ever been enjoyed openly, peaceably and uninterruptedly. The appellants desire us to fasten upon one piece of evidence and "after the manner of the Horatii and the Churiatii" to challenge the Government to bring forward any piece or rebutting evidence.

Lastly, it was argued that the lower Appellate Court wrongly excluded evidence sought to be adduced by the appellants. The learned vakil for the appellants can however give us very few particulars about the document alleged to be improperly rejected and as to the effect it would have on the evidence. It appears that it is a report made on 31st August 1908: when pressed the learned vakil for the appellants could only say that it might possibly point to there being earlier records which might be discovered by the clue so obtained and which might turn out in favour of the appellants; section 167 of the Indian Evidence Act precludes interference by a Court of Appeal on such hypothetical grounds It is unnecessary therefore to deal with the question whether any evidence on behalf of the plaintiffs to show that the document was not a communication made in official confidence as improperly rejected. But I entirely agree with my learned brother that the question whether or not a communication is made in official confidence cannot depend solely on the question whether it is marked "confidential."

I agree therefore that the second appeals should be dismissed with costs.

S.V.

(1) (1910) I.L.R., 33 Mad., 173. (2) (1910) I.L.R., 33 Mad., 362
(3) (1896) I.L.R., 19 Mad., 165. (4) (1869) 5 M.H.C.R., 6.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Srinivasa Ayyangar.

MACHIKANDI PARKUM MARAMITTATH THARUVIL MOOTHA CHETTIAM VEETTIL CHAKKRA KANNAN (PLAINTIFF), APPELLANT,

1913. April 24 and 1915 August 2 and 12.

v.

VARAYALANKANDI KUNHI POKKER AND FOUR OTHERS (DEFENDANT), RESPONDENT.*

Malabar Law—Gift to wife and children or children alone—Presumption—Incidents of tarwad property—Right of management in the senior male—Maintenance of other members—Right to partition—Alienation of member's share—Its attachment and sale execution.

When properties are given by a person to his wife and children or children alone following the Marumakkattayam law the presumption is that the donees take the property with the incidents of tarwad property and the right of management of the properties forming the subject of the gift is vested in the senior male member amongst the donees

Persons subsequently born into the tavazhi are entitled to be maintained but not to claim partition

Any one member of a tarwad or a tavazhi cannot alienate his share nor can it be attached and sold in execution of a personal decree against any of the members

Per SRINIVASA AYYANGAR, J.—It is not the giving of the properties by a person to his wife and children that constitutes the tarwad, but if properties are given to a wife and children following the Marumakkattayam law, they as tavazhi hold those properties with the incidents of tarwad property and the right of management of the properties is vested in the senior male member of the tavazhi

Kunhacha Umma v. Kutti Mammi Hajee (1893) I.L.R., 16 Mad., 201 (F.B.), followed

SECOND APPEAL against the decree of T. R. RAMAKRISHNA AYYAR, the acting Subordinate Judge of Tellicherry, in Appeal No. 241 of 1909, preferred against the decree of K. V. KARUNAKARA MENON, the District Munsif of Payyoli, in Original Suit No. 333 of 1908.

The facts of the case are set out in the ORDER OF REFERENCE TO THE FULL BENCH by SANKARAN NAIR, J.

T. R. Ramachandra Ayyar for the appellants.

J. L. Rosario for the respondents Nos. 2 and 3.

This Second Appeal came on for hearing before SANKARAN NAIR and TYABJI, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH.—

* Second Appeal No. 2078 of 1910

CHAKKRA KANNAN v. KUNHI POKKER. — SANKARAN NAIR, J.

SANKARAN NAIR, J.—The suit out of which this Second Appeal arises was brought by the plaintiff-appellant for partition and possession of the interest of the first defendant which he had purchased in execution of a money decree obtained by him. The second and third defendants are respectively the brother and niece of the first defendant, and they contend that the first defendant had no such interest in the property as could be attached and sold. Their case is that the property is held by them with the incidents of tarwad property. Both the lower Courts have dismissed the plaintiff's suit.

One Pakran made a gift of certain properties to his two sons, the first and second defendants and a daughter Pathumma whose daughter is the third defendant. The question for decision is whether they took the property as joint-tenants or tenants-in-common or whether they took it only as members of the tarwad, none of them having any interest liable to be attached and sold. The material portion of the instrument of gift runs thus: " I have settled by this that the properties . . . . and all dealings in my name and all moveables are to be enjoyed by me till my death according to my pleasure and after my death they are to belong to my children Ammadkutti (second defendant), Kunhi Pocker (first defendant) and Pathumma (the mother of the third defendant) and that no one else has any right to my properties. Properties and dealings which I may acquire in future also are for the said children. After my death the abovementioned persons, who are my children, are to collect all outstandings due to me and arrears of rent and the assessment which was in my name has to be transferred in the names of my children and patta obtained and they are to hold the same in the same way I was holding them, paying the porappad due to the jenmies and getting renewals in their names " Now there can be scarcely any doubt that, if we look to the terms of the instrument alone, the three donees therein named took an absolute interest and so far as their right of alienation is concerned it makes no difference whether they are tenants-in-common or joint-tenants as in either case any of them could alienate his interest in the property. But it is contended, and the contention has a good deal of force in it, that the decisions have laid down the principle that the donees in such cases must hold the property with the incidents of tarwad

property and that therefore Kunhi Pocker, the first defendant and one of the donees and the judgment-debtor, had no saleable interest in it.

The case that is mainly relied upon is that of a Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee*(1). There were a series of decisions before that on the question of the liability of the interest of one of the donees to be attached and sold—some of them following *Narayanan* v *Kannan*(2), which was a decision to the contrary and others not apparently following it. Many of them will be found reported in the foot-notes to the Full Bench judgment in *Kunhacha Umma* v. *Kutti Mammi Hajee*(1). *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) was a case in which the properties were given after a person's death by his legal representatives to his widow and her children in accordance with his orally expressed wish, and the question was whether the interest of one of the children could be attached and sold. BEST, J., was of opinion that they hold the property as joint-tenants, under English law, as there were all the four unities of a joint-tenancy, that is (1) of possession, (2) of interest, (3) of title and (4) of the commencement of such title, and therefore interest of the judgment-debtor who had died could not be attached and sold. This view cannot be accepted. See the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(3). Mr. Justice SUBRAHMANYA AYYAR contented himself with saying that there was a conflict of decisions and the question was therefore one that should be decided by a Full Bench. The Full Bench delivered the following judgment:—"In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with Marumakkathayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(4) and *Mahomed Shumsool* v. *Shewukram*(5) and

(1) (1893) I.L.R., 16 Mad., 201 (F.B.). (2) (1884) I.L.R., 7 Mad., 312.
(3) (1896) I.L.R., 23 Calc., 670 (P.C.), s.c., 23 I.A., 37.
(4) (1857) 6 M.I.A., 526. (5) (1874) 2 I.A., 7.

CHAKKRA KANNAN v. KUNHI POKKER.

SANKARAN NAIR, J.

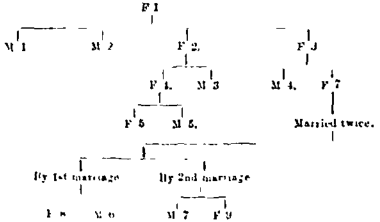
they expressed the opinion that the decision above referred to—*Narayanan* v. *Kannan*(1)—is in conflict with the rule of construction indicated by the Privy Council. Now it will be observed that in the Full Bench case the judgment-debtor had died and the question whether he left any interest liable to be sold is very different from the question which arises here. Again, there was no instrument of gift and the intention was imputed to the donor only in the absence of any expression of his intention, while in the case before us there is an expression of the donor's intention. The Privy Council judgments have application only to gifts to a Hindu woman who generally takes only a life-interest. It is the other way in the case of a Malayalam woman, the theory of the Marumakkattayam law being that the property is vested only in the females, the males having only the right of maintenance. For these reasons I should have held without hesitation that the present case is not governed by the Full Bench decision but for the reason that the latter decisions of this Court have apparently included within its scope cases of this kind. It becomes necessary therefore to consider the question more fully.

If it is to be held that the three donees in the case before us held the property with the incidents of tarwad property and that any one of them could not convey his interest, then it would be directly contradicting the terms of the instrument Exhibit I, because Exhibit I distinctly recites that the donees were to hold the property "in the same way I was holding them," or, in other words, those three persons could alienate it even if such alienation may not be in the interests of the branch to which they belong, which would include the third defendant, a daughter of Pathumma. The will states that no one else besides the three donees named has any right to the properties, whereas, if they belonged to the branch, the descendants of Pathumma born before or after the death of the testator would be entitled to them in their own right and not as representatives of any donee, so that, if we were to decide the case on the construction of the instrument of gift alone, I should have little hesitation in holding that I must give effect to the terms of the instrument and should not import any artificial intention into the case. But the decisions that I have referred to have no

(1) (1884) I.L.R., 7 Mad., 315

doubt held that in such cases the properties must be deemed to be held with the incidents of tarwad property.

The rule of decision is that indicated by their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1) in which they expressed their dissent from a decision of the Madras High Court—*Vydinada* v. *Nagammal*(2)—to the effect that, where a Hindu testator devised certain properties to his nephew and his wife, they took them as joint-tenants and the nephew could not sever the joint-tenancy by an alienation by him alone to a creditor. The judicial committee pointed out "the principle of joint-tenancy appears to be unknown to Hindu Law except in the case of co-parcenary between members of an undivided family," and in the second place, even if it is a joint-tenancy under English Law, that joint-tenancy could be severed by a conveyance or an equivalent of conveyance. According to this, therefore, it is where a co-parcenary might exist according to the rules of the Marumakkattayam Law that the property given to certain members of a Marumakkattayam family may be deemed to be held by them as co-parceners. Under that law it is only tarwad property or the property of a branch who hold certain properties as their branch property in the same way as a tarwad with their own karnavan, etc., that is really held in co-parcenary right. As in my view the right decision of the question mainly depends upon an appreciation of what properties are held as co-parcenary property, I will explain it in some detail—



(1) (1896) I.L.R., 23 Calc., 670 (P.C.), s.c., 23 I.A. 37.

(2) (1888) I.L.R., 11 Mad., 258.

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M 1, the senior male member would be the karnavan of the entire tarwad and in management of all its properties He is the guardian of the infants or children born to any of the female members, he is bound to look after them, maintain them in the tarwad house and give them the education customary among such tarwads. Any female and her children form a tavazhi or branch. *Tavazhi* literally means, *tayar* mother, and *vazhi*, line, that is mother's line. Very often a woman and her descendants live apart from the tarwad house in a house of their own with properties belonging exclusively to their branch, the senior member amongst them having all the rights and obligations of the karnavan of an ordinary tarwad. Such a branch or *tavazhi* is constituted or created by gifts from the father of the woman or by gifts from a favourite brother or maternal uncle, or, it may be, by the self-acquisition of any member of that branch which he would often reserve for the sole benefit of the members of h branch. The karnavan of the main tarwad does not exercise h rights over the members of this branch or interfere in th management of the exclusive properties of that branch. In al such cases what the interests of that branch are in the main tarwad and its properties have often been discussed. If they wish to preserve their rights, which carry with them their obligations in the main tarwad, then the senior member of that branch when he becomes the senior of the main tarwad also assumes the headship or karnavanship of the main tarwad. Failure to assume the karnavanship of the main tarwad when by seniority in age it comes to a member of this tavazhi or branch is usually taken as an indication that it has become a distinct branch without any co-parcenary interests in the main tarwad. Whether the branch members retain their interests in the main tarwad or not, so long as they have a karnavan exercising over them the ordinary karnavan's rights, they form a branch tarwad. I take no exception to the Full Bench Judgment in *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) if it goes only to that extent; it was on that footing that the case was argued by me before the Division Bench; the reference to a Full Bench was rendered necessary by a decision which was supposed to throw doubt even on that doctrine.

(1) (1893) I.L.R., 16 Mad., 201 (F.B.).

But let us take a case where a female and her children remain in the tarwad house under the control of their karnavan and certain properties are given to them by their father. Now there are four possible views. (i) One view is that they constitute a tarwad by themselves with reference to that property. (ii) Another view is that those members hold the property in the same way for instance as the members of a Mitakshara family do in Bengal, substituting females for males; that is they may be entitled to partition but before partition their interests are not liable to be attached and sold. (iii) A third possible view is that they hold in the same way as the properties held by a Mitakshara family according to the Madras decisions, that is they are entitled to partition but their interest also is liable to be attached and sold during their life-time but not after that. (iv) Another view is that it may be attached and sold even after death.

I have already stated that, if *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) is to be understood as applying to the members of a tarwad who live apart from the main tarwad house holding their own property and having their own karnavan, I accept that decision. Mr. Justice MOORE and I have also followed that decision, nor do I see any reason to question it in so far as it holds that the interest of a member cannot be attached and sold after his death.

But, it is said that, according to that decision, even if the members do not form a separate tavazhi holding separate property, they hold the properties gifted to them (we will say), by the husband of the woman, with all the incidents of a tarwad, etc. Now, what is the position of that group of members? Take it in the table above given the husband of F 7 gives certain property to her and to her children F 8 and M 6. It cannot be contended for a moment that they are constituted into a separate tarwad or a separate tavazhi, with the tarwad incidents, by themselves, for M 1, the karnavan of the entire tarwad, does not lose his rights over the children F 8 and M 6 if minors, and even F 7 if she is a minor or any children that may be hereafter born to F 7 and F 8. Nor do they lose their corresponding rights in the tarwad house and its property. For the same reason the senior male in that group cannot displace the old karnavan and succeed to his rights over the other

(1) (1893) I.L.R., 16 Mad., 201 (F.B.)

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members. This view, which Mr. Justice MOORE and myself put forward in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(1) has been accepted in the subsequent cases which have reference to that doctrine. Now, if they do not constitute by themselves a separate tarwad or tavazhi, is there any reason why to the donor must be imputed an intention that they should hold the property with the incidents of tarwad property? This would lead to startling results. Supposing F 7 marries again after the divorce by or of the first husband or after his death. Then the children that might be born to her by the second husband, M 7 and F 9, would also form the members of the tavazhi to which their mother and her children by her first husband belong, because the mother is the root of the tavazhi and the father has no place in the system, and they (i.e., the children by the second husband) would acquire an interest in the property given by her first husband. It is obvious that we cannot impute to the first husband an intention that the children born to his wife by another person should benefit in the gift which he made for her and her children's use. Once it is recognized that a woman with her children by one husband are incapable of forming a tavazhi or joint family by themselves only, to the exclusion of the children that may be born or have been born to her by another husband, it seems necessarily to follow that they do not take as a tavazhi or as co-parceners according to the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(2) already referred to. Even in cases of inheritance it has been held by a Full Bench of this Court that the co-parcenary principle does not generally apply, *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(3); *a fortiori* therefore, in cases of gifts which stand in this respect on the same footing as wills. This is in accordance with the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(2) that in the absence of anything to the contrary the donees take as tenants-in-common. Again, the husband may himself be a follower of the Muhammadan law or of the Hindu law called in Malabar the Makkathayam law of inheritance, and in *Kunhacha Umma* v. *Kutti Mammi Hajee*(4) itself the donor was probably a follower of the Muhammadan law. The Chief Justice and

(1) (1906) I.L.R., 29 Mad., 322.

(2) (1896) I.L.R., 23 Cal., 670 (P.C.); s.c. 23 I.A., 37.

(3) (1904) I.L.R., 27 Mad., 300. (4) (1893) I.L.R., 16 Mad., 201 (F.B.).

Mr. Justice WALLIS in *Pattatheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji*(1) assumed it to be so and applied it to a case where the father followed the Muhammadan law of inheritance. Now what reason is there to impute to him an intention that his children should be governed by the incidents of the Marumakkathayam law? If the intention is to be presumed from the general inclination of a person towards a particular system of inheritance, then it is almost impossible to presume such intention in the case of a Muhammadan donor, and the reason that I suggest next would show that such a presumption ought not to be made even in any other case.

How does it stand on principle? Ordinarily a karnavan's rights are commensurate with his obligations. He has the custody of the entire property in which all the members of the tarwad are interested, to hold it for the benefit of them all, to maintain them in the family house and to educate them. Now, if the properties gifted by a father are to be held with the incidents of tarwad property and the senior male member amongst them is to hold it without any right of the other members for partition, what is the result? They are not maintained out of it, because living in the tarwad house they get their maintenance from the karnavan of the entire tarwad and the senior male of their branch has no control in the tarwad house. They are not educated by the senior male of their branch, because the obligation to educate them is on the karnavan of the tarwad. The guardianship of the infants is also in the karnavan of the entire tarwad. I cannot imagine that a person should be in the possession of the property of another in which they are all jointly interested without any obligations towards those others—the only obligation in this case which would be recognized, if this contention is upheld, being that he has to hold them during his lifetime as karnavan to be handed over after his death to the next man to be held in the same way, no other member getting any benefit out of it. I can hardly conceive that any donor would intend that his property should be enjoyed only by the senior male amongst his descendants to the exclusion of others. That senior male might be—and it has often turned out to be—the son of one of the daughters; and his

(1) (1908) I.L.R., 31 Mad., 228.

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members. This view, which Mr. Justice MOORE and myself put forward in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(1) has been accepted in the subsequent cases which have reference to that doctrine. Now, if they do not constitute by themselves a separate tarwad or tavazhi, is there any reason why to the donor must be imputed an intention that they should hold the property with the incidents of tarwad property? This would lead to startling results. Supposing F 7 marries again after the divorce by or of the first husband or after his death. Then the children that might be born to her by the second husband, M 7 and F 9, would also form the members of the tavazhi to which their mother and her children by her first husband belong, because the mother is the root of the tavazhi and the father has no place in the system, and they (i.e., the children by the second husband) would acquire an interest in the property given by her first husband. It is obvious that we cannot impute to the first husband an intention that the children born to his wife by another person should benefit in the gift which he made for her and her children's use. Once it is recognized that a woman with her children by one husband are incapable of forming a tavazhi or *joint family by themselves only, to the exclusion of the children* that may be born or have been born to her by another husband, it seems necessarily to follow that they do not take as a tavazhi or as co-parceners according to the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(2) already referred to. Even in cases of inheritance it has been held by a Full Bench of this Court that the co-parcenary principle does not generally apply; *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(3); *a fortiori* therefore, in cases of gifts which stand in this respect on the same footing as wills. This is in accordance with the Privy Council decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(2) that in the absence of anything to the contrary the donees take as tenants-in-common. Again, the husband may himself be a follower of the Muhammadan law or of the Hindu law called in Malabar the Makkathayam law of inheritance, and in *Kunhacha Umma* v. *Kutti Mammi Hajee*(4) itself the donor was probably a follower of the Muhammadan law. The Chief Justice and

(1) (1906) I.L.R., 29 Mad., 322.
(2) (1896) I.L.R., 23 Calc., 670 (P.C.); s.c., 23 I.A., 37.
(3) (1904) I.L.R., 27 Mad., 300 (4) (1893) I.L.R., 16 Mad., 201 (F.B.).

to Malabar. On the other hand, no presumption ought to be drawn that his sons other than the senior male are to get scarcely any benefit out of it. I do not think therefore the Privy Council decision compels us to impute any artificial intention to the donor, and in particular, when there is an instrument of gift, I am satisfied that we ought to go upon the words of the instrument. It does not of course follow from this that one of these donees may either sell his share or a creditor may attach and sell his interest in execution of a decree. If we follow the Madras decisions in reference to the Mitakshara family, he would be so entitled to do, but if we follow the Bengal decisions, which proceed perhaps upon the true theory of Hindu co-parcenary law, he will not be entitled to do so. Where certain members of a Hindu family earn property there is no presumption that they hold it as co-parcenary property.

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Similarly it has been held that in the case of followers of Marumakkathayam law also there is no such presumption. See *Govindan Nair* v. *Sankaran Nair*(1).

It is desirable on account of the apparent conflict of opinion that the matter should be settled by a Full Bench. I would therefore refer the following questions to a *Full Bench*.—

(1) When properties are given by a person to his wife and children or children alone following the Marumakkathayam law, do the donees constitute by themselves a tarwad or tavazhi, and if they do so, is the right of management of the properties forming the subject of the gift vested in the senior male member thereof?

(2) If the first question is answered in the affirmative, whether in such cases the other members of the tavazhi including those who become members of it by birth are entitled to maintenance, etc., out of such properties in the same manner as they were entitled before the gift to receive maintenance out of the properties belonging to the main tarwad; and whether they are entitled to partition of the said properties?

(3) Can any one member of the tarwad or tavazhi so constituted alienate his share, or can his interest be

(1) (1909) I.L.R., 32 Mad., 351 (F B)

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known to prevail, whether in such matters effect ought to be given to "logical conclusions which may seem to an acute modern dialectician to follow" from the rules imposed by ancient customs [*cf. Baqar Ali Khan* v. *Anjuman Ara Begam*(1)]. It may be that in such matters effect ought to be given rather to the ordinary notions and wishes of the parties, even though such notions and wishes may not in strict logic be in conformity with the prevailing customs nor have taken a shape sufficiently definite to be considered as embodying an independent rule of customary law, but may only furnish indications of what justice, equity, and good conscience would require.

On many of the matters involved in this reference (to some of which I have alluded above) I feel that there are not sufficient materials at present available which would enable me to express an opinion.

I therefore agree that the questions mentioned in my learned brother's judgment be referred to a Full Bench.

T. R. Ramachandra Ayyar for the appellants.—How the gift is to be construed is the question involved in this reference. Court should as a rule be slow to impute to the donor an intention to contravene the law. If the gift is to be interpreted as one to the tavazhi and not to the individual, persons born subsequent to the gift and who become members of the tavazhi would take under the gift; in such a case the gift would be void as being one to unborn persons. See *Bai Diwali* v. *Patel Bechardas*(2) and *Kishori Dubain* v. *Mundra Dubain*(3). A gift must be so construed as to make it limited to the donees in existence at the time of the gift. When there is a gift to two persons there is no presumption that the incident of survivorship is annexed to it. See *Jogeswar Narain Deo* v. *Rama Chandra Dutt*(4).

If the lady married another husband and had children by him, the gift would enure to the latter children also—a result which would not have been contemplated by the first husband. *Kunhacha Umma* v. *Kutti Mammi Hajee*(5) follows *Sreemutty* v. *Soorjeemoney Dossee* v. *Denobundoo Mullick*(6) and *Mahomed Shumsool* v. *Shewukram*(7). The observations of the Privy

(1) (1903) I.L.R., 25 All. 236 (P.C.); s.c., 30 I.A., 94.
(2) (1902) I.L.R., 26 Bom., 445. (3) (1911) I.L.R., 33 All., 665
(4) (1896) I.L.R., 23 Calc., 670 (P.C.); s.c. 23 I.A., 37.
(5) (1893) I.L.R., 16 Mad., 201 (F.B.). (6) (1857) 6 M.I.A., 526.

Council are confined to Hindu women who take only a life interest. A woman of the marumakkatayam tarwad on the other hand owns the tarwad property, and the presumption therefore is in favour of an absolute gift to the wife and children.

The donor may be the follower of makkattayam or of the Muhammadan law. How can we impute to him an intention that his children should be governed by the Marumakkattayam law? If the property which is the subject-matter of the gift is to be held with the incidents of tarwad property, then the sons of the donor may not have the management of the property at all, if there is a daughter's son entitled to act as karnavan. If the tarwad of which the donees are members has property, then it may be that the donees may never have any occasion to enjoy the gifted property. Where the tarwad is joint and the donees are living within the main tarwad the intention can never be that the donees should enjoy as a tavazhi. We must construe the gift in such a way as to avoid these anomalies. That can be done only by holding that the property in question is held as absolute property by the donees free from the tarwad incidents. *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) does not lay down the correct law. The decision would be right only if the gift is a gift to an independent tavazhi living separate from the tarwad. This is what is referred to in the reference order of SANKARAN NAIR, J.

The respondents Nos. 1 and 5 did not appear in person nor were they represented by pleader.

J. L. Rosario for the respondents Nos. 2 and 3.—The principle of *stare decisis* should be applied to this case. *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) has been followed as good law ever since 1892 and rights have grown up under it which ought not to be unsettled; and further, the decision itself is right. Property can be conserved only if it is held with the incidents of tarwad property.

T. R. Ramachandra Ayyar in reply.—The principle of *stare decisis* ought not to apply in this case; for there has been conflicting decisions in this Court. See *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(2), *Chakkantavida Chakkan Abdulla* v. *Thazhath Cheekkootti*(3) and *Kalliani Ammah* v. *Govinda Menon*(4)

(1) (1893) I.L R , 16 Mad , 201 (F.B). (2) (1906) I L.R., 29 Mad., 322.
(3) (1911) I.L R., 34 Mad., 245 (4) (1912) I.L.R , 35 Mad , 648.

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and seeing that the property has been tied up in accordance with the doctrine of *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) no rights with regard to tarwad property could have grown up in other people.'

This REFERENCE coming on for hearing the Court expressed the following OPINIONS :—

WALLIS, C.J.

WALLIS, C.J.—It seems desirable at the outset to point out that the decision of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee*(1), which is questioned in the reference merely decides that among the followers of the Marumakkattayam law, when a gift is made by the father to the mother and her children, there is a presumption that they are intended to take such properties as the exclusive properties of the branch or tavazhi consisting of the mother and her children, that is to say, with the usual incidents of tarwad property. In the absence of express provision the presumption is that the property is to be enjoyed by the mother and her issue in the way in which property is customarily held and enjoyed among followers of the Marumakkattayam law. The decision proceeded on the authority of two decisions of their Lordships of the Judicial Committee which laid down that the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor. As pointed out in the judgment of one of the Judges who made the reference to the Full Bench the presumption was arrived at in consideration of what were known to be the notions and wishes of persons in the position of the donor and also of the ordinary incidents of property in the district This view was accepted by the Full Bench of four Judges two of whom MUTTUSWAMI AYYAR and WILKINSON, JJ., were well acquainted with Malabar, and that it was well founded is suggested by the fact that the decision has not only been accepted but has been given a considerable extension in the neighbouring State of Travancore, as pointed out during the argument by my learned brother speaking from his experience as Chief Justice of that State. It has also been followed, as I shall show, in numerous cases in this Court, and was not questioned before *Ummanga* v. *Appadorai Patter*(2), a decision of Sir ARNOLD WHITE, C.J., and SANKARAN NAIR, J.,

(1) (1893) I.L.R., 16 Mad. 201 (F.B.). (2) (1911) I.L.R., 34 Mad., 387.

in 1910, and it may be taken that many transactions have proceeded on the footing that it was correct. In these circumstances, notwithstanding the respect which I feel for the opinion of SANKARAN NAIR, J., especially in a matter affecting his own community, I think we should be very slow to differ from the decision of the Full Bench unless we are absolutely obliged to do so, more especially as that decision merely relates to a presumption which it is always in the power of a donor to negative if so minded by express provision. If any change is to be made it should, it seems to me, be made by the legislature.

As regards the authorities, the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*(1), was not only not questioned but, as pointed out in subsequent cases, was accepted in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(2), to which SANKARAN NAIR, J., was a party. It was followed in *Pattatheruvath Pathumma* v. *Vannamkunniyil Abdulla Haji*(3), *Kunhamina* v. *Kunhambi*(4), *Katankandi Koma* v. *Siva Sankaran*(5), *Chakkantavida Chakkan Abdulla* v. *Thazhath Cheekkootti*(6), and *Parvathi Kattilammah* v. *Ramachandra Ejaman*(7). Lastly in *Kalliani Ammah* v. *Govinda Menon*(8), which was subsequent to *Ummanga* v *Appadorai Pattar*(9), it was again accepted and acted on by ABDUR RAHIM and SUNDARA AYYAR, JJ., in a careful judgment in which all the authorities were examined. In this state of things it seems to me that it is not now open to us to question the decision of the Full Bench even if we saw reasons to doubt that it had been correctly decided. "With reference to the observations of their Lordships of the Judicial Committee in *Joyeswar Narain Deo* v. *Ram Chandra Dutt*(10), which are referred to by SANKARAN NAIR, J., that the principle of joint tenancy appears to be unknown to the Hindu law except in the case of a co-parcenary between members of an undivided family, it may be observed that these observations of their Lordships were made with reference to ordinary Hindu law and not to the peculiar Marumakkattayam system which was not under their Lordships' consideration. But even taking them to

(1) (1893) I L R, 16 Mad, 201 (F.B.). (2) (1906) I L R, 29 Mad., 322.
(3) (1903) I L.R 31 Mad, 228 (4) (1909) I L R, 32 Mad, 315.
(5) (1910) 20 M.L J, 134. (6) (1911) I.L.R., 34 Mad, 245.
(7) (1910) M.W N., 124 (8) (1912) I.L.R., 35 Mad., 648.
(9) (1911) I.L.R, 34 Mad, 387
(10) (1896) I.L.R., 23 Calc, 670 (P.C.); s.c, 23 I.A., 37.

be applicable, I cannot see how a gift to a female and all her descendants in the female line can be held to infringe the principle, for that is the kind of joint family known to the Marumakkattayam system. On the other hand, the propriety of such a gift would appear to be recognized by their Lordships in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(1) in the passage cited by BENSON and SUNDARA AYYAR, JJ., in *Vengamma* v. *Chelamayya*(2). The question whether a gift with the incidents of tarwad property could be made to the mother and some of her issue only, viz., those by a particular husband does not arise in this particular case, as the gift is to the children of the donor by a deceased wife and it is not suggested that she left any other children. It is therefore unnecessary to express any opinion on this point, or to refer to the authorities which are collected in the judgment of BENSON and SUNDARA AYYAR, JJ., just mentioned.

Following the decision of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee*(3) and the course of subsequent decisions I would answer the question in the reference as follows:—

(1) The presumption is that the donees take the property with the incidents of tarwad property including those mentioned. (2) Persons subsequently born into the tavazhi are entitled to be maintained but not to claim partition. (3) An individual cannot alienate his share nor can it be attached and sold in execution of a personal decree against any of the members.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I am prepared to follow the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*(3) which is in conformity (so far as I find) with the views universally held by the communities following the ordinary Marumakkattayam law and with the intentions of a father (who might even belong to a Makkattayam community) who consorts with a lady belonging to a Marumakkattayam community and who makes or arranges a gift to his children born of his said Marumakkattayam wife.

The objection, based on the rule of perpetuity, to the validity of such gifts has been considered elaborately by SUNDARA AYYAR, J., in *Vengamma* v. *Chelamayya*(2) and I respectfully agree with his opinion that that rule cannot be applied so as to defeat

(1) (1883) 11 I.A., 164 at p. 179. (2) (1913) I.L.R., 36 Mad., 484.
(3) (1893) I.L.R., 16 Mad., 201 (F.B.).

gifts made to all the persons who can naturally form a joint Hindu family the gifted property to be held as joint family property or to the whole of a group of persons following the natural law Marumakkattayam forming a natural tavazhi group.

The objection based on the woman (whose husband makes a gift to his children by her) marrying another husband and begetting other children to the latter and on these children also belonging to her tavazhi along with her children by the first husband is not, in my opinion, insuperable. The result of that state of facts will only be that there will be two separate groups in the same tavazhi holding separate tavazhi property, the senior male in each tavazhi group being the karnavan of that tavazhi group. For instance, take the case of a woman and her children who form a tavazhi within a tarwad. Two of her daughters might form two different groups in the same tavazhi and their respective husbands might give properties to their respective children. Then, all these children would belong to the tarwad of their great grand-mother, would again belong to their grand-mother's tavazhi and would also belong to the groups or sub-tavazhis of their respective mothers and hold those respective group properties separately. Just as there can be tavazhis within a tavazhi, there can be group tavazhis and sub-tavazhis in the same tavazhi. If two groups or sub-tavazhis springing from two daughters who from a tavazhi can have separate sub-tavazhi properties, there is nothing startling in two branch tavazhis springing from the same lady (through her marrying two successive husbands) and holding separately their respective branch tavazhi properties. A tavazhi consists, no doubt, of the descendants of a single woman (I do not think that it includes the woman herself etymologically), but there is nothing to prevent the existence in that same tavazhi of two groups each of which groups *might form a separate unit for the purpose of holding particular properties* as if it was a separate tarwad and with the incidents of tarwad property. It cannot be said to be an unnatural separation between the two groups, unnatural in the sense of repugnance to the habits, practices and sentiments of the community. I agree to the answers proposed by my Lord.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—In India it is not uncommon for groups of persons though not incorporated to hold properties as if they were corporate entities. Castes and sub-castes hold

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property as such, so also village communities. But the more common and familiar instances of such groups in Southern India are the joint Hindu family governed by the Mitakshara law, the Nambudri illom governed by the Makkattayam law, the Nayar tarwad governed by the Marumakkattayam law, and the Aliyasantan family of South Canara. The Mappillas of North Malabar generally follow the Marumakkattayam system and the parties to this suit are governed by that law. The incidents of such group holding are now well settled. In the case of Malabar tarwads such incidents include the impartibility of the property, the right by birth of persons born in the tarwad, and the management of the properties by the senior male member of the tarward who is styled the karnavan.

The constitution of a Marumakkattayam tarwad is well known and is concisely stated in the extract from the report of the Malabar Marriage Commission printed in *Raman Menon* v. *Raman Menon*(1). The constitution of a joint Hindu family governed by the Mitakshara law furnishes a very close parallel (see the description of such a family by BASHYAM AYYANGAR, J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri*(2). These groups cannot of course be created by agreement of parties. The tavazhis or the subordinate groups constituting the tarwad are, I think, capable of holding properties as corporate units with the incidents of tarwad property, at the same time retaining their joint interest in the properties of the main tarwad, just as branches and sub-branches in a Mitakshara joint Hindu family are capable of holding properties with the incidents of joint Hindu family property. I am also of opinion that some only of the members of a tavazhi cannot form a corporate unit capable of holding property as such. The husbands of the female members and the children of the male members of a tarwad are not members of the tarwad. It is not uncommon for them to make gifts of properties to their wives, daughters or sisters and their children, and such properties are called Puthravakasam properties. The question is whether, in the absence of express words in the grant, the tavazhi hold them as a corporate unit with the incidents of impartibility and right by birth, or whether the members of the tavazhi hold the

(1) (1901) I.L.R., 24 Mad., 73 at p 76. (2) (1902) I.L.R., 25 Mad., 149 at p. 155.

property as co-owners, i.e., as tenants-in-common. I think these are the only two alternative views possible, and the second and third views mentioned in the referring order of SANKARAN NAIR, J., may be left out of consideration—*Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1). This question was answered by a Full Bench of this Court in *Kunhacha Umma* v. *Kutti Mammi Hajee*(2), and the answer was that such properties were held with the incidents of tarwad property. The basis of the decision was that was the usual mode of holding property by persons governed by Marumakkattayam law; and that the donors presumably intended to benefit not merely the existing members of the family but also those who may thereafter be born in the family. This decision was followed in a large number of cases in this Court, viz., *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(3), *Pattatheruvath Pathumma* v *Mannamkunniyil Abdulla Haji*(4), *Kunhamina* v. *Kunhambi*(5), *Katankandi Koma* v. *Siva Sankaran*(6), *Chakkantavida Chakkan Abdulla* v. *Thazhath Cheekkootti*(7), *Parvathi Kattilamma* v. *Ramachandra Ejaman*(8), *Kunhiraman* v *Kunhi Parvathi*(9) and *Kalliani Ammah* v. *Govinda Menon*(10).

For the first time, in *Ummanga* v *Appadorai Patter*(11), a suggestion was made that if a tavazhi had not become a distinct tarwad by division or relinquishment of its joint interest in the properties of the main tarwad, the property held by that tavazhi will not have the incidents of tarwad property; and the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*(2) was explained as deciding only that the interest of a member of such a tavazhi lapsed to the other members of the tavazhi, if that interest has not been alienated during his life-time. With the greatest respect to the learned Judges I am unable to accept this explanation. It ignores the fact that in properties held with the incidents of tarwad property no individual member has an alienable interest. It is to be observed that SANKARAN NAIR, J., who was one of the Judges who decided that case, at that time

(1) (1896) I.L.R., 23 Calc., 670 (P.C.), s.c., 23 I.A., 37.
(2) (1893) I.L.R., 16 Mad., 201 (F.B.).
(3) (1906) I.L.R., 29 Mad., 322.
(4) (1908) I.L.R., 31 Mad., 228.
(5) (1909) I.L.R., 32 Mad., 315.
(6) (1910) 20 M.L.J., 134.
(7) (1910) 20 M.L.J., 368.
(8) (1910) M.W.N., 124.
(9) (1910) M.W.N., 642.
(10) (1911) I.L.R., 35 Mad., 648.
(11) (1912) I.L.R., 34 Mad., 387.

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seems to have been of opinion that it is only in cases where a tavazhi becomes a distinct tarwad by ceasing to have any interest in the properties of the main tarwad, that it can hold properties with the incidents of tarwad property; but in the order of reference the learned Judge concedes that the rule would apply even in cases where the tavazhi retains its interest in the properties of the main tarwad, provided that the members of the tavazhi live separately from the other members of the tarwad. He thinks that *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) was a case of that sort. In any case he thinks that decision should not be extended to tavazhis whose members do not live separately with a separate karnavan of their own In the Full Bench case—*Kunhacha Umma* v. *Kutti Mammi Hajee*(1)—so far as one can gather from the report, the tavazhi do not seem to have been living separately with a separate karnavan of their own. In many of the cases which followed the Full Bench decision, the members of the tavazhi do not appear to have lived separately with a separate karnavan. I am unable to see how the fact of separate living by the members of a tavazhi without a separation in interest can possibly affect the capacity of the tavazhi to hold property or the incidents of the property held by them as such tavazhi. In *Krishnan* v. *Damodaran*(2) a Full Bench of this Court decided that where a female member of a tavazhi dies, her separate property is inherited by her tavazhi as such, i.e., as a corporate unit. Though in *Govindan Nair* v. *Sankaran Nair*(3), it was held by two Judges of this Court, a third Judge dissenting, that the separate property of a male member of a tavazhi on his death lapses to the tarwad and not to the tavazhi, the opinion collected in the referring order in that case show clearly the consciousness of the people that the tavazhi was a separate entity which ought to inherit the property of both the male and female members of that tavazhi. In a case where the tavazhi succeeds to the property of a deceased member, that property will be managed, I assume, by the senior male member of that tavazhi and the members of that tavazhi will have the additional advantage of participating in the income of that property. I see no difficulty in the tavazhi

(1) (1893) I.L.R., 16 Mad., 201 (F.B.) (2) (1915) I.L.R., 38 Mad., 48.
(3) (1909) I.L.R., 32 Mad., 351 (F.B.).

holding the properties to which it succeeded with the incidents of tarwad property.

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Two points are taken by SANKARAN NAIR, J., in the order of reference. One, that a tavazhi which has not separated itself in the sense mentioned above cannot cease to be under the control of the karnavan of the tarwad and cannot have a karnavan of its own; and the other, that a tavazhi may consist of children of different fathers. In *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(1), MOORE and SANKARAN NAIR, JJ., had no difficulty in holding that Puthravakasam property held by a tavazhi was held with the incidents of tarwad property though the mere gift of property to a tavazhi did not constitute them a distinct tarwad. In *Kalliani Ammah* v. *Govinda Menon*(2), all the previous cases were considered by ABDUR RAHIM and SUNDARA AYYAR, JJ., and the relation of the senior male member of a tavazhi managing the properties of the tavazhi to the other members of the tavazhi was indicated. They say: "There can be no doubt that he cannot have all the rights of a karnavan over the junior members of his tarwad. He is not their guardian and has no right of supervision or control over them. He is not responsible for their protection, education or maintenance. His right is confined to the management of the special property owned by him and the other members of his branch." I do not think that a tavazhi [which] is not [a] separate tarwad with a separate karnavan of its own is an impediment to their holding property with the incidents of tarwad property. As regards the second point there is of course the possibility of a woman to whom properties are given by one husband marrying another and having children by him. All the children of that woman would form members of her tavazhi. It is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely. After all the rule is one of construction and even if the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*(3) is open to question [I think it is not] we ought not to depart from it after it has been followed for such a long time.

It is now necessary to notice another contention of Mr. Ramachandra Ayyar which does not seem to have been put

(1) (1906) I.L.R., 29 Mad., 322. (2) (1912) I.L.R., 35 Mad., 648.
(3) (1893) I.L.R., 16 Mad., 201 (F.B.).

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forward before the referring Judges. He contends that no gift or grant of property can be made to a tarwad so as to enable it *to hold that property with the incidents of tarwad property*; such a grant, he contends, amounts to a grant in favour of unborn persons and therefore contrary to the decision of the Privy Council in the *Tagore* case. I understand him to concede that a tarwad could purchase properties and hold them with the incidents of tarwad property. If they can do that, I do not see why they should not take a gift and hold the properties with the incidents of tarwad property. The fallacy underlying the argument is that the grant is a grant made in favour of unborn persons. The gift is made to the entity which is called the tarwad or tavazhi and the law governing the parties regulates the mode of successions and enjoyment. Mr. Ramachandra Ayyar relied on a *dictum* of the Bombay High Court in *Bai Diwali* v. *Patel Bechardas*(1) and on *Kishori Dubain* v. *Mundra Dubain*(2). There is nothing in the Allahabad case to support his contention, and the passage in *Bai Diwali* v. *Patel Bechardas*(1) is only an expression of doubt. On the other hand, the decision in *Vengamma* v. *Chelamayya*(3) supports the contrary conclusion.

My answer to the first question is that it is not the giving of properties by a person to his wife and children that constitutes them a tarwad or tavazhi, but that if properties are given to a wife and children following the Marumakkattayam law, they as a tavazhi hold those properties with the incidents of tarwad property, and the right of management of the properties is vested in the senior male member of that tavazhi.

I answer the first part of the second question in the affirmative and second part in the negative.

I answer the third question in the negative.

C.M.N.

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(1) (1902) I.L.R., 26 Bom., 445 (2) (1911) I.L.R., 33 All., 665.
(3) (1913) I.L.R., 36 Mad., 484.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1914.
November 11 and 26.

SREEMANTHU RAJA YARLAGADDA MALLIKARJUNA NAYUDU BAHADUR, ZAMINDAR GARU OF CHELLAPALLI (PLAINTIFF), APPELLANT,

v.

RAJALAPATI SOMAYA AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

(Madras) Estates Land Act (I of 1908), ss. 3, 8 and 185—Private land, conversion of ryoti, into—Proof—Proviso to section 185, nature of.

Per WALLIS, C.J.—Section 8 of the Estates Land Act does not impose retrospectively an absolute prohibition of the conversion of ryoti into private land not to be found in the definition or in the section specially dealing with evidence as to what is private land.

Such a conversion should be proved by very clear and satisfactory evidence.

The acquisition of kudivaram right in certain lands by the landlord and his letting them out as *kambattam* lands on terms negativing occupancy right with a view to prevent the assertion of such right is not sufficient to convert them into private lands within the meaning of the definition.

Per SESHAGIRI AYYAR, J.—Land originally *seri* cannot become the private land of the landholder except in the one instance mentioned in the proviso to section 185 of the Act.

The proviso is not in the nature of an exception but enacts a rule of substantive law.

Mullins v. *Treasurer of Surrey* (1880) 5 Q.B.D., 173 and *Maha Prasad Singh* v. *Ramani Mohan Singh* (1914) 27 M.L.J., 459, followed.

APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 22 of 1910.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *C. V. Anantakrishna Ayyar* for the appellant.

V. Ramadoss for the respondents.

WALLIS, C.J.—This case raises a question of considerable importance as to what consitutes private land under the

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* Appeal No. 104 of 1913.

Madras Estates Land Act, 1908. The Subordinate Judge has decided the question very largely with reference to speeches made while the Bill was passing through the Council, in which private lands were said to represent lands which were granted free of assessment by the Muhammadan Government to the zamindars as part of their remuneration for their services. However this may be, what the Court has to see is whether the land in question comes within the definition in section 3 (10) of the Act, where private land is said to mean "the domain or home farm land of a landholder by whatever designation known such as *kambattam, khas, seri* or *pannai*."

Here it may be well to note that the word "domain" in this connection is explained by Webster citing *Shemtore* as meaning "the land about the mansion-home of a lord and in his immediate occupancy." Section 185 prescribes certain rules of evidence as to whether any land is private land or not, and provides that land shall be deemed not to be private land until the contrary is shown. That it is the intention of the legislature that this should be strictly proved is also to be gathered from the provisions of section 183 as to ascertaining and recording whether any land is private land in which the Revenue Officer is directed to disregard any agreement or anything contained in any compromise, or in any decree proved to his satisfaction to have been obtained by fraud or collusion and not to register the land as private unless it is proved to be such by satisfactory evidence of the nature prescribed in section 185. Under that section regard is to be had to local custom, and to the question whether the land was before the first day of July 1898 specifically let as private land, and to any other evidence that may be produced. Then we have the proviso: "Provided that all land which is proved to have been cultivated as private land by the landholder himself by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be the landholder's private land."

Mr. Govindaraghava Ayyar very properly relied on the fact that this provision is enacted by way of proviso to the body of the section and not by way of exception, and argued that it should not be construed as inconsistent with the body of the section, and therefore that the fact that the land had been so

cultivated by the proprietors would have been evidence that the land was private land apart from the proviso. This is no doubt a sound principle of construction and was recently applied by the Privy Council in *Maha Prasad Singh* v. *Ramani Mohan Singh*(1), but it is scarcely necessary to rely upon it, because it is expressly provided in the body of the section that the fact that the land has been let as private land is evidence of its being such, and the case of its being cultivated as such by the owner himself is of course much stronger For the respondent, however, it is contended that once it is shown that the land in question was at one time ordinary ryoti land or seri, as it is called in the district in question, evidence that subsequently it has been dealt with as private land, though admissible under section 185, is of no avail, because by virtue of the provisions of section 8 which are retrospective, the land must be taken not to be private land, unless the conditions of the proviso to section 185 are satisfied. As to this it may be observed that, if this be so, the proviso should rather have appeared as an exception to section 8.

Now it is well settled that retrospective enactments must be strictly construed and it is therefore necessary to examine carefully the provisions of section 8 to see if they really have the result contended for Sub-section (1) provides that whenever before or after the commencement of the Act the entire interests of the landholder and the occupancy ryot in any land in the holding have become united in the same person in the circumstances specified in the section, such person shall have no right to hold the land as a ryot but shall hold it as a landholder, and sub-section (3) further provides that such merger shall not have the effect of converting ryoti land into private land. I do not think the latter provision is of much importance as it only provides that the merger in question shall not convert ryoti land into private land, and cannot be read as enacting that such land shall not be converted into private land by being subsequently cultivated or let as such. This effect must be produced, if at all, by virtue of the provision in sub-section (1) that in such a case the owner "shall have no right to hold the land as a ryot but shall hold it as a landholder." But for this provision a landholder who had acquired the kudivaram rights in a

(1) (1914) 27 M L.J., 459 at p. 466.

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holding could have escaped the operation of the Act by purporting to let the lands in his capacity of ryot, seeing that ryots are free to sublet their lands on what terms they please whereas the powers of a landholder are governed by the provisions of the Act. This provision that the owner shall not hold the land as a ryot was intended to guard against this mischief, and is not in my opinion of itself sufficient, if the section be construed strictly, to prevent the owner from subsequently converting such land into private land and by cultivating, or letting it as such. We have then to see whether the further provision that after such merger, the owner shall hold the land as a landholder has that effect. Now landholder is defined in section 3 (5) as meaning a person holding an estate, and the definition of estate in section 3 (2) is such as to include both ryoti and private land; and as already pointed out, private land is defined as "the domain or home farm land of a landholder." In this state of things, and construing the sub-section strictly as we are bound to construe it, I do not think it can be said that a landholder holding land as private land is not holding it as a landholder rather than as a ryot, for that is the distinction contemplated in the section. This appears to be in accordance with the opinion expressed by SADASIVA AYYAR, J., in *Venkata Sastrulu* v. *Sitaramudu*(1).

In *Chintam Reddi Sanyasi* v. *Sri Raja Sagi Appala Narasimha Raja Garu*(2) to which I was party the provisions of section 8 are not referred to in the judgment, but as appears from a reference to the printed papers that was a case of immemorial waste being cultivated as private land, and not a case in which the interests of a landholder and an occupancy ryot had become merged in the manner specified in section 8. I have come to the conclusion that the effect of section 8 is not to impose retrospectively an absolute prohibition of the conversion of ryoti into private land not to be found in the definition, or in the section specially dealing with evidence as to what is private land: and I may say that, if the legislature had intended to exclude from the category of domain or home farm land, lands which had been cultivated as such for a century or more on the ground that such land had at some remote period been held

(1) (1914) 26 M.L.J., 585 at p. 590. (2) (1914) M.W.N., 768.

as ordinary ryoti land, it would I think have expressed its intention in clear and unambiguous language. While I feel bound to arrive at this conclusion I think that it is very necessary that an actual conversion from ryoti into private land should be proved by very clear and satisfactory evidence.

We have next to see whether the evidence in this case is sufficient for the purpose In this connection it is to be borne in mind that numerous instances have come before the Courts in which subsequent to the decision of *Chockalinga Pillai* v *Vythealinga Pundara Sunnady*(1) zamindars succeeded in inserting in pattas and muchilikas terms negativing the existence of occupancy right, and that one way of effecting this purpose was to deal with the land as *kambattam* or home farm land, even though it had never been cultivated by the zamindar himself and there was no intention of so cultivating it. Now in the present case we find that the earliest accounts of the village of the year 1836 show that it contained 6 puttis or about 102 acres of savaram lands in which the suit lands were not included, and that 800 acres or more than a third of the whole acreage of the village is now classed as *kambattam.* So too the accounts of 1866—Exhibits 18 and 19 and of 1867. Exhibits 3 and 12 show only 49 acres and 54 acres under cultivation 'as *kambattam*' in these years. The evidence in the present case shows how the extension came about. The character of the suit lands was called in question in Original Suit No. 10 of 1881 in the District Court of Masulipatam when the District Judge decided that the predecessors of the present owners had executed muchilikas agreeing to hold the land as *kambattam* but did not knowingly consent to the change from *seri* to *kambattam.* The High Court in Exhibit J set aside his decree on the ground that the only defence set up by the defendants was that they had not executed the muchilikas. This was all that was decided but the learned Judges observed that the District Judge found that the zamindar was at liberty to change seri into *kambattam* on the occurrence of a vacancy and had overlooked the fact that such a vacancy had occurred in 1874 on the death of Komapati Venkanna, in whose name the lands then stood. It may fairly be inferred that no documents were then preferred in

(1) (1870) 6 M.H.C.R., 164.

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evidence in which the land was treated as *kambattam* prior 1875, and the documents relied on in the present case are ev later. In that case the learned Judges put the onus of provi that the land was seri on the defendants, and held that th had discharged it. As the law now stands, the burden is on t zamindar to show that the suit lands come within the definiti in section 3 as forming part of his domain or home farm land There was no evidence in that case that he had ever cultivat them himself. The earliest evidence that they had been treat as *kambattam* related to 1875 shortly after the decision *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1) aft which zamindars endeavoured to get their ryots to contra themselves in one way or another out of their occupancy right a process which apparently explains the extraordinary increa in the amount of land classed as *kambattam* in recent year The evidence that the zamindar cultivated these lands in recen years is negatived by the karnam who otherwise shows himsel favourable to the zamindar. He says that out of 2,300 acres i the village, 800 are classed as *kambattam* and that of these th zamindar cultivates 200 acres himself but not always the sam 200 acres. It is not shown that he ever cultivated the su lands. On the contrary the evidence is that they have alway been cultivated by tenants.

Though the fact that the lands have been let as *kambattam* is evidence under section 185 that they are private lands, and though the provisions of section 183 do not apply to the Civi Courts, still, as I have already said, I think the fact that the *lands really were at some time domain or home farm lands* should be strictly proved. Once it is shown as here that they were a ryoti, down to a certain date the effect of section 8 is that even if the zamindar subsequently acquired the kudivaram right that would not of itself convert them into private land and we have to see whether what has happened subsequently is sufficient to convert the land into private land, that is to say, into domain or home farm land. It does not seem to me that calling the lands *kambattam* and letting them on terms which negative occupancy right with a view to prevent the assertion of such right is sufficient to convert them into private lands within the meaning of the definition.

(1) (1870) 6 M.H.C.R., 164.

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The Subordinate Judge has found and I agree with him that the suit lands were never cultivated by the zamindar as part of his home farm lands, and it seems to me that his treatment of them as *kambattam* was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as sir lands, and this is one of the terms mentioned in the definition. In *Budley* v. *Bukhtoo*(1), it was held that sir land is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The plaintiff sues for a declaration that the lands in suit are his home farm lands. The defendants claim them as their jeroyiti. The Subordinate Judge dismissed the suit.

I see no reason to differ from the conclusion at which the lower Court has arrived. The Subordinate Judge found that from the year 1884, the lands were treated by the plaintiff as his *kambattam* or home farm lands and that they were held as seri or jeroyiti lands from 1866 to 1883 by the defendants and their predecessors. The appellant has convinced us that in the year 1879, the lands were treated as *kambattam*. Exhibit J, the judgment of the High Court, Exhibit V, the cultivation account for 1880, and Exhibit XIII the *hissab* account for 1879, show that from the year 1879 onwards, the plaintiff dealt with the lands as his *kambattam*. The Subordinate Judge's finding must be modified to this extent. As regards the earlier period, discussed by the Subordinate Judge in paragraph 11 of his judgment, Mr. Govindaraghava Ayyar contended that the documents commented upon do not support his finding. I see no force in this argument. Exhibit X, the adangal account of 1868, is against this contention. Whenever land is mentioned as *kambattam* in this account, the zamindar is entered as owner and the person actually cultivating the field under him is entered as being the cultivator. The two entries referred to by the Subordinate Judge fully support this view. With reference to the plaint lands, the zamindar is not entered as owner. Exhibit XVIII,

(1) (1871) N.W.P., H.C.R., 203.

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the landwari account of the plots in 1866, shows the defendant's predecessor as the owner. Exhibit XIX is to the same effect. Exhibits III and XII the accounts for 1867, are of the same character as Exhibits XVIII and XIX: Exhibit XI for the year 1874 which is an account of the seri lands shows that one Korapattai Venkanna was the owner of the plaint lands. Even if we are not prepared to accept the suggestion that this Venkanna was a relation of the defendants, the entry shows that the zamindar was not the owner. The learned vakil for the appellant suggested that the entries in these documents, especially in Exhibit X, may be due to the fact that the person entered as cultivators were let in for the first time by the zamindar. There is no trace of this explanation in the evidence; on the whole, I see no reason to differ from the Subordinate Judge in his conclusion that from 1866 to 1874, the lands were held and enjoyed as seri.

On these facts, the question for determination is whether lands once enjoyed as seri with tenant right can be converted by the zamindar into his *kambattam*. The question is not free from difficulty. The sections that have a bearing upon this point are 3 (10), 6, 8, 181, and 185. Section 3 (10) defines "Private land" The meaning of the word *domain is not given* in the Act. The learned Chief Justice pointed out in the course of the argument that it was synonymous with *Demesne*. In the Encyclopædia Brittanica, volume III, it is explained as follows: *Demesne*—(Demeine, Demain, Domain, etc.), that portion of the land of a manor not granted out in the free hold tenancy, but (*a*) retained by the lord of the manor for his own use and occupation, or (*b*) let out as tenemental land to his retainers or "villani." The demense land, originally held at the will of the lord, in course of time came to acquire fixity of tenure, and developed into the modern copyhold (see Manor) It is from demesne as used in sense (*a*) that the modern restricted use of the word comes, i.e., "land immediately surrounding the mansion or dwelling house, the park or chase." I have no doubt that it is in a similar sense that the legislature has used the expression. The special incidents of such property are that it must have been an appertenance to the general holding, and should have been in the personal occupation of the zamindar. Some indication of its characteristics is to be found in the Fifth Report relating to

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the Madras Presidency. In giving instructions to Collectors regarding the properties to be taken into account in making the permanent settlement with the zamindars, one of the items to be included is thus described:—"All private lands at present appropriated by the zamindars and other landholders to the subsistence of themselves and families, as well as all lands held by private servants and dependants, will be considered as forming part of the Sirkar land, and therewith responsible for the public jumma." This is practically the definition of private land. Ordinarily a private land must have possessed that character from prior to the permanent settlement, except in certain cases, to which I shall refer later on.

Prima facie a jirayati or *seri* land cannot be converted into private land. This view is strengthened by the last explanation to section 6 which lays down that an occupancy right in land is not lost by the tenant becoming the landholder. The character of the holding remains the same whatever may be the change in the position of the owner of it. Then we come to section 8; clause (1) of that section deals with the merger of occupancy right in certain cases. A great deal of argument was directed towards the clause "by transfer, succession or otherwise." I think there can be no doubt that a bare surrender will not come under the expression "otherwise," because a surrender without more does not confer a right to the property. I had to consider this question at some length in *Venkata Sastrulu* v. *Sitaramudu*(1). I adhere to the view I therein expressed that if the surrender has been accepted and acted upon, it would amount to a mode of acquisition and would come under the expression "otherwise." In that view, clause (3) of section 8 will preclude the conversion of a ryoti land the occupancy right in which had become vested in the landholder by an accepted surrender into home farm land. I cannot accede to the contention of Mr. Govindaraghava Ayyar that clauses (1) and (3) contemplate a bare merger without more and that when such a merger has been given effect to by treating the land as home farm land, it will not be obnoxious to the rule enunciated in section 8. Although it may not be competent to Courts to examine the policy underlying an enactment apart from the actual language

(1) (1914) 26 M.L.J., 585.

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employed in the sections it is our duty to give effect to such a policy when they appear clearly from the language employed. The definition section and section 8 leave no doubt in my mind that the legislature demands the strictest proof of a land being *kambattam*. This is made clearer still by section 181 which while enacting that a landholder can allow his private land to be converted into ryoti land makes no provision for the converse case.

The only other section that has to be considered is section 185. There can be no doubt, as pointed out by Mr. Govindaraghava Ayyar that the proviso to that section is not in the nature of an exception. *Mullins* v. *Treasurer of Surrey*(1) lays down that a proviso is in the nature of a substantive rule and should not be treated as an exception to the proposition stated in a section. See also *Maha Prasad Singh* v. *Ramani Mohan Singh*(2). Accepting this position, I think that the first part of section 185 deals with the determination of the question whether a particular field is ryoti or *kambattam*, where nothing is known about its origin. If it was originally ryoti the rule of evidence contained in the first part of section 185 can have no application, because that would practically abrogate the principle enunciated in section 8 clauses (1) and (3). The proviso to the section 185 is really an exception to section 8, clause (3). The object of the proviso is to enable the landlord to say that although the land was seri, he has by his own servants, or by hired labour cultivated the land for 12 years preceding the Act and that consequently it should be regarded as his home farm land. An irrebuttable presumption should be drawn from such a conduct. If one remembers that a home farm land is that which has been ordinarily cultivated personally by the landlord at the outset, the meaning of such a reservation in favour of the landholder will be apparent. This conclusion carries out the scheme of the legislature which seems to be opposed to the augmentation of the private land of landholders, except in the special instance mentioned in the proviso to section 185.

This view receives support from the observations of the learned Judges who decided *Cheekati Zamindar* v *Ranasooru Dhora*(3). The object of the Estates Act is to prevent the

(1) (1880) 5 Q B D, 173. (2) (1914) 27 M L J., 459.
(3) (1900) I.L.R., 23 Mad, 318.

conversion of ryoti land into *kamballam* land which process had been adopted largely since the decision in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1). My conclusion is in accordance with the decision of Mr. Justice AYLING and myself in *Markapulli Reddiar* v. *Thandava Kone*(2); *Narayanasawmi Naidu* v. *Venkatrayudu*(3) decided by SADASIVA AYYAR and NAPIER, JJ., is also to the same effect. The decision of the learned Cheif Justice and Mr. Justice AYLING in *Chintam Reddi Sanyasi* v. *Sri Raja Sagi Appala Narasimha Raja Garu*(4) is not opposed to this conclusion. The land in that case was never ryoti land. It only laid down that private land can come into existence even after the permanent settlement. The proviso to section 185 is intended to enact such a rule.

The decision of the Subordinate Judge is therefore right and this appeal must be dismissed with costs.

S V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt, Chief Justice and Mr. Justice Seshagiri Ayyar.

1914 November 4 and 5 and December 2.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF MALABAR (DEFENDANT), APPELLANT,

v.

A. COCKCRAFT AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Torts—Negligence of servants of the Public Works Department—Suit against the Secretary of State for India in Council for damages, if maintainable—Stacking of gravel on a military road—Making and maintenance of roads—Governmental or sovereign function, nature of—Non-liability of East India Company and Secretary of State for India, for acts done in exercise of sovereign powers—Exceptions—English and American Laws

Plaintiff sued the Secretary of State for India in Council for damages in respect of injuries sustained by him in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a road which was stated in the plaint to be a military road maintained by the Public Works Department

(1) (1870) 6 M.H.C R., 164. (2) Second Appeal No. 275 of 1913.
(3) Second Appeal No 1402 of 1912 (4) (1914) M.W.N, 706

* Appeals Nos. 58 and 59 of 1912,

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employed in the sections it is our duty to give effect to such a policy when they appear clearly from the language employed. The definition section and section 8 leave no doubt in my mind that the legislature demands the strictest proof of a land being *kambattam*. This is made clearer still by section 181 which while enacting that a landholder can allow his private land to be converted into ryoti land makes no provision for the converse case.

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(3) (1900) I.L R, 23 Mad, 318.

road and was not protected by danger light or other signal and it was not possible to avoid the danger, though the plaintiffs' carriage was provided with a light on each side. The plaintiffs sustained thereby severe bodily injuries. The accident was alleged to be entirely due to the gross negligence and carelessness displayed by the servants of the Public Works Department and the plaintiffs claimed different amounts as damages against the Secretary of State for India in Council. The Secretary of State for India in Council admitted the accident but pleaded that the accident was not due to the gross negligence and carelessness of the servants of the Public Works Department, that he was not liable as the work was done by an independent contractor under the Public Works Department, and also that he was not in any way liable for the plaint claim. The learned District Judge, who tried the suit as the Court of first instance, raised several issues with reference to the special allegations made in the pleadings but no issue was raised on the general ground of non-liability of the Secretary of State, which was raised in the written statement of the defendant. The District Judge decided the issues of fact in favour of the plaintiffs and held that the defendant was liable in damages for the accident caused to the plaintiffs in the two suits and awarded a sum of Rs. 250 and of Rs. 1,000 respectively to the plaintiffs in the two suits. Against the decrees in the suits, the defendant (Secretary of State) preferred separate appeals to the High Court.

The Government Pleader for the Crown.

T. Narasimha Ayyangar for the respondent.

WALLIS, C.J. WALLIS, C.J.—These are suits against the Secretary of State for India in Council to recover damages for injuries sustained by the plaintiffs in a carriage accident which is alleged to have been due to the careless stacking of gravel on a road which is alleged in the plaints to be a military road maintained by the Public Works Department. The defendant pleaded a general denial of liability and also among other things that he was not responsible as the gravel was stacked by a contractor under the Public Works Department. No issue was framed as to the general denial of liability even if the facts were as stated in the plaints nor was such a defence pressed at the trial. On appeal, however, it has been contended that the plaints disclose no cause of action and that on this ground the

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suits should have been dismissed and in support of this contention *P. & O.S.N. Co. v. Secy. of State for India*(1) is mainly relied on. I have so recently considered this case in *Ross v. Secretary of State*(2) that I will merely say that though it only decides that the East India Company was liable for the negligent acts of its servants as done in the course of their employment when such acts were done in the conduct by the Company of undertakings which might have been carried on by private individuals without any delegation of sovereign powers yet it is also authority for the position that in respect of acts done by the Company in the exercise of its sovereign powers it could not have been made liable for the negligence of its servants in the course of their employment. The authority of this decision in my opinion is not affected by the cases such as *Farnell v. Bowman*(3) and *Attorney-General of the Straits Settlements v. Wemyss*(4) or such as *Parnaby v. Lancaster Canal Company*(5) or *Mersey Docks and Harbour Board v. Gibbs*(6), because in all these cases the liability of the defendants depended on the terms of a particular statute and was merely a question of construing the statute This test however is inapplicable to the sovereign powers of the East India Company which were not conferred upon it by statute but were derived from the Native Rulers of India, though no doubt held subsequently after some controversy to have been acquired by the Company in trust for the Crown and to be subject to the authority of Parliament. The view taken in the *P. & O.S.N. Co. v. Secy. of State for India*(1) would rather seem to have been that in the exercise of the sovereign powers so acquired the Company was *prima facie* entitled to the immunities of a sovereign. It is however unnecessary to consider the question further in the present occasion and I abstain for doing so. The only question now open seems to be whether the acts complained of can be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons. There is a decision to the contrary of FLETCHER, J., on facts closely resembling the present case in *McInerny v. Secretary of State for India*(7) and apart

(1) (1861) 5 Bom., H.C.R., Appx. I
(2) (1914) I.L.R., 37 Mad., 55
(3) (1887) 12 A.C., 643.
(4) (1888) 13 A.C., 192.
(5) (1839) 11 Ad. & E. 223
(6) L.R. 1 H.L., 93.
(7) (1911) I.L.R., 38 Calc., 797

from authority I have come to the same conclusion. I think the provision and maintenance of roads is one of the functions of Government though in India it is now largely delegated by the statute to Municipalities and Local Boards, just as in England it was imposed first upon the parishes and then on statutory bodies created by Parliament and the case seems to be all the stronger where the road in question is a military road as is alleged in the plaints here. As the point was not taken at the trial the decrees must be reversed and the suits dismissed without costs.

SESHAGIRI AYYAR, J.—The facts of these cases are not in dispute in this Appeal. The plaintiffs' carriage was capsized by one of its wheels running over a heap of gravel carelessly stacked on the road by a contractor under the Public Works Department of the Government of Madras. This road is a military road, and it apparently leads to the barracks where soldiers are quartered The plaintiff sustained injuries. He sues the Secretary of State for India in Council for damages, on the ground that the accident to him "was entirely due to the gross negligence and carlessness displayed by their (the Government's) servants."

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The defendant denied carlessness on his part and the liability to pay damages; several subsidiary pleas relating to contributory negligence, etc., were raised. The learned Government Pleader does not rely on them in this Court.

The District Judge awarded Rs 1,000 as damages in Original Suit No. 17 of 1910 and Rs. 250 in Original Suit No. 21 of 1910. The Government have appealed. It was contended for the appellant that the Secretary of State in Council cannot be sued for a tort committed by any of the servants of the Crown It is necessary to examine the scope and limitations of this contention.

It is true that ordinarily States and Sovereigns are not liable for damages occasioned by the negligence of their officers or of persons employed in their service (6 Halsbury, sections 683 and 8, Encyclopœdia, 472). But this rule has no application to the Secretary of State for India. Under 21 and 22, Victoria, chapter 106, the Secretary of State is under the same liability as the East India Company were subject to. The Judicial Committee of the Privy Council laid down in *Secretary of State for India* v. *Moment*(1) that the extent of this liability has been correctly stated

(1) (1912) 40 I.A., 48

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in *P. & O.S.N. Co.* v. *Secy. of State for India*(1). It becomes necessary therefore to see whether under that ruling the present action could have been maintained against the East India Company. Before dealing with that point I shall clear the ground by pointing out that the analogy of the Crown in England has no application to the Secretary of State. In *Farnell* v. *Bowman*(2), it was pointed out by the Privy Council that subjects of the Empire residing in the Colonies are not restricted in suing the Local Governments to such actions only as found a remedy by the Petition of Right in England. In an earlier case *Hettihewage Siman Appu* v. *The Queen's Advocate*(3), Lord BLACKBURN while holding that a subject of the Ceylon Government was entitled to sue the Governor in the Municipal Courts on a breach of contract intimated that action *ex delicto* would not lie; Sir BARNES PEACOCK in *Farnell* v. *Bowman*(2) points out that this dictum should be read as intreperting the Ceylon Ordinances and not as a general proposition that Colonial Governments are not liable for torts. In *Attorney-General of the Straits Settlements* v. *Wemyss* (4) which was an appeal from the Straits Settlements, it was held by the Judicial Committee that the Crown is liable to pay damages for trespass to immoveable property. It is therefore evident that the principle that the Crown can be sued only for remedies contemplated by the petition of right is confined in its operation to the United Kingdom: and that general liability for torts is dependent upon the law of the particular dominion wherein the action is instituted.

I may also dispose of another objection to jurisdiction on the ground that "Government departments, public officers and servants of the Crown cannot be made liable for the wrongful acts of their subordinates." This rule as pointed out in *P. & O. S.N. Co.* v. *Secy. of State for India*(1) and in *Lane* v. *Cotton*(5) only relates to the personal liability of the officers sued: but where satisfaction can be had from the revenues of the State, this objection cannot prevail; see *Bainbridge* v. *The Postmaster-General*(6) and *Raleigh* v. *Goschen*(7). The main point for consideration

(1) (1861) 5 Bom., H.C.R., Appx. 1.
(2) (1887) 12 A.C., 643.
(3) (1884) 9 A.C., 571.
(4) (1888) 13 A.C., 192.
(5) (1701) 1 Lord Raymond, 650.
(6) (1906) 1 K.B., 178.
(7) (1898) 1 Ch., 73

is whether the present action could have been successfully maintained against the East India Company. We are only concerned with the position of that Company when the India Councils Act was passed. After 3 and 4 William 85, the Company held the British possession in India in trust for the King of England. By section 4 of that Act, the right to carry on business for the benefit of the State was recognised. The monopoly in salt and opium is referred to by Sir BARNES PEACOCK as coming under this section. The Company had therefore two distinctive functions which are even today exercised by the Government of India: In so far as the Company exercised sovereign rights, they are generally exempt from liability to be sued in the Municipal Courts. But with reference to transactions which though carried on for public purposes and for the public benefit are of such a nature as could have been undertaken by private individuals or by a trading Corporation, they are governed by laws regulating private rights and obligations. Even in regard to the exercise of sovereign functions, the immunity is subject to exceptions. As the Chief Justice points out in *Dhakjee Dadajee* v. *The East India Company*(1), "an action of trespass will lie against a Corporation, and especially against the East India Company if, assuming to act in their political capacity, they commit a trespass by having ordered it, or by recognising it when done for their benefit, as much as trespass would lie against the Governor of a Colony, who, assuming to act in his political capacity, should commit a trespass." Another exception is that if the State by its legislature prescribes the limits or conditions under which executive acts are to be performed, a liability may arise for transgressing those limits or conditions. *The Secretary of State for India* v. *Hari Bhanji*(2). Mr. Narasimha Ayyangar suggested another limitation with reference to the observations of the learned Chief Justice in *The Bank of Bengal* v. *The United Company*(3), namely that whenever a State has benefited by the wrongful act of its servants, it is liable to be sued for the restitution of the profit unlawfully made.

The present case is not covered by any of these exceptions. The learned Government Pleader argued that in making roads like the one in question, the Government was acting in its sovereign

(1) (1843) 2 Morley's Digest, 307 (2) (1852) I.L.R., 5 Mad., 273.
(3) (1831) Bignell, 87; s.c., 1 Ind. Dec., 439.

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capacity and consequently came within the exemption recognised in *P. & O.S.N. Co.* v. *Secy. of State for India*(1). The proposition is thus stated in that judgment: "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign or private individual delegated by a sovereign to exercise them, no action will lie." In *Moodalay* v. *Morton*(2) referred to in *P. & O.S.N. Co.* v. *Secy. of State for India*(1), the Master of Rolls has drawn a distinction between sovereign powers and powers exercisable by individuals. The line of demarcation seems to be that in the one case, no question of consideration comes in, whereas the essence of the other is that some profit is secured, or some special injury is inflicted in the exercise of the individual rights. Sir BARNES PEACOCK recognises that it is difficult to determine in individual instances whether the act complained of was done in pursuance of sovereign rights or not. The mere fact that a duty is undertaken in the interests of the public will not make it a sovereign act. It has been decided that corporations entrusted by statute with the execution of public duties and in receipt of tolls or dues for such purposes are liable for acts of negligence on the part of its servants—*Parnaby.* v. *Lancaster Canal Company*(3).

This principle was elaborated in great detail by Justice BLACKBURN in *Mersey Docks Trustees* v. *Gibbs*(4), in delivering the unanimous opinion of the Judges consulted in that case. Lord CRANWORTH (Lord Chancellor) and Lord WESTBURY in accepting the opinion say that the fact that tolls are levied for the public benefit is not an answer to an action for negligence caused by a servant [see also *Cox* v *Wise*(5)]. The position of the East India Company is not very dissimilar to that of the Company whose liability was discussed by Mr. Justice BLACKBURN. At first, I was inclined to think that the present case was covered by that decision. But the Judicial Committee have held that the law was correctly laid down by Sir BARNES PEACOCK in *P. & O.S.N. Co.* v. *Secy. of State for India*(1). In that case, the learned Chief Justice specifically exempts cases in which the sovereign delegates

(1) (186) 5 Bom. H.C.R., Appx. 1.
(2) (1875) 1 B.o., C C, 469; s.c., 28 E.R., 124, at p. 126.
(3) (1839) 11 Ad. & El. 223.
(4) 1 Eng. & Irish App. 93. (5) (1900) L.R.I.Q.B., 711.

to a private individual (a Company will be in the same position) his sovereign powers. Consequently, the only question open for argument is whether in making and repairing the road in question, the Government acted in the exercise of private rights. The cases quoted by Mr. Narasimha Ayyangar in which the Secretary of State was held liable for the negligence of a servant employed in a State railway cannot afford much assistance in this case. A State railway is managed by the Government for commercial purposes, although it secures considerable benefit to the public. I have felt doubts whether the maintenance of the military road is done in the exercise of sovereign functions. The absence of any profit, the securing of the public benefit alone, are some *indicia* of the act having been done in the public capacity. Mr. Narasimha Ayyangar has been unable to draw our attention to any authority which defines sovereign functions. The policing of a province, the constitution and control of the various departments of the State may be instances of the exercise of sovereign rights But where the sole object of the Government in carrying out a project is the public good, and no ideas of profit enter into it, *prima facie*, the business cannot be said to have been done in the discharge of private duties.

As I felt some doubts regarding the correctness of this position, I examined the American Law to find out under what category of duties, the maintenance of roads comes in. It seems clear from the passages I shall refer to, that the laying of roads is a governmental or sovereign function. Questions of this kind are considered in America with reference to the liability of municipal corporations for the negligence of their servants. The right to sue municipal bodies in India may not rest on the same considerations as in America. Much will depend upon the Legislative enactment which has brought these institutions into existence. And as pointed out in *The Secretary of State for India* v. *Hari Bhanji* (1) the measure of exception from liability of boards and municipalities will depend upon how far their powers are defined by the Act constituting them. Apart from these special considerations, the authorities in America indicate definitely and clearly that the maintenance of roads is carried

(1) (1882) I.L.R., 5 Mad., 273.

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on in the exercise of public functions and that consequently negligence in relation to them will not be actionable.

In 28 Encyclopædia at page 834, it is pointed out that there are three modes of establishing a public highway: (a) "by the State in the exercise of its sovereign function," (b) "by the municipality, as its agent," and (c) "by dedication, prescription or statutory proceedings." In the same volume it is stated at page 1340 "In the absence of statutes imposing liability it has been held in some jurisdictions that the duties of a municipal corporation with regard to its streets are governmental and that it is not liable to an individual injured by its failure to keep them in repair or safe for travel." The distinction between public or governmental, and corporate or private duties has been pointed out in *Hart* v. *Bridgeport* (1). Public duties are, in general, those which are exercised by the State as a part of its sovereignty, for the benefit of the whole public and the discharge of which is delegated or imposed by the State upon the municipal corporation. They are not exercised either by the State or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Private or corporate powers are those which the city is authorised to execute for its own emolument or from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the Government for the universal benefit." The citations I have made are applicable to the present case. In the first place, this is not a road maintained by a local board or municipality. Consequently, it is strictly within the exercise of Governmental duties that this road is made and maintained. In the second place, if the position of the East India Company is analogous to that of municipal corporations in America, even then, it is clear that the company will not be liable for the negligence of its servants in failing to keep the road in good repair.

I must hold, therefore, that this case comes under the exception suggested by Sir BARNES PEACOCK in *P. & O. S. N. Co.* v.

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(1) 11 Fed. Cases No. 6, 149.

Secy. of State for India (1). The subject of liability for the negligence of public servants is elaborately discussed by the learned Chief Justice in *Ross* v. *Secretary of State*(2). The question which we have to decide, namely, whether the act complained of in this case was done in the exercise of sovereign powers did not arise for decision in that case. The learned Government Pleader relying on the observations of Sir LAWRENCE JENKINS in *Sivabhajan* v. *Secretary of State for India* (3) and of the learned Chief Justice in the case already referred to contended that as the Executive Government is vested in the Governor in Council by section 56 of 3 and 4 William, Cap. 85, the maintenance of the military road is not a liability incurred on behalf of the Government of India and consequently, the Secretary of State is not liable. For a proper solution of this question, it will be necessary to investigate between the relative powers of superintendence possessed by the Government of India and the Government of Madras in relation to the Public Works Department. We have not sufficient materials before us for that purpose. It would also necessitate an enquiry into the correctness of the concession made by the Advocate-General in *Vijaya Ragava* v. *Secretary of State for India* (4) that the Secretary of State is liable for all illegal acts of the Governor in Council, Fort St. George I do not propose to go into these questions, as I have come to the conclusion on the records before us, that the injury caused in this case was not due to negligence resulting from the exercise of other than sovereign or administrative powers by the Government of Madras. I would therefore reverse the decrees of the District Judge and dismiss the suit.

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SESHAGIRI AYYAR, J

K.R.

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(1) (1861) 5 Bom H.C R Appx 1.
(2) (1914) I.L R, 37 Mad, 55.
(3) (1904) I L R., 28 Bom., 314
(4) (1884) I.L.R, 7 Mad., 466 (F.B)

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Hannay.

1914
November 30 and December 4

THE CROWN PROSECUTOR (APPELLANT IN BOTH), APPELLANT.

v.

P. R. GANAPATHY IYER AND ANOTHER (ACCUSED), RESPONDENTS.*

Madras City Municipal Act (III of 1904), by-law 169—Exposing for sale unwholesome drink (aerated waters)—"Food" in by-law not covering "drink."

The word "food" in by-law 169 framed under the Madras City Municipal Act (III of 1904) which prohibits the exposing or keeping for sale any article intended for human food which is unwholesome or unfit for human consumption does not include "drinks" such as aerated waters.

APPEALS under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the accused by P. NARAYANA MENON, the Fourth Presidency Magistrate, Egmore, Madras, in Calendar Cases Nos. 15569 and 15570 of 1914 on his file.

The facts of the case appear from the judgment.

The Crown Prosecutor for the Crown.

C. V Ananthakrishna Ayyar for the accused in Criminal Appeal No. 549 of 1914.

The accused in Criminal Appeal No. 550 of 1914 neither appeared in person nor was represented by pleader.

AYLING AND HANNAY, JJ.

The judgment of the Court was delivered by HANNAY, J.—In these cases the local Government appeals against an order of acquittal in Calendar Cases Nos. 15569 and 15570 of 1914 on the file of the Presidency Magistrate. In both cases the charge against the accused was that they had exposed for sale aerated waters unwholesome and unfit for human consumption contrary to by-law 169 framed under section 409 (19) of the Madras City Municipal Act (III of 1904), an offence punishable under by-law 177.

By section 409, clause (19) of the Act, the Corporation is authorized to make by-laws to provide for the prevention of the

* Criminal Appeals Nos 549 and 550 of 1914.

sale or exposure for sale of unwholesome meat, fish or provisions; and securing the efficient inspection and sanitary regulation of shops in which articles intended for human food or drugs are kept or sold. The by-law in question (No 169) has evidently been framed with reference to the first part of clause (19), as the second part of that clause relates to inspection and the sanitary regulation of shops.

The by-law is as follows. "No person shall expose for sale or keep for the purposes of sale any article intended for human food which is unwholesome or unfit for human consumption." The decision of the cases before us turns on the question whether word "food" in the by-law includes drink or not. The Magistrate has held that it does not. The learned Crown Prosecutor contends that the word "food" does include "drink' and in support of his contention refers to the definition of "food" given in the Standard and Century Dictionaries, in the English Sale of Food and Drugs Acts and in section 251 of the Bengal District Municipalities Act (III of 1884). Admittedly the word "food" in ordinary parlance would not include "drink" and there is nothing in the dictionaries referred to which would support a contrary view. It is argued, however, that in law the word "food" does include every article used for food or drink by man, other than drugs or water. This, no doubt, is the definition of the term "food" in the English Sale of Food and Drugs Acts (See Halsbury, Volume 15, page 5); but it is evident that that definition was made for the purposes of those Acts and it is so stated in the passage in Halsbury which is above referred to. Similarly with regard to section 251 of the Bengal District Municipalities Act. By that section "food" is defined to include every article used by man for food or drink, except drugs or water. But there again, the definition was introduced into the Act by an amendment in 1886 and has special reference to that Act alone. The fact that it was found necessary to introduce the definition by subsequent amendment of the Act is, of course, a point against the contention of the learned Crown Prosecutor. It is also pointed out by the learned vakil for the accused that the Madras City Municipal Act can hardly be construed by reference to a mufassal Act of Bengal.

There is no definition of the term "food" either in the Madras City Municipal Act, or, apparently in the corresponding Acts

THE CROWN PROSECUTOR v. GANAPATHY IYER.

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in Calcutta or Bombay. The point which militates most strongly against the meaning which the learned Crown Prosecutor seeks to apply to the term "food" is the fact that in the body of the Madras Act itself in several places the words "food and drink" occur, indicating that it was not intended that the latter term should be included in the former (see sections 357 and 358). It is difficult in the face of these sections to hold that the term "food" in the by-law in question does include "drink." It is immaterial for the purposes of these cases that the Magistrate has held that aerated water and lemonade are not "provisions" within the meaning of section 409 (19) as the word "provisions" does not occur in the by-law under which the prosecutions were brought. It may be mentioned that in the dictionaries referred to by the learned Crown Prosecutor the word "provisions" is given as a synonym of "food."

The Municipal Council has special powers with reference to the manufacture of aerated water under section 328 of the Act. Possibly this may have been thought a sufficient safe-guard by the legislature for securing the purity of aerated waters. However that may be, as there is nothing in the Act or by-laws to support the view for which the Crown Prosecutor contends, namely that the term "food" includes "drinks" other than drugs or water, the conclusion at which the lower Court has arrived on that point must be upheld. The acquittals are right and these appeals are accordingly dismissed.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1914.
November 24, 25 and 26 and December 7.

A. C CHIDAMBARA MUDALIAR (PLAINTIFF), APPELLANT IN BOTH,

v.

N. KRISHNASAMI PILLAI AND TWELVE OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Will—Co-executors—Probate obtained by one executor—Subsequent application by the other co-executor for joint probate—Compromise between co-executors—Mortgage of estate by one executor to the other—Renunciation of executorship—Validity of compromise—Action of executor without probate, validity of—Probate and Administration Act (V of 1881), ss 2, 4, 82 and 92, applicability of, to all Hindus—Executor, trustee of charities under the will—Claims of trustee against trust estate—Charge—Suit—Limitation Act (IX of 1908), art. 120—Suit for account and for scheme, against trustee—Right of trustee as defendant to equities in such suit—Decree in favour of trustee as defendant—Civil Procedure Code (Act V of 1908), sec 92

Assuming that an executor is competent in law to compromise the claims of his co-executor against the testator's estate, it is essential that the compromise should be entered into *bona fide* and for the benefit of the estate.

Per WALLIS, C.J —The Probate and Administration Act does not say that section 82 is to apply only to cases of Hindus governed by the Hindu Wills Act, but section 2 provides that Chapters II to XIII which include section 82, are to apply to every Hindu.

Per SESHAGIRI AYYAR, J.—It is not incumbent on an executor of the will of a Hindu to obtain probate before acting as an executor.

Section 82 of the Probate and Administration Act is no bar to an executor acting as a representative of a Hindu testator's estate, because a co-executor had alone obtained probate of the will in his name.

Section 92 of the said Act should be confined to cases where probate is compulsory before dealing with the property

An executor, who was appointed trustee of a charity under a will and who had claims against the estate in respect of his administration, has no charge on the estate in respect of such claims but should bring his suit within six years under article 120 of the Limitation Act. But when a suit was brought against him for an account, if he was under a liability to account to the trust at the date of the suit, he would be entitled to all the equities flowing from the taking of the account and a decree could be passed in such suit in his favour for the amount that might be found due to him from the estate, though a suit by the trustee for the same might be barred by limitation

* Appeals Nos 106 and 107 of 1911

CHIDAMBARA MUDALIAR v. KRISHNASAMI PILLAI.

APPEALS against the decrees of A. RAMASWAMI SASTRIYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suits Nos. 45 of 1908 and 31 of 1909, respectively.

These are two appeals in two suits which were tried together in the lower Court. The first of these suits was brought to recover money on a mortgage-bond executed by the first defendant. The circumstances under which the mortgage-bond was executed were these. The plaintiff and the first defendant were appointed executors under a will, dated 4th January 1897, of a Hindu testator named Nagu Pillai. The plaintiff alone applied for and obtained probate of the will in 1899. In 1901, the first defendant filed an application in the District Court for the issue of a probate to both the executors in supercession of the previous probate and alleged in the petition that the plaintiff had not rendered an account of his administration within one year as required by the Probate and Administration Act. The Court directed the plaintiff to submit his accounts and appointed a Commissioner to examine the same; the Commissioner made a report which was unfavourable to the plaintiff. The plaintiff and the defendant subsequently entered into a compromise under which the first defendant executed a mortgage of the properties of the estate to the plaintiff in satisfaction of certain claims set up by the plaintiff against the estate, and the plaintiff was to renounce his executorship and deliver certain properties belonging to the estate in his possession over to the first defendant. The Court accepted the compromise and passed an order in the probate proceedings in accordance therewith. The plaintiff brought the present suit to recover the amount due on the mortgage executed to him by the first defendant. The defendants contended that the compromise was illegal, that the mortgage was invalid as the first defendant was not competent to execute it under sections 82 and 92 of the Probate and Administration Act, and that the mortgage was not binding on the estate as it was not executed *bona fide* in the interest of the estate. The other connected suit was instituted by two persons under section 92 of the Civil Procedure Code for removal of both the executors who were appointed trustees by the will in respect of certain charities created by the will, and for a scheme and for accounts against the trustees in respect of their administration. One of the defendants-trustees claimed a certain sum of money as due to him

from the estate, but a suit for the same would have been barred by limitation if he had brought a suit therefor; but the trustee as defendant claimed credit for the same as a matter of equity arising out of his liability to account in the suit, and set up also a right to a charge on the estate properties in respect of his claim. The other facts appear from the judgments of the High Court.

Appeal No. 106 *of* 1911.

C. V. Ananthakrishna Ayyar for the appellant.

V. C. Seshachariar and *C. Krishnamachariar* for the first respondent

K. Bhashyam Ayyangar for the second respondent.

C. Padmanabha Ayyangar for the ninth respondent.

S. Srinivasa Ayyangar for the respondents Nos. 10 and 11.

Appeal No. 107 *of* 1911.

C. V. Ananthakrishna Ayyar for the appellant.

S. Srinivasa Ayyangar for the respondents Nos. 1 and 2.

V. C. Seshachariar and *C. Krishnamachariar* for the third respondent.

WALLIS, C.J.

WALLIS, C.J.—These are appeals from a judgment in two suits which were tried together. One was a suit by Chidambara Mudaliar, one of the executors of the deceased Naga Pillai, on a mortgage for Rs. 6,500 executed by the first defendant, another of the executors in favour of four persons, who it is alleged transferred it to the plaintiff. The mortgage, as found by the Subordinate Judge was really executed by the first defendant, as executor of the deceased under his will Exhibit OO *benami* for the plaintiff in the following circumstances: the plaintiff, though it was unnecessary for him to do so, thought proper to obtain probate of the will, Exhibit EE, from the District Court of Trichinopoly and for some time administered the estate under the grant. In January 1901 the first defendant, the son of the deceased who had come of age, presented a petition (Civil Miscellaneous Petition No. 183 of 1901) for the issue of probate to him along with the plaintiff, and alleged therein that the plaintiff had failed to file in Court within one year the accounts required of him as executor under the Probate and Administration Act V of 1881. The plaintiff then filed certain accounts which were referred to a Commissioner by

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APPEALS against the decrees of A. RAMASWAMI SASTRIYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suits Nos. 45 of 1908 and 31 of 1909, respectively.

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ate acts done by him in express disobedience to section 82. Act does not say that this section is only to apply to cases rned by the Hindu Wills Act XXI of 1870, but (section 2) chapters II to XIII which include this section are to apply ery Hindu, and I do not think it is open to us to refuse to y to provisions of the section on grounds of real or supposed ivenience. On the other hand it may be said that the bal- of convenience is in favour of the section being applicable. e is however a more serious objection to the mortgage. ace of the Commissioner's report (Exhibit XI), which must been known to the first defendant, as it was obtained at his nce, the compromise by which the plaintiff's claim against estate for Rs. 6,686 cannot be said to have been entered bona fide in the interests of the estate and would appear to been entered into by the first defendant mainly with the ct of getting the plaintiff to withdraw in his favour from the of executor. It appears not to be free from doubt whether xecutor can enter into a compromise with his co-executor ill. See *Cook* v *Collingridge*(1) and *De Cardova* v. *Cardova*(2), and the strong language of the Court of Appeal; *Fish*(3), as to such settlements between trustees. Assuming ever that a co-executor has such a power as held by EWICH, J., in *In re Houghton*(4), it is essential that the promise should be a bona fide one and I do not think that the promise above referred to can be considered to be a bona fide or in any way binding upon the estate. As regards the r made by the District Judge accepting the compromise, it s not appear that the true facts were then brought to his ice or how, on a petition for the grant of probate to an itional executor, he had jurisdiction to sanction a compromise veen two executors imposing a heavy burden on the estate. vas then contended that the plaintiff was entitled to a charge the estate for the sums found due to him in the account taken the suit. An executor however has only a right of retainer l no charge on properties not in his possession which at one e formed part of the estate—*Peary Mohun Mukerjee* v. *rendra Nath Mukerjee*(5). This case is also authority for the

(1) (1822) Jac. 607, s.c.; L.J. Ch. 74, s c, 23 R.R., 155.
(2) (1879) 4 A.C, 692.
(3) (1893) 2 Ch., 413;
(4) 1904) 1 Ch, 622.
(5) (1910) I.L.R., 37 Calc, 229.

CHIDAMBARA MUDALIAR v. KRISHNASAMI PILLAI — WALLIS, C.J.

position that such a claim by a plaintiff is governed by arti 120 and is therefore barred. I think that the Subordinate Jud should have dismissed the plaintiff's suit on the mortgage a that it must now be dismissed and his appeal must be dismiss with costs throughout. The amount allowed in that suit will allowed in the account taken in the other suit and included that decree.

The connected suit was instituted under section 92 of t Civil Procedure Code with the requisite permission for the remov of the defendant, the plaintiff in the other suit, from the positi of trustee of the charities created by the will, and also prayed f an account against him which was ordered. The account w taken in the connected suit which was tried with this suit, wi the result that a sum of over Rs 200 was found due to tl defendant, and a decree for that amount was given him in th connected suit. There is no appeal against that decree, but th appellant contends that a large sum ought to have been foun due to him and it is urged in reply that, as his claim agains the trust is barred by limitation, no decree can be given by hir in the suit under section 92 of the Code of Civil Procedure fo the amount found due to him on taking the account. We ar unable to agree with this contention. Though the appellant' right to sue is barred his claim is otherwise unaffected and i would not be right to remove him from the office of truste without providing for payment to him in the account which has been taken as between him and the trust at the instance of the plaintiffs, more especially as in the connected suit we have held that the mortgage by which he sought to secure his claim against the estate is not binding on it There is moreover no reason why a decree for the amount found due should not be given against the estate. As regards the particular items I agree with the judgment about to be delivered No order as to costs. The memorandum of objections is dismissed with costs.

Appeal No. 106 *of* 1910.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—One Naga Pillai made a will on the 4th January 1897 and died two days after. The plaintiff in this case was appointed one of the executors. The will provided that the first defendant who was then a minor should be co-executor, after coming of age, with the plaintiff. The testator

after providing for certain legacies, directed the founding of a feeding house. Immediately after his death the genuineness of the will was questioned. The plaintiff applied for probate in the District Court of Trichinopoly. It was opposed, but he succeeding in obtaining an order for its grant in July 1897. There was an appeal against the order to the High Court. The probate was actually granted to him only in November 1899.

The first defendant attained majority in 1897 and, in January 1901, he applied for the issue of a joint probate to himself and the plaintiff in supersession of the one granted to the plaintiff (ZZ): one of the grounds for recalling the original grant is contained in paragraph 8 of the petition which alleged that the plaintiff had not rendered any account of his administration. This petition was opposed by the plaintiff (AAA). The District Judge directed the plaintiff to furnish a detailed account of the estate. On this being done, the first defendant was permitted to state his objections. A commissioner was afterwards appointed to examine the accounts His report is Exhibit XI, dated [illegible] July 1901 This was not favourable to the plaintiff; while its consideration was pending before the District Judge, the plaintiff and the first defendant filed a razinamah (Exhibit PP) in Court, This was accepted by the District Judge on the 22nd April 1902. It was agreed to in this compromise that certain articles in the possession of the plaintiff should be handed over to the first defendant, that the plaintiff should renounce his right to the joint executorship with the first defendant, and that, in consideration of these terms and of the allegation that the plaintiff had spent monies on behalf of the estate, a mortgage on the trust property should be executed by the first defendant in favour of certain nominees of the plaintiff for the sum of Rs. 6,[illegible]. The deed of mortgage was actually executed on the 14th April [illegible], eight days prior to the acceptance of the compromise by the Court, (See Exhibit LL).

Plaintiff now sues on this mortgage to recover from the first defendant personally and on the liability of the mortgaged trust properties the amount due to him. The other defendants are the widow, the daughter's sons, and the alienees of some of the mortgaged properties. The first defendant impeaches the mortgage on various grounds. The principal question for decision in this appeal is whether the mortgage is binding on the trust.

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—
SESHAGIRI AYYAR, J.

Mr. S. Srinivasa Ayyangar argued that an executor is not competent to compromise the claim of his co-executor and that the mortgage is invalid upon that ground. Mr. Anantakrishna Ayyar relied upon the decision of KEKEWICH, J., in *In re Houghton*(1), and argued that a bona fide composition of the claim of a co-executor stands on the same footing as that of a stranger. This case has neither been followed, nor cited with approval in any of the subsequent cases. The learned Judge bases his conclusion upon the decision of the Court of Appeal in *In re New, In re Leaves and In re Morley*(2). I have read that case carefully and I do not find any support for the proposition laid down by KEKEWICH, J., in that case. The point considered related to the jurisdiction of the Court of Chancery to sanction transactions entered into by trustees which were beyond the powers conferred by the deed of trust but which were for the obvious advantage of the *cestui que trust*. Lord Justice ROMER says at page 545, "of course the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate, and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances." I do not think this statement of the law supports the view of KEKEWICH, J. On the other hand, the observations of Sir BARNES PEACOCK in *De Cardova* v. *De Cardova*(3) are distinctly against his view. Moreover, the decision of KEKEWICH, J., was under section 21 of the Trustees Act (56 & 57 Vict., c. 53) of 1893, and the pronouncement regarding common law rights is only an obiter dictum. There is nothing in section 92 of the Probate and Administration Act V of 1881 to enable an executor to compromise the claim of the co-executor. Chapter VI dealing with the powers of an executor is silent on the question. I have therefore

(1) (1904) 1 Ch., 622. (2) (1901) 2 Ch., 534
(3) (1879) 4 A.C., 692.

come to the conclusion that it is not competent under the Act to one executor to compound the claim of his co-executor. Further, in this case, the compromise cannot be said to have been entered into bona fide. I have referred to the circumstances which existed at the time of the razinamah, and they show that the first defendant was anxious to secure powers to himself, and that the plaintiff wanted to get money. Neither of them seems to have had the interests of the trust in his mind. Consequently, if an application were made to a Court to sanction the arrangement, it should have been rejected The recording by the District Judge of the compromise should not be construed as giving his sanction for it.

Mr. Srinivasa Ayyangar also argued that as probate was taken out by the plaintiff, the first defendant had no status as executor until he was recognised as such by the order of the Court on the 22nd April 1902, and that the mortgage of the 14th April was *ultra vires* of his powers. Under section 4 of the Probate Act, the property of the testator vests in the executors. It was pointed out in *In re Pauley and London and Provincial Bank*(1), that the estate of the deceased vests in all the executors and not only in those who have proved the will or acted in the administration of the estate. Further it is settled law that it is not incumbent on an Hindu executor to obtain probate before acting, although there is nothing to prevent him from taking out probate. Under these circumstances, I cannot agree that section 82 of the Act is a bar to the first defendant acting as representative of the deceased, because the plaintiff had alone obtained probate of the will. Section 92 which empowers only persons who have proved the will or taken out administration to act on behalf of all the executors should be confined to cases where probate is compulsory before dealing with the property. The result of acceding to the contention of Mr Srinivasa Ayyangar will be this—whereas if no probate had been taken, every Hindu executor can deal with the property of the deceased, the fact that one of them obtains a probate will compel the executor that has not joined in the original application, to apply himself to the Court, if he wants to exercise the powers vested in him. I do not think the language of sections 82 and 92 of the Probate and

(1) (1900) 1 Ch., 58.

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SESHAGIRI AYYAR, J.

Administration Act compels us to give our sanction to such an anomalous position.

On the view that I have taken that the mortgage deed was not executed bona fide and for the benefit of the estate and that it is not competent to one executor to compromise the claims of his co-executor, this appeal fails and the appeal and the suit on the mortgage should be dismissed with costs throughout.

Appeal No. 107 *of* 1911.

This appeal is connected with Appeal No. 106 of 1911. In the present case two plaintiffs representing the public sued under section 92 of the Code of Civil Procedure for the removal of the two executor trustees appointed under the will of Naga Pillai, for an account of the estate and for settling a scheme. The Subordinate Judge settled a scheme for the management and directed the new trustees to discharge the debts payable to the plaintiff (appellant) in the connected appeal. There is no contest now regarding the scheme. But the first defendant (plaintiff in the connected suit) has appealed claiming larger sums of money than has been decreed to him. The plaintiffs have preferred no appeal against the direction to pay the appellant. Before settling the amount due to the appellant, we have to deal with the objection raised by Mr. Srinivasa Ayyangar that, as the claim of the appellant was barred, he is not entitled to any relief in the suit By Exhibit QQ, dated the 22nd of April 1902, the first defendant ceased to be an executor to the estate of Naga Pillai. It was competent to the Court to revoke the probate granted to him under section 50 of the Probate Act for failure to exhibit an inventory. This was done, but the order says nothing about the right of trusteeship: although for good cause shown, a trustee can be removed from his office, it does not appear that the mind of the District Judge was directed towards this question. Certainly, it was not competent to the co-trustee to purchase the appellant out.

This appellant was a creditor of the estate and he spent his own monies on behalf of the estate. It must be taken that these claims were barred by limitation at the date of the present suit. Mr. Anantakrishna Ayyar's contention is that the appellant has a charge upon the property and has twelve years to enforce that charge under article 132 of the Limitation Act.

This contention is opposed to the decision cited by him—*Peary Mohu Mukerjee v. Narendra Nath Mukerjee*(1). It was pointed out in that case that an executor creditor should bring his suit within six years of the accrual of the cause of action, under article 120 of the Limitation Act. There are numerous Indian and English authorities enunciating the same view. No doubt, if he had the estate in his possession, he might claim a right of retainer and might claim a lien upon it. This was laid down in *Trevor v. Hutchins*(2), *In re Rhoades*(3) and *Pulman v. Meadows*(4). But the appellant had no property of the trust in his possession at the time of the suit. Consequently if he filed a suit for the amounts due to him, he would have been barred by limitation Does the fact that an account is claimed against him enable him to get a decree for monies actually due? Mr. Srinivasa Ayyangar contended that this is in the nature of a cross claim by the appellant and that he is not entitled to a decree. The question is not covered by any authority It is true that the remedy to recover the money is barred by limitation. As was pointed out by Mr. Justice PENTIFEX in *Nursing Doyal v Hurryhur Saha*(5): "If the creditor had a lien on the goods of his debtor on a general account, he would be entitled to hold the goods for a debt, the recovery of which was barred by the Limitation Act." I think this principle extends to all cases where there is liability to account whether there is a subsisting lien or not. As I said before, the appellant has not been shown to have ceased to be a trustee, and under section 92, he is liable to be called upon to render an account. He cannot escape liability on the ground that he was not administering the estate from April 1902. If he was under this liability at the time of the suit, he is in equity entitled to the monies that he may be found to have spent on behalf of the trust. I have been able to find only one case as having any bearing on the present discussion and that is *McLaren v. Public Trustee, In re Robinson*(6). In that case one of the *cestui que trust* was wrongly overpaid by the executor. In dealing with the claim made by the other *cestui que trust* for recovering it, WARRINGTON, J., held that the suit was barred by

(1) (1910) I.L.R., 37 Calc, 229. (2) (1896) 1 Ch., 844.
(3) (1899) 2 Q B., 347 (4) (1901) 1 Ch., 233.
(5) (1880) I.L R, 5 Calc, 897. (6) (1911) 1 Ch., 502.

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SESHAGIRI AYYAR, J.

limitation, but pointed out that in an administration action the bar of limitation will be of no avail. The principle of the decision seems to be that although the remedy by suit may be barred, so long as the right to account subsists between the parties, limitation cannot be pleaded to defeat the adjustment which the right to account gives. In analogy of this case, I hold that as the appellant was under a liability to account to the trust at the date of the suit, he was entitled to all the equities flowing from the taking of the account. The liability should not be separated from the right. Moreover, the plaintiffs in this case have not objected to the decree which has been given in appellants' favour for a portion of the amount sued for and the reasoning of *Kandasamy Chetty* v. *Annamalai Chetty*(1), which precludes the agitation of a question in partial bar of a claim applies I would therefore disallow the respondent's contention.

The appellant is entitled to the payment of the amount decreed from out of the corpus of the trust estate.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1914. December 9, 10 and 15.

VENKATACHALAM CHETTY (FIRST DEFENDANT), APPELLANT,

v.

A. N. R. M. NARAYANAN CHETTY AND SIX OTHERS (PLAINTIFF NOS. 1 TO 5 AND DEFENDANTS, NOS. 4 AND 5), RESPONDENTS.*

Limitation Act (IX of 1908), art 89—Agent's liability to principal, suit on—Limitation—Agency, termination of—Indian Contract Act (IX of 1872)

Money is moveable property within the meaning of article 89 of the Limitation Act.

Asghar Ali Khan v. *Khurshed Ali Khan* (1902) I L R, 24 All, 27 (P.C.), followed.

Article 89 applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run

(1) (1905) I L R., 28 Mad., 67

* Appeal No. 184 of 1914.

when the account is, during the continuance of the agency, demanded and refused, or, when no such demand is made when the agency terminates.

An agency is determined when the agent ceases to represent the principal though his liability in respect of acts done by him as agent may continue.

Babu Ram v. *Ram Dayal* (1890) I.L.R., 12 All., 541 and *Fink* v. *Buldeo Dass* (1899) I.L.R., 26 Calc., 715, dissented from

Jogesh Chandra alias Dhali Ghose v. *Benode Lal Roy* (1909) 14 C.W.N., 122, not followed.

APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Rāmnād, Madura, in Original Suit No. 145 of 1910.

The facts of the case appear from the judgment of WALLIS, C.J.

C. S. Venkatachariar, *K. Bhashyam Ayyangar* and *A. Srinivasa Ayyangar* for appellant.

C. V. Ananthakrishna Ayyar and *K. V. Krishnaswami Ayyar* for respondents Nos. 1 to 5.

M. N. Duraisuami Ayyangar for the sixth respondent.

WALLIS, C.J.

WALLIS, C.J.—The first defendant was employed by the plaintiffs, a firm of Nattukottai Chettis of Devakotta in the Rāmnād district to carry on business at certain places in Burmah as their agent under the terms of a document, Exhibit A, known as a salary chit executed by the first defendant on his appointment. By this he undertook to carry on the business under the direction of the first plaintiff, and stipulated that on bringing back the cash and accounts to Devakotta and rendering the same he was to get back the salary chit. It is explained that in the case of these agents the return of the salary chit means that the agent has passed his accounts and that his conduct has been satisfactory The present suit is brought by the plaintiffs for an account of his dealings, and the question is whether it is barred by limitation. The first defendant continued to represent the plaintiffs in Burmah after the expiry of the three years originally agreed upon, and the plaintiffs who were dissatisfied with his conduct had some difficulty in getting rid of him as appears from the correspondence. As early as the 24th November 1906, they wired to him to give the keys, accounts, and a power to the fourth defendant who was to succeed him, and at length on the 2nd March 1907, having executed a power of attorney in favour of his successor apparently with a view to facilitate the collection of debts owing to the firm, he handed over charge to

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his successor, who gave him Exhibit IV, a signed receipt, and a list of outstandings which were stated to have been checked, and also apparently, Exhibits G and G-1 (certain further particulars) signed by his successor, which he subsequently handed over to the plaintiffs at Devakotta.

He then received a sum of Rs. 200 for his travelling expenses and for sweets and other presents to be purchased for the principals. According to the evidence taken in Commission for the plaintiffs, Exhibit VIII (*a*), this sum was not given as a loan, but he could do what he liked with it. It is customary to pay such sums to agents when they are returning. It is not very easy to reconcile this with the earlier statement made by the witness that if any surplus remained, it was to be handed over to the principal or an account rendered. On his arrival at Madras on the 19th March 1907, the first defendant wrote Exhibit H and wired Exhibit H-1 to the plaintiffs announcing his arrival and stating that he was coming in two days. According to the evidence for the plaintiffs he came later and handed over Exhibits G and G-1, but he never accounted for his agency or got back his salary chit.

The question then is, whether in these circumstances the suit is barred. It is now well settled that money is moveable property within the meaning of article 89 of the Limitation Act. That article applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run "when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when *the agency terminates*." The first defendant in the present case relies on the termination of the agency. Under section 201 of the Indian Contract Act an agency is terminated, among other ways, by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the business of the agency being completed, and it is from this point. Under article 89 that time is to begin to run in a suit by the principal for money received or not accounted for. Under section 218 of the Indian Contract Act the agent is no doubt bound to pay the principal the sums received on his account, but it cannot be said that until he does so, the agency is not determined because the business of the agency is not completed, for the terms of article 89 necessarily involve that

the agency may be terminated before the payment is made. I am therefore, with great respect, unable to agree with the observations to that effect in *Babu Ram* v. *Ram Dayal*(1) and *Fink* v. *Buldeo Das*(2), which do not seem to have been necessary for the decision as there were other grounds for holding that the agency had not been determined. The better view appears to be that the agency is determined when the agent ceases to represent the principal though his liability in respect of acts done by him as agent may continue.

Article 89 was worded in its present form for the first time in the Act of 1877, but in *Hurrinath Rai* v. *Krishna Kumar Bakshi*(3), a case under Act IX of 1871, their Lordships of the Judicial Committee observed that whether article 60 or article 90 or article 118 of that Act applied, time must be counted from the day when the defendant ceased to discharge the duties of diwan by departing from the plaintiff's service. That was a case of termination of the agency by the agent renouncing the business of the agency within the meaning of section 201 of the Indian Contract Act. The present would appear to be an equally clear case of termination of the agency under section 201 of the Indian Contract Act by the principal revoking his authority and the agent handing over charge to his successor. I think that on the facts set out above his agency was determined before he left Burmah and that as the suit was instituted more than three years later it is barred if article 89 applies.

It is said, however, that under Exhibit A the first defendant was bound to return to Devakotta, hand over the money and accounts and pass his accounts, and that article 89 is inapplicable as there was an express agreement that the first defendant should pass his accounts on his return. The plaintiffs rely on a decision in *Jogesh Chandra* alias *Dhala Ghose* v. *Benode Lal Roy*(4) that where there was a definite contract to render an account yearly, article 115 and not article 89 would be the article applicable in the case of unregistered contracts. This case proceeded to some extent on the authority of a decision in *Mati Lal Bose* v. *Amin Chand Chattapadhay*(5) that in the case of a contract in writing

(1) (1890) I.L.R., 12 All., 541. (2) (1899) I.L.R., 26 Calc., 715.
(3) (1887) I.L.R., 14 Calc., 147. (4) (1909) 14 C.W.N., 122.
(5) (1902) 1 C.L.J., 211.

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registered article 89 does not apply, but article 116. The authority of the latter decision has been doubted in *Shib Chandra Roy* v. *Chandra Narain Mukerjee*(1) and *Hafezuddin Mandal* v. *Jadu Nath Saha*(2), and it is not in my view conclusive of the present case.

As regards the present question, it seems to me that the agent's contract to account to his principal, whether express or implied, is specially provided for in article 89 and if that be so, it cannot, having regard, to the language of article 115, be brought under that article. I am therefore unable with great respect to follow the decision in *Jogesh Chandra* alias *Dhala Ghose* v. *Benode Lal Roy*(3) and hold that the suit was barred and that the appeal must be allowed, and the suit dismissed with costs throughout.

The memorandum of objections is not pressed and is dismissed.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree with the learned Chief Justice. The suit is by the plaintiffs, the principals for an account against the first defendant the agent. The subordinate judge disbelieved the plea that the accounts were finally rendered and passed a preliminary decree for the taking of accounts. Mr C. S. Venkatachari for the first defendant in the appeal argues that the suit is barred by limitation.

With great reluctance, I have come to the conclusion that the contention is well founded. I do not see my way to holding that either article 115 or 120 of the Limitation Act applies to this case, as contended for by Mr. C. V. Anantakrishna Ayyar for the respondents Nos.1 to 5. Article 115 is the residuary article relating to contracts, and applies only where there is no special provision relating to contracts Article 120 is the general residuary article. On the other hand article 89 in terms provides for an account respecting moveable property received by the agent from the principal. The Judicial Committee have laid down in the *Asghar Ali Khan* v *Khurshed Ali Khan*(4), that money is moveable property within the meaning of this article. The suggestion of the learned vakil for the respondents Nos 1 to 5 that as the account claimed by the principal related to monies

(1) (1905) I.L.R., 32 Calc., 719.
(2) (1908) I.L.R., 35 Calc., 298.
(3) (1909) 14 C.W.N., 122.
(4) (1902) I.L.R., 24 All., 27 (P.C.).

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SESHAGIRI AYYAR J.

lent out by the agent on his behalf and which are still unrealised the present claim is not for moveable property received from the principal, ignores the fact that the outstandings are part of the original advance made by the plaintiff to the defendant and of its augmentation. It was also contended that as Exhibit A provided for the rendering of the account at Devakottah on the return of the agent from Burma, the agency did not terminate till that was done. I am unable to accept this contention. Under section 201 of the Contract Act, an agency is terminated by the principal revoking his authority, or by the business of the agency being completed. In this case, the plaintiffs sent a telegram on the 24th November 1906 to the first defendant to hand over to one Muthiah the accounts (Exhibit VII). On the 18th December 1906, he asked the agent to start immediately (Exhibit VI B). A similar communication was sent on the 20th December 1906 (Exhibit VII A). On the 2nd of March 1907, first defendant handed over the accounts to Muthiah and started for Madras. I am of opinion that the agency terminated on this date, and as the suit was instituted more than three years after this date, it is barred by limitation.

The decisions in *Babu Ram* v. *Ram Dāyal*(1) and *Fink* v. *Buldeo Dass*(2) do not affect this conclusion It was held in those cases that until an agent for the sale or purchase of goods pays the sale-proceeds or delivers the purchased property to the principal, the agency does not terminate. This rests on the ground that the business is not completed with the effecting of the sale, or purchase, because it is the essence of an agency in such cases that the sale-proceeds or the property purchased should be handed over to the principal.

It is said that the first defendant took Rs. 200 as passage money for which he had to render an account. There may be a separate accountability for this sum, but this is no part of the business carried on in Rangoon for which the defendant was constituted the agent It is in evidence that the agent came to Madras and handed over some accounts to the plaintiffs at Devakottah. That fact will not have the effect of intercepting the termination of the agency. The business on which the first defendant was engaged was completed when he handed over

(1) (1890) I.L.R., 12 All., 541 (2) (1899) I.L.R., 26 Calc., 715.

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the accounts to Muthiah. That was done in obedience to the order of the plaintiffs' in that behalf thereby revoking the agency. The first to fifth respondents' vakil relied on *Jogesh Chandra* alias *Dhalu Ghose* v *Benode Lal Roy*(1), for the position that when there is a special contract fixing a date for the rendering of the accounts, the article applicable to suits by principals against agent is 115 and not article 89. The fixing of a date for rendering accounts cannot stop the termination of the agency. The authority relied upon in *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy*(1) has been dissented from by MACLEAN, C.J., in *Hafezuddin Mandal* v *Jadu Nath Saha*(2). Mr. Justice MOOKERJEE in *Shib Chandra Roy* v. *Chandra Narain Mukerjee*(3), held that article 89 would apply to a case like the present. I am therefore constrained to hold that the suit is barred by limitation.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr Justice Hannay.

1914 December 10 and 15

GANDI RAMASWAMI (SECOND DEFENDANT), APPELLANT,

v

PURAMSETTI PEDAMUNAYYA AND SEVEN OTHERS (PLAINTIFFS, NOS 1 to 6 AND FIRST DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 2, cl (11), O XXII, r 1—Legal Representative—Survival of right to sue—Daughter's suit for possession of father's estate—Death of daughter—Right of father's heirs to continue suit.

Pending a suit by a daughter to recover possession of her father's property as his heir, from strangers whom she alleged to be trespassers, the plaintiff (daughter) died In an application by the grandsons of the deceased plaintiff's father's brother as his heirs to continue the suit, *Held* (1) that the right to sue survived within the meaning of Order XXII, rule 1, Civil Procedure Code (Act V of 1908), and (2) that the applicants were her legal representatives within the meaning of section 2, clause (11) of Civil Procedure Code.

Premmoyi Choudhrani v *Preonath Dhur* (1896) I.L.R., 23 Calc., 636 and *Rikhai Rai* v *Sheo Pujan Singh* (1911) I.L.R., 33 All., 15, followed

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(1) (1909) 14 C.W.N., 122. (2) (1908) I.L.R., 35 Calc., 298

(3) (1905) I.L.R., 32 Calc., 719.

* Second Appeal No 776 of 1913.

RAMASWAMI v. PEDANU-NAYYA.

SECOND APPEAL against the decree of F. A. COLERIDGE, the acting District Judge of Kistna, in Appeal No. 164 of 1912, preferred against the decree of S. NILAKANTAM PANTULU, the Additional District Munsif of Masulipatam, in Original Suit No 313 of 1910.

The facts of the case appear from the judgment.

V. Ramadas for the appellant.

V. Ramesam for the respondents Nos. 1 to 5.

AYLING AND HANNAY, JJ.

The following JUDGMENT of the Court was delivered by HANNAY, J.—The suit out of which this Second Appeal arises was brought by one Peramma to establish her right to certain inam land and to recover possession after ejecting the defendants. Her case was that the suit property belonged to her father Bapulu, that after his death her mother Venkamma enjoyed the land and that on Venkamma's death, the plaintiff became entitled to the land as daughter of Bapulu but that the defendants prevented her from taking possession.

The defendants alleged that Bapulu had made over the land to one Rattam, the husband of the third defendant, to do the Inam service for him over fifty years before suit, and that their family had held the land and done service ever since.

The plaintiff Peramma died pending the suit and the plaintiffs Nos. 2 to 5 were then brought on record as being her legal representatives The plaintiffs Nos 2 to 5 are the grandsons of Bapulu's brother. Both the lower Courts on the merits have given a decree in favour of the plaintiffs Nos 2 to 5 and it is conceded by the present appellants that on the findings of fact arrived at by the lower Courts the decree in favour of the plaintiffs Nos. 2 to 5 cannot be impeached. They contend, however, that upon the death of Peramma, the suit abated and that the plaintiffs Nos. 2 to 5 could not be added as legal representatives of the deceased Peramma or continue the suit, as they claim, not as legal representatives of Peramma but as reversioners of the last male holder, i.e., Bapulu. The lower Appellate Court relying upon the cases *Premmoyi Choudhrani* v. *Preonath Dhur*(1), *Rikhai Rai* v. *Sheo Pujan Singh*(2), *Tribhuwan Sundar Kuar* v. *Sri Narain Singh*(3) and *Mussamut Parbutty* v. *Mussamut Higgin*(4), held that the plaintiffs Nos.

(1) (1896) I.L.R., 23 Calc., 636.
(2) (1911) I.L.R., 33 All., 15.
(3) (1898) I.L.R., 20 All., 341.
(4) (1872) 17 W.R., 475.

RAMASWAMI v. PEDAMUNAYYA.

AYLING AND HANNAY, JJ.

2 to 5 were rightly added as plaintiffs and the question for determination is whether that decision is correct or not.

This point involves the determination of the questions whether the right to sue survived after the death of Peramma and whether the plaintiffs Nos. 2 to 5 are her legal representatives.

The appellants rely upon *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(1), *China Veerayya* v. *Lakshminarasamma*(2) and *Arunachalam* v. *Vellaya*(3). The first two cases were suits by presumptive reversioners on their own behalf to set aside a widow's alienation. On the death of the plaintiff in each case, it was held that the right to sue did not survive to the next reversioners. In the former case, it was decided that the right to sue in such cases was a personal right and that such suits could not be treated as representative suits, reversioners who are not actual parties to such litigations not being bound by the adjudications thereon.

This decision was followed in the latter case *China Veerayya* v. *Lakshminarasamma*(2). *China Veerayya* v. *Lakshminarasamma*(2) is authority for the view that for the purposes of deciding the question whether the right to sue survives or not, there is no distinction between suits to set aside an adoption and suits to set aside an alienation. It was there held that the right to sue to set aside an adoption would not survive after the death of the mother of the last male owner, who was the plaintiff in the suit, notwithstanding that [as held in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(4)] an adjudication in such a suit would have been binding on the other reversioners, if there had been a fair trial, for the rights of the reversioners remain, subject to the rule of law laid down in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(4).

The respondents contend that these rulings do not conclude the points for determination in this case, as they relate to declaratory suits whereas the present is a suit for possession.

Premmoyi Choudhrani v. *Preonath Dhur*(5) and *Rikhai Rai* v. *Sheo Pujan Singh*(6) relied upon by the lower Appellate Court, clearly support the view that in suits such as the present

(1) (1904) I.L.R., 27 Mad., 588.
(2) (1914) I.L.R., 37 Mad., 406, s.c., 22 M.L.J., 375.
(3) (1912) 23 M.L.J., 719
(4) (1906) I.L.R., 29 Mad., 390 (F.B.)
(5) (1896) I.L.R., 23 Calc., 636.
(6) (1911) I.L.R., 33 All., 15.

the right to sue survives to the reversioners, who are the legal representatives of the widow for the purposes of such suits, although they do not claim title through her but only as reversioners of the last male owner. These two cases are referred to in *China Veerayya* v. *Lakshminarasamma*(1). It was observed as regards *Premmoyi Choudhrani* v. *Preonath Dhur*(2), that it could not be reconciled with the Madras Cases relating to declaratory suits upon the question of the survival of the rights to sue, etc., on the ground that the claim there was to recover possession of property. *Rikhai Rai* v. *Sheo Pujan Singh*(3) was also distinguished on the ground that it was a suit for possession. We think that these cases are not in conflict with the Madras cases relied upon by the appellants on the ground of distinction given in *China Veerayya* v. *Lakshminarasamma*(1). In this connection, the respondents rely upon the observations in *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(4). There is no analogy between the case of widows and other qualified female holders entitled to present possession of property and the case of reversioners, presumptive or otherwise, whose rights are absolutely contingent. The vested right to the estate and possession in the case of the former renders it necessary and proper to invest them with the right to bind those who may come in succession to them by any adjudication duly made in litigation to which they were parties. Upon this basis the line of reasoning adopted in *Premmoyi Choudhrani* v. *Preonath Dhur*(2) appears to be entirely applicable here upon the question of the survival of the right to sue. Upon the second point also, viz., whether in the circumstances of this case, the plaintiffs Nos. 2 to 5 are the legal representatives of the deceased Peramma, that case as well as *Rikhai Rai* v. *Sheo Pujan Singh*(3) are fully in point. The widow sued in a representative capacity as representing the estate which would after her death go to the succeeding heirs and as found by both the lower Courts, the plaintiffs Nos. 2 to 5 are the persons on whom the estate has devolved on the death of Peramma. The plaintiffs Nos. 2 to 5 therefore fall within the terms of the definition of a legal representative contained in section 2 (11) of the present Civil Procedure Code.

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(1) (1914) I.L.R., 37 Mad., 406, s.c., 22 M.L.J., 375.
(2) (1898) I.L.R., 23 Calc., 636
(3) (1911) I.L.R., 33 All., 15.
(4) (1904) I.L.R., 27 Mad., 588.

RAMASWAMI v. PEDANDNAYYA. —— AYLING AND HANNAY, JJ.

2 to 5 were rightly added as plaintiffs and the question for determination is whether that decision is correct or not.

This point involves the determination of the questions whether the right to sue survived after the death of Peramma and whether the plaintiffs Nos. 2 to 5 are her legal representatives.

The appellants rely upon *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(1), *China Veerayya* v. *Lakshminarasamma*(2) and *Arunachalam* v *Vellaya*(3). The first two cases were suits by presumptive reversioners on their own behalf to set aside a widow's alienation. On the death of the plaintiff in each case, it was held that the right to sue did not survive to the next reversioners In the former case, it was decided that the right to sue in such cases was a personal right and that such suits could not be treated as representative suits, reversioners who are not actual parties to such litigations not being bound by the adjudications thereon

This decision was followed in the latter case *China Veerayya* v. *Lakshminarasamma*(2). *China Veerayya* v. *Lakshminarasamma*(2) is authority for the view that for the purposes of deciding the question whether the right to sue survives or not, there is no distinction between suits to set aside an adoption and suits to set aside an alienation It was there held that the right to sue to set aside an adoption would not survive after the death of the mother of the last male owner, who was the plaintiff in the suit, notwithstanding that [as held in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(4)] an adjudication in such a suit would have been binding on the other reversioners, if there had been a fair trial, for the rights of the reversioners remain, subject to the rule of law laid down in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(4).

The respondents contend that these rulings do not conclude the points for determination in this case, as they relate to declaratory suits whereas the present is a suit for possession.

Premmoyi Choudhrani v. *Preonath Dhur*(5) and *Rikhai Rai* v. *Sheo Pujan Singh*(6) relied upon by the lower Appellate Court, clearly support the view that in suits such as the present

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(1) (1904) I.L.R., 27 Mad., 588.
(2) (1914) I.L.R., 37 Mad., 406, s.c., 22 M.L.J., 375.
(3) (1912) 23 M.L.J., 719.
(4) (1906) I.L.R., 29 Mad., 390 (F.B.)
(5) (1896) I.L.R., 23 Calc., 636.
(6) (1911) I.L.R., 33 All., 15.

Dictum in Guda Coopoosamier v. Soondarammall (1913) I.L.R., 33 Mad., 167, approved.

VELLAYAN CHETTY v. MAHALINGA AIYAR.

AYLING AND SESHAGIRI AYYAR, JJ.

PETITION praying that the High Court will be pleased—

(1) to rehear Appeal No. 235 of 1911 filed against the decree of S. MAHADEVA SASTRIAR the acting temporary Subordinate Judge of Ramnad, in Original Suit No. 75 of 1910 after bringing the legal representatives of the deceased second respondent in Appeal No. 235 of 1911 on the file of the High Court, Madras,

(2) to bring on record the names of the respondents herein as the legal representatives of the deceased second respondent in the abovesaid appeal,

(3) to appoint Alagia Sundaram Pillai as guardian *ad litem* of the minor second and third legal representatives of the deceased second respondent in the abovesaid appeal, and

(4) to bring on the record of the abovesaid appeal the name of Chellam Aiyar as the assignee of the decree in Original Suit No. 36 of 1908 on the file of M. MUNDAPPA BANGERA, the Subordinate Judge of Trichinopoly.

The facts appear from the judgment.

The Honourable Mr. *F. H. M. Corbett*, the Advocate-General and *T. Rangaramanujachariar* for the petitioner.

K. V. Krishnaswami Ayyar for the respondent.

The following JUDGMENT of the Court which was delivered by SESHAGIRI AYYAR, J. :—

Civil Miscellaneous Petition No. 1792 of 1914

This is an application by the appellant for an order to rehear the appeal under the following circumstances :—

Two days before the appeal came on for hearing, the second respondent had died. Neither the appellant's vakil nor the vakil who filed a vakalat on behalf of the second respondent was aware of this. The appeal was heard and we delivered judgment dismissing it with costs. The legal representatives of the second respondent do not ask us to hear the appeal on the ground that they have been prejudiced by the disposal of the case. The learned Advocate-General who appears for the appellant on the present occasion contends that the judgment passed without bringing the legal representatives of the deceased respondent on the record is a nullity and should be set aside. The question involved is one of considerable importance

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ATLING AND SESHAGIRI AYYAR, JJ.

regarding practice. We have come to the conclusion that the appellant has no claim to a rehearing of the appeal. Under the Code of Civil Procedure, the death of one of the defendants (the same rule applies to respondents) does not abate a suit. Under Order XXII, rule 4, clause (3), it is provided that if the legal representative of the deceased defendant is not brought on the record within the time limited by law, the suit shall abate against such defendant, thereby indicating that the suit can proceed against the other parties on the record. Further if a defendant has not been served owing to the default or neglect of the plaintiff, it is open to him to elect to abandon the suit as against the unserved defendant and to proceed to trial with the suit as against the other. The law also makes provision for the legal representatives of a deceased defendant themselves applying to be brought on the record under certain circumstances. The object of these various provisions is to ensure that no party shall be prejudiced by a hearing in his absence. No rule of law has been quoted to us which enables a party who has had the benefit of a full hearing to take advantage of the absence of a party on the record. The dictum of BENSON and SANKARAN NAIR, JJ., in *Goda Coopooramier* v. *Soondarammall*(1), is against such a contention. All the decided cases are reconcileable with the principle that it is only a party who has not been heard that can claim a rehearing on the ground that he has been prejudiced. The reasoning in *Janardhan* v. *Ramchandra*(2) may appear at first sight to point the other way. The statement that under section 571 of the old Code the Courts are bound to hear both the parties is not conclusive of the point. *Janardhan* v. *Ramchandra*(2), *Monee Lall* v. *Kazee Fuzul Hossein*(3) and *Ramacharya* v. *Anantacharya*(4) are all cases in which the party prejudiced was granted a rehearing.

The rules of practice in England on which our Code is based are to the same effect. The decision of BOWEN, L.J., in *Duke* v. *Davies*(5) lends strong support to the view we have taken. The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned;

(1) (1910) I.L.R., 33 Mad., 167.
(2) (1902) I.L.R., 26 Bom., 317.
(3) (1870) 14 W.R., 337.
(4) (1897) I.L.R., 21 Bom., 314.
(5) (1893) L.R., 2 Q.B., 260

and that any disposal of the case, notwithstanding the death of one of the parties will be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

VELLAYAN CHETTY v. MAHALINGA AIYAR.

AYLING AND SESHAGIRI AYYAR, JJ.

In the interests of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. The affidavit in this case does not say in what manner the appellant was prejudiced in the conduct of the appeal before us by the fact that the second respondent was dead at the time. We must decline to rehear the appeal. The petition will be dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr Justice Tyabji.

1915. February, 2

RAMASAMI MOOPPAN (PLAINTIFF), APPELLANT,

v.

SRINIVASA IYENGAR (SECOND DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O XXI, rr. 46 and 54—Attachment of usufructuary mortgagee's right under Order XXI, rule 54 and not under rule 46, illegal—Sale, consequent, invalid.

Attachment of the interest of a usufructuary mortgagee in a certain property should be in the manner provided by Order XXI, rule 46, Civil Procedure Code, for the attachment of a debt and not in the form provided for the attachment of immoveable property. Where, therefore, there was an attachment of the usufructuary mortgagee's right in the manner prescribed for attachment of immoveable properties and the mortgagor who did not receive from Court any order prohibiting him from making payment of the usufructuary mortgage debt discharged the same by payment and obtained from the mortgagee a release of his rights some time prior to the actual sale thereof in Court auction,

Held, that the sale of the mortgagee's right in Court auction was invalid and that the purchaser acquired nothing by the purchase as against the mortgagor who had redeemed the mortgage by payment.

The fact that on the date of the payment the mortgagee could not have got a personal decree against the mortgagor for the payment of the mortgage debt on account of limitation, is immaterial as limitation does not put an end to the debt and does not prevent the mortgagor and mortgagee from paying and receiving the mortgage amount.

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* Second Appeal No. 1601 of 1913.

RAMASAMI MOOPPAN v. SRINIVASA IYENGAR.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 474 of 1912, preferred against the decree of P. G. RAMA AYYAR, the District Munsif of Tiruvadi, in Original Suit No 6 of 1912.

One Govinda Row who was the owner of the suit properties usufructuarily mortgaged the same for Rs. 4,450 to one Saminatha Chetty in 1892. The mortgage was redeemable on 12th April 1898. Govinda Row's interest in the equity of redemption was purchased by one Muthiyan Chetty in Court auction on 17th February 1898. Muthiyan Chetty conveyed his interest in the equity of redemption to the plaintiff in April 1911. After the death of Saminatha Chetty the first defendant in the case who was a creditor of Saminatha Chetty, the usufructuary mortgagee, brought a suit in 1904 for the recovery of his debts against Chidambaram Chetty, the son of Saminatha Chetty, and having got an order for attachment before judgment got the usufructuary mortgagee's interest attached on 14th August 1904. The attachment was effected under section 274, old Civil Procedure Code, corresponding to Order XXI, rule 54, new Civil Procedure Code, in the manner provided for attachment of immoveable properties. After getting a decree the first defendant got the usufructuary mortgagee's interest sold to him in Court auction on 6th December 1911 First defendant having died, his son the second defendant, was brought on the record as his legal representative. Long after the attachment Chidambaram Chetty sold his mortgagee's interest to one Kandasami Mooppan in 1910, and plaintiff paid Kandasami Mooppan the mortgage amount and got a release from Kandasami Mooppan of his rights on 2nd October 1911, and obtained possession. Thus after the attachment before judgment and before the sale in Court auction of the usufructuary mortgagee's right the mortgagor's successor in interest, namely, the plaintiff, paid the mortgage amount and redeemed the property. After such redemption and after getting an adverse order on his claim petition he brought this suit for a declaration of the invalidity of the attachment and the sale to the first defendant. Both the lower Courts dismissed the suit holding that the attachment of the mortgagee's interest as immoveable property and its subsequent sale were good. Thereupon plaintiff preferred this Second Appeal.

S. Muthiah Mudaliyar for the appellant.—The attachment of the usufructuary mortgagee's interest as immoveable property under section 274, old Civil Procedure Code, corresponding to Order XXI, rule 54, the new Civil Procedure Code, is invalid. The attachment must have been as of a debt under section 268 of the old Civil Procedure Code, corresponding to Order XXI, rule. 46. Then alone there will be a prohibitory order restraining the debtor from paying the creditor. The decisions in *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly*(1) and *Chullile Peetikayil Nammad* v. *Othenam Nambiar*(2) are in my favour, the latter of which relates to the method of attaching a usufructuary mortgagee's interest. Having no knowledge of the attachment, my client paid the mortgage amount and redeemed the mortgage and he was thus prejudiced by the procedure adopted. *Manilal Ranchod* v. *Motibhai Hemabhai* (3), is distinguishable as there the mortgage was a purely usufructuary mortgage without any liability to pay and the Court treated the case as if there was no debt payable by the mortgagor to the mortgagee. In this case there was a covenant to pay.

C. V. Ananthakrishna Ayyar for the respondent.—A mortgagee's right is an interest in immoveable property and a usufructuary mortgagee's right must be attached only as immoveable property. Moreover the creditor can elect to attach the mortgagee's right either as a debt or as an immoveable property. Notice of the attachment on the land is notice to all the persons interested in the land including the creditor and the debtor. Moreover the right to recover the mortgage amount personally was barred on the date of attachment and this case is exactly similar to *Manilal Ranchod* v *Motibhai Hamabhai*(3). At the most this kind of attachment was only an *irregularity* and the plaintiff who acquired the interest in question only subsequent to the attachment cannot plead the invalidity of the attachment; see section 64, Civil Procedure Code. The invalidity of an attachment is not a thing that can be pleaded after sale and grant of a sale certificate. *Noordinkutty* v. *Kunhi Bana*(4), *Balakrishna* v. *Masuma Bibi*(5) and *Velayutha Muppan* v. *Subramaniam Chetty*(6).

(1) (1914) I.L.R., 37 Mad., 51. (2) (1914) 27 M.L.J., 239
(3) (1911) I.L.R., 35 Bom., 288. (4) (1912) M.W.N., 879.
(5) (1882) I.L.R., 5 All. 142 at p. 157 (P.C.). (6) (1912) 24 M.L.J., 70

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AYLING AND TYABJI, JJ.

(to which one of us was a party) is relied upon by the plaintiff. In our opinion there is no conflict in the ratio decidendi of each of these cases *Manilal Ranchod v. Motibhai Hemabhai*(1) proceeded on the assumption that on the true construction of the deed then before the Court, there was no debt which the mortgagee was entitled to recover at the time of the attachment; and consequently a person who claimed to have acquired from the mortgagee a right which the mortgagee himself did not possess, could not claim to be put in possession of property as collateral security for a debt which did not exist. Where in accordance with the document the mortgagee cannot claim to recover any debt from the mortgagor nor the mortgagor claim to make any payment to the mortgagee it would seem that the attachment of the rights arising under such a document cannot take the form containing in Order XXI, rule 46 of the Code of Civil Procedure (section 268 of the Code of Civil Procedure, 1882); for that form consists of prohibitions from making and receiving payments: it would be meaningless to prohibit persons from making and receiving payments when their relationship is such that no payments are contemplated. On the other hand the decision in *Chullile Peetikayil Nammad v. Othenam Nambiar*(2) proceeds on the basis that where there is a debt payable by the mortgagor the fact that the mortgagee is in possession of the land does not the less make it a debt, nor is the mode of attachment of such debt affected by the collateral security for such debt, even though that security may take the form of possession of the property.

We have therefore to determine in this case first whether there was any debt which ought to have been attached as such; and secondly whether in failure of any such attachment, the payment on which the plaintiff relies can be considered to have transferred the mortgagee's rights to him.

The mortgage in question was no doubt usufructuary. It however provided for redemption on 12th April 1898; and the mortgagor promised to the mortgagee "we shall pay to you the principal of the mortgage amount and we shall redeem the said lands clear of sirkar teervai. Further after discharging (the loan) as above, we shall get back the mortgage deeds and

(1) (1911) I.L.R., 35 Bom., 283. (2) (1914) 27 M.L.J., 239

other documents, eight in number, which we have obtained and given to you. Should we "fail to pay you the principal of the usufructuary mortgage amount on the said due date, we shall, on your demanding it of us within the 1st of the month of Chittrai in any year pay you the said amount and redeem the mortgage." At the time of the attachment therefore, viz., on 14th August 1904, the mortgagor had already become bound to repay the mortgage debt, and had in any case a right to pay it and to demand possession of the mortgaged property. Hence it is clear that there was such a right to receive payment, if it was offered, as could have been attached, and if the attaching creditor desired that the payment should be made to him he should have obtained an order of the Court prohibiting the mortgagor from making the payment to the mortgagee: section 268 of the Code of Civil Procedure, 1882.

Secondly (as the learned pleader for the appellant forcibly pointed out in argument) if the attachment be taken to be that of the mortgagee's collateral security by way of being in possession of immoveable property till his debt is paid, then assuming that the attachment was valid the attaching creditor acquired merely that precarious interest in immoveable property by attaching under section 274 of the Code of Civil Procedure, 1882; and the defendant cannot claim to have any right to be in possession of the property (for that is all the right that he can claim) as security for a debt which has now been paid off.

It was contended for the defendant that there could not be said to be a debt capable of being attached, as the mortgagee's personal rights had become barred, at the date of the attachment. But assuming that at the date of the attachment the mortgagee could not have obtained any relief on his mortgage-deed except possession of the property, it does not affect the mortgagor's right to pay off the mortgagee and to obtain possession of the property nor the corresponding right of the mortgagee to receive payment prior to giving up possession. These reciprocal rights were not barred by limitation and the attachment could not affect them

The appeal will therefore be allowed. The suit will be remanded to the Court of first instance for disposal on the other issues. Costs will abide the result.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1915. February 16, 18, 19 and March 19.

SRI RAJAH ROW VENKATA MAHIPATHY GANGADHARA RAMA ROW BAHADUR (PLAINTIFF), APPELLANT IN APPEAL No 141, BUT RESPONDENT IN APPEAL No. 142 OF 1912

v

SRI RAJAH VENKATA KUMARA MAHIPATHY SURYA RAO BAHADUR GARU, RAJAH OF PITTAPUR (DEFENDANT), RESPONDENT IN APPEAL No 141 AND DEFENDANT IN APPEAL No. 142 OF 1912.*

Hindu Law—Impartible zamindari—Maintenance of junior members—Basis of the right—Coparcenary right or community of interest by birth, not the basis—Relationship to holder of the zamindari, necessary—Provision for maintenance—Agreement with junior member, construction of—Adoption by zamindar—Subsequent bequest of zamindari—Suit for maintenance against legatee—Denial of relationship with legatee—Suit, not maintainable.

The plaintiff's father was adopted by the zamindar of Pittapur who died in 1890 leaving a will bequeathing all his properties including the zamindari which is an impartible estate, to the defendant who claimed also to be the natural son of the testator The late zamindar had entered into an agreement with the plaintiff's father in 1882 whereby he agreed to pay him Rs. 1,500 a month and a lump sum of Rs 6,000 a year The will confirmed that arrangement. The plaintiff's father sued to recover the zamindari from the defendant, denying that the latter was the natural son of the late zamindar and also impugning the validity of the will. The suit was finally dismissed by the Privy Council on the ground that the will was valid. The plaintiff brought the present suit to recover maintenance from the defendant from 1902 when he ceased to be maintained by his father. The plaintiff did not admit that the defendant was the natural son of the late zamindar or that he and the defendant were members of an undivided family The defendant contended that a junior member of the family of the holder of an impartible zamindari was not entitled to claim maintenance from the holder, and that the suit was not maintainable by reason of the agreement with the plaintiff's father and the will of the late zamindar and on the ground that the plaintiff did not claim any maintenance as a member of the defendant's family.

Held, that the arrangement made by the late zamindar with the plaintiff's father was not a provision for the maintenance of the latter and all his descendants, and did not operate to bar the plaintiff's claim.

* Appeals Nos. 141 and 142 of 1912.

A junior member of the family of the holder of an impartible zamindari is entitled to maintenance only on account of his relationship to the holder and not on account of any coparcenary interest in the property or community of interest therein acquired by birth.

Held (on the facts of the case), that, as the plaintiff did not advance any claim based on relationship but refused to admit any relationship with the defendant, his claim for maintenance could not be sustained.

That, as there was no community of interest in the property, it was not burdened with his claims in the hands of the defendant who was the legatee under the will.

APPEALS against the decree of A. SAMBAMURTI AYYAR, the temporary Subordinate Judge of Rajahmundry, in Original Suit No. 19 of 1911.

These are two connected appeals arising out of a decree in a suit brought by the plaintiff to recover maintenance from the defendant, who is the present zamindar of Pittapur, which is an impartible zamindari descending by lineal primogeniture. The plaintiff's father was adopted by the previous zamindar who died in 1890, leaving a will by which he bequeathed all his properties including the zamindari to the defendant who also claimed to be the *aurasa* (natural) son of the late zamindar. The plaintiff's father sued, as the adopted son, to recover the zamindari from the defendant, denying the relationship of the defendant as the *aurasa* son of the late zamindar and also impugning the validity of the will of the late zamindar. The suit was finally dismissed by the Privy Council on the ground that the will was valid. The late zamindar had entered into an agreement in 1882 with the plaintiff's father by which he agreed to pay him an allowance of Rs 1,500 a month and a lump sum of Rs 6,000 per annum. The plaintiff in the present suit did not admit that the defendant was the *aurasa* (natural) son of the late zamindar but refused to admit any relationship with the defendant. The plaintiff alleged that his father refused to support him from 1902, and claimed to recover past and future maintenance from the defendant as the present holder of the zamindari. The defendant contended that a junior member of an impartible zamindari was not entitled to claim maintenance from the holder of the zamindari, and further that the plaintiff's suit was not maintainable by reason of the agreement executed by the late Raja (zamindar) with the plaintiff's father, and that

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the plaintiff could not recover maintenance from him as he was a legatee under the will of the late Raja and as maintenance was not a charge on the property so as to be attached to the property in the hands of a legatee under a will of the late zamindar. The Subordinate Judge held that the plaintiff was entitled to maintenance and decreed past and future maintenance to be paid by the defendant and made future maintenance a charge on the property. Both parties appealed against the decree of the Subordinate Judge. The material portion of the deed of agreement between the plaintiff's father and the late zamindar, referred to above, was as follows:—

"Know all men by these presents that I, Rajah Row Vencate Mahipati Gangadara Rama Row Bahadur, Rajah of Pittapuram in the District of Godavary, do solemnly execute this bond in favor of my adopted son, Rajah Row Vencatsuriya Mahipati Rama Krishna Row Bahadur. Whereas in consequence of certain private misunderstandings which have recently arisen between us you have demanded and I have agreed to give you out of the income of the Zemindary the sum of Rupees one thousand and five hundred a month for your maintenance and a gross sum of Rupees six thousand a year for all festivals and other special ceremonies in your family and a house at Cocanada to reside in, I hereby covenant to pay you out of the income of the Zemindary the sum of Rupees one thousand and five hundred on the first day of each month at the Bank of Coconada beginning with the first day of April one thousand eight hundred and eighty-two, and I further covenant to pay you the sum of six thousand Rupees in every year,"

K. Srinivasa Ayyangar, A Krishnaswami Ayyar and *A. Suryanarayaniah* for the appellant.

S. Srinivasa Ayyangar, P Narayanamurti and *S. V. Padmanabha Ayyangar* for the respondent.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—These are appeals from the decree of the Subordinate Judge, Rajahmundry, directing the defendant the Raja of Pittapur to pay to the plaintiff the sum of Rs. 46,250 for maintenance

The zamindari of Pittapur is an impartible estate descending by lineal primogeniture but otherwise governed by the Mitakshara law. The plaintiff's father was adopted by the late

zamindar who died in the year 1890, having executed testamentary instruments disposing of all his properties in favour of the defendant who also claims to be the natural son of the testator. The late Raja had previously entered into an agreement with the plaintiff's father in 1882 whereby he had agreed to pay him Rs. 1,500 per month and a lump sum of Rs. 6,000 a year. The will confirmed that arrangement. On the death of the Raja the plaintiff's father sued to recover the zamindari denying that the defendant was the late Raja's natural son, and also, the validity of the will. But the suit was finally dismissed by the Judicial Committee on the ground that the will was valid.

The plaintiff claims maintenance from 1902 when he ceased to be maintained by his father. It will be noticed that the plaintiff does not admit that the defendant is a natural son of the late Raja and that himself and the defendant are members of an undivided family.

The defendant contended that the plaintiff, a junior member of a family of the holder of an impartible zamindari is not entitled to any maintenance from the holder, as the zamindari is not joint property; that, if it is, on account of the agreement, Exhibit III and the will referred to and also on the ground that the plaintiff does not claim any maintenance as a member of his family, the suit must be dismissed.

The Subordinate Judge decided that the zamindari must be treated as joint family property and the plaintiff has got therefore a legal right to be maintained out of the zamindari. He was also of opinion that such right was independent of and not derived through the father.

On the second question, conceding that a Hindu father has the right to represent his descendants in obtaining a provision for himself and his posterity, the Subordinate Judge held that Exhibit III was not an arrangement which was intended to include the allowance due to the plaintiff also. He also held that even if the arrangement under Exhibit III is held to enure to the benefit of the grantee during his life time, it was not intended to include within its scope all the descendants of the plaintiff's father even during that limited period. As to the rate of maintenance, he held that Rs. 250 per month plus Rs. 50

zamindar who died in the year any separate maintenance as mentary instruments disposing in Exhibit III. It is true that he defendant who also clair ered into between the plaintiff's estator. The late Raja xing the amount payable to him, greement with the plaint father had also to maintain the greed to pay him Rs. 1 who had been born before the date of s. 6,000 a year. Th have been taken into consideration and e death of the have been settled accordingly. But if the mindari den d to claim maintenance from the Raja the tural son, naturally vary from time to time. He would, ally di arriage in 1904, require a higher amount than in 1882, e will of the agreement.

Th ibit III, as we have already pointed out, does not be the plaintiff's father either as the managing member aintif branch or as the guardian of his children then in exist- e lat In certain cases that the father represented his branch an sons may be presumed, but this is not one of such cases. Th the plaintiff nor his brother are referred to in the a ent. It may be open to the defendant to modify the titl nent, Exhibit III, if he has to pay separate maintenance not plaintiff. But the question cannot affect the plaintiff's chi We disallow this contention.

It was then argued that the plaintiff is only entitled to main- nance from the joint family estate and as according to the ntiff's claim he and the defendant are not members of a joint aily, he is not entitled to any maintenance out of the estate in e hands of the defendant.

Before the decision of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari*(1), the junior members were held entitled to aintenance on the ground that the impartible zamindari was joint family estate like any other partible estate in which they d co-parcenary interest, with the single exception that it uld be held only by one member of the family on account of e impartible character of the holding. Joint family property d co-parcenary property were assumed to be the same under e Mitakshara law. In *Sartaj Kuari* v. *Deoraj Kuari*(1), it was ld that the co-parcenary interest which is acquired by a

(1) (1888) I.L.R., 10 All., 272 (P.C.)

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member of a joint family by birth under the Mitakshara law is so connected with the right to partition that it does not exist where there is no right to partition, and that communty of interest, therefore, did not exist as partition could not be enforced. At the same time their Lordships stated, that for purposes of maintenance and succession the estate should be treated as joint family estate though there was no such interest in the property as would entitle a member to object to an alienation by the holder for the time being. Subsequent to this decision, the question has been raised in this Court very often, whether the property is not for that reason the sole property of the Zamindar and the junior members can be said to have any interest in it so as to entitle them to any maintenance or on their succession to the zamindari to deny their liability to pay the debts of their predecessor. The decisions upheld the right of the junior member to maintenance. The ground of decision was that for this purpose they must be taken to be members of a joint family. In *The Udayarpalayam case*(1), the High Court gave a decree for maintenance as the estate was found to be impartible and this decision was confirmed by the Judicial Committee though the question whether a junior member is entitled to any maintenance does not appear to have been argued before their Lordships. In all the cases decided by this Court or the other Courts in India, in which the junior member's claim for maintenance has been upheld, the right was held to exist on the ground that he was a member of a joint family. According to the plaintiff, the plaintiff and the defendant are not members of a joint family. The plaintiff is not, it is argued, therefore entitled to any maintenance out of the estate. It is argued on the other side that at the time of his birth he was the grandson of the then holder of the estate and his right to maintenance therefore cannot be defeated by an alienation subsequently made by that holder in favour of the defendant. Or in other words, it is urged that the sons of the plaintiff's father born subsequent to the vesting of the zamindari in the defendant may not be entitled to any maintenance out of the estate, but the plaintiff's right subsists. If the plaintiff's maintenance was a charge on the estate, if he had any

(1) (1901) I.L.R., 24 Mad., 562.

interest in the zamindari before its alienation, then the plaintiff might be entitled to recover it. But the question is, if the plaintiff's claim was only a right to recover maintenance from the holder for the time being, and his maintenance was not a charge on the estate though it may have to be paid out of the ncome of the estate and with reference to it, whether, then the plaintiff would be entitled to enforce it against the estate in the hands of an alienee who is not admitted by the plaintiff to belong to his family. Before the decision in *Sartaj Kuari* v. *Deoraj Kuari*(1), the question could not arise. We have therefore to consider the grounds of that decision. In that case the High Court of Allahabad laid down the law in the following terms :—" It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition, are merged in or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to *preserve for them a kind of dormant co-ownership.*" That is, the High Court decided that the right to maintenance was due to a kind of dormant co-ownership which is subordinated to the title of the individual member to hold the estate. This was the proposition which came before the Judicial Committee for consideration. Referring to the various cases in which an impartible zamindari was treated by their Lordships in their previous decisions as common family property or joint family property, the Judicial Committee said that all such statements were only made with reference to the questions then in issue, that is the right of succession or right to maintenance, and they declared the law in these words: " This is a clear opinion that though an impartible estate may be, for some purposes, spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist." It is quite clear that the plaintiff is not therefore a co-parcenor. They further held that the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with a right to partition "*that it*

(1) (1888) I.L.R., 10 All 272 (P.C.).

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does not exist where there is no right to it." Accordingly the plaintiff has no acquired any interest by birth. The right to maintenance therefore cannot be a right which arises out of the co-parcenary interest in the property or which arises out of any community of interest acquired by birth.

The property is, however, joint family property in the sense of the younger brother's taking "such rights and interests in respect of maintenance and possible rights of succession as belong to a junior member of a raj or other impartible estate descendible to a single heir." If the impartible zamindari is joint family property for purposes of maintenance, is not the right of maintenance, which has been upheld by the decisions of this Court evidence of community of interest? Their Lordships held otherwise. This appears to be clear from a reference to the Hunsapore case and the Dayabhaga law. Referring *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*(1), their Lordships said that though the estate was governed by Mitakshara law and had descended by family usage and custom according to the rule of primogeniture subject to the burden of making allowances to the junior members of the family for maintenance, yet, the right to get maintenance was not evidence of any community of interest which the members of the family acquired by birth. With reference to the Dayabhaga law, they say: "In Bengal there is joint family property, but where property is held by the father as its head, his issues have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases and they cannot demand a partition. The sons have no ownership while the father is alive and free from defect. Upon his death, the property in the sons arises and with it a right to partition Dayabhaga, Chapter I." This shows that in the opinion of their Lordships property may be called *joint family property*, though the junior members may have no ownership in the same at all during the life-time of the holder for the time being. Their Lordships also point out that the father may alienate the property. The purchaser takes it without any obligation to maintain the sons. That their Lordships use the term joint family property in a peculiar sense, not in the ordinary acceptation of those words, is not a reason for disregarding

(1) (1867) 12 M.I.A., 1.

their opinion. That opinion was necessary to support the conclusion therein arrived at. A junior member of the family of the holder of an impartible zamindari is therefore entitled to maintenance only as in a Dayabhaga family on account of his relationship and not on account of any interest in the property. The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship. His claim cannot be sustained on that ground. As there was no community of interest, the property is not burdened with his claim in the hands of a donee. In this view the plaintiff's claim fails. We reverse the decree and dismiss the suit with costs throughout.

OLDFIELD, J.—*I have had the advantage of reading my learned* brother's judgment and have nothing to add to it as regards Exhibit III and the effect on plaintiff's claim of any settlement with his father. There remains the wider question whether that claim is sustainable by him in virtue of his position as a junior member of the Pittapur family.

As set out in my learned brother's judgment, plaintiff has, for motives which are easily intelligible, refused to rely on any relationship between himself and defendant, the present zamindar. Defendant must therefore for the purpose of the case be regarded as an alienee of the estate, who acquired it after plaintiff's birth. The questions in general terms are therefore whether (1) a junior member of a family has a right to maintenance from an impartible estate held by its head, (2) that right is acquired at birth and runs with the estate after its transfer to a stranger.

The learned pleader for defendant reserved his right to argue the first of these questions elsewhere, if necessary, and confined himself to the second. I understand him by taking that course to have conceded provisionally that the junior member's right existed, but to have admitted nothing as to its nature or basis, which could involve its binding the estate in the hands of an alienee. Plaintiff supported his claim as founded in one way only, on the validity of a proposition, which he contended for as settled law:—That members of a joint family, whose property is impartible, are entitled to maintenance from that property, in whosesoever hands, during their lives, because they cannot claim shares in it on division. It is not

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to discuss its merits at length. The contention is however in effect firstly that, because a junior member of a Mitakshara family cannot, when the property is impartible, derive advantage from his membership in the ordinary way, he is on that account entitled to derive it in another, not ordinarily authorized by Hindu Law. It is next that he can do so by way of receipt of a maintenance, although the case in which a right to maintenance is recognized by the texts, are those of illegitimacy or other disqualification personal to the claimant and in no way depend on the nature of the property. Both positions seem to me open to question and I should in the absence of direct authority hesitate to adopt them.

In these circumstances plaintiff, having failed to show that he acquired a right to maintenance from the impartible estate by birth, must fail. I observe that his claim has been based on his *membership of a Mitakshara family and his consequent* acquisition of a right in its impartible property and could be dealt with only, on that basis. It has not therefore been open to us to consider his claim as based on custom, either as regards the Pittapur estate or impartible estates in general in this Presidency, although, if it had been put forward on the latter basis, the instance of recognition of the right to maintenance afforded by the reported decisions might have been important evidence in his favour. In the result, I concur in my learned brother's judgment, dismissing the suit with costs.

K.R.

PRIVY COUNCIL.*

JAMNA BAI SAHEB MOHITAI AVERGAL (DEFENDANT No. 2),

v.

VASANTA RAO ANANAD RAO DHYBAR (PLAINTIFF),

and

VASANTA RAO ANANAD RAO DHYBAR (PLAINTIFF)

v.

SETHURAM SAHEB (DEFENDANT No. 1).

TWO APPEALS CONSOLIDATED.

1916
March 13
and 21.

[On appeal from the High Court of Judicature at Madras.]

Civil Procedure Code (Act XIV of 1882), sec 462—Compromise of suit on behalf of minor made without obtaining leave of the Court—Liability of other party to a joint bond so executed as part of the compromise.

A compromise made on behalf of a minor without having complied with the requirements of section 462 of the Civil Procedure Code, 1882, as to obtaining leave of the Court, is not enforceable against the minor. The fact that a joint bond executed as a part of the compromise was not enforceable against the minor, did not absolve the other obligee from liability

APPEAL No. 111 of 1913, being two appeals consolidated, from a decree (29th July 1910) of the High Court at Madras, varying a decree (19th January 1906) of the Subordinate Judge of Tanjore.

The suit arose out of claims to the estate of one Sakharam Saheb who survived his children and died in 1895 leaving property moveable and immoveable valued at several lakhs, to which three claims were made. One Chota Raja claimed as a surviving co-parcener alleging adoption by the son of the deceased. Jamna Bai and Sethuram, defendants in the present suit, denying the alleged adoption claimed under a will of the deceased which the Registrar who had seen the testator about the time he must have made it, refused to register, and the present plaintiff Vasanta Rao, the great-grandson of the deceased, denying both the adoption and the will, claimed as under an

* Present LORD SHAW, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

intestacy. All these claimants except Jamna Bai were minors, and in the litigation which followed were represented respectively by their guardians and next friends. The will was never proved, and seemed to be unsupported by any evidence, but Chota Raja assented to a decree declaring that it was genuine in consideration of which Jamna Bai and Sethuram (the devisees under the will) consented to a decree that he should have half of the estate, and these claimants agreed to bear in equal shares all the costs incurred in resisting any claims put forward by third parties adversely to them, and to meet in equal shares any such claims decreed against them.

Vasanta Rao's suit was No. 2 of 1896 and the defendants were (among others) the abovementioned claimants. The schedules annexed to the plaint enumerated most of the properties of the deceased, other than some of the moveable properties which were in the possession of the Collector, and the properties scheduled were placed in the possession of a receiver appointed by an order, dated 26th August 1896. In order to induce Vasanta Rao to withdraw his suit it was proposed that Rs. 90,000 should be paid to him by the claimants under the will, Sethuram receiving a moiety of that sum from Chota Raja. Vasanta Rao's guardian and next friend accepted these terms, and money bonds were executed for the respective sums, and the suit was dismissed by consent, and Chota Raja, Jamna Bai and Sethuram were put into possession by the receiver of the scheduled properties of the deceased which were in his charge.

The form of the bond which was dated 16th June 1897 was: "We the executants hrb y agree and bind ourselves to conjointly pay to you Vasanta Rao Rs. 90,000 in consideration of your withdrawing suit No. 2 of 1893 now pending in the District Court of Tanjore in which you claim to be heir and legal representative of the deceased Raja Sakharam Saheb of Tanjore and in consideration of your giving up all rights in the estate and properties of the said Sakharam Saheb. We further agree to pay the said amount within 3 months from the date of our taking delivery of the moveable and immoveable properties of the said Raja Sakharam as scheduled in the aforesaid suit, now under the management and custody of the receiver"

Vasanta Rao having received no consideration for the withdrawal of his suit except some small sums on account of interest, instituted, on 6th April 1904, by his next friend the

present suit to recover the principal and interest due on the bond for Rs. 90,000 *against Sethuram (represented by the* guardian who had executed it on his behalf) and Jamna Bai.

The main defence was that the bond was invalid for want of the sanction of the Court under section 462 of the Code of Civil Procedure, 1882.

The facts of the case will be found fully stated in *Sethuram Sahib* v. *Vasanta Rao*(1) where the judgment of the Subordinate Judge (who made a decree against both defendants) and that of the High Court (Sir ARNOLD WHITE, C.J., and AYLING, J, who affirmed the decree against Jamna Bai, and dismissed the suit as against Sethuram) are set out.

On this, appeal.

De Gruyther, K.C., and *E. B. Raikes* for Jamna Bai the appellant in the first appeal, contended that the bond sued upon was invalid and void as having been part of an agreement of compromise which had not received the sanction of the Court under section 462 of the Civil Procedure Code, 1882, and therefore was voidable as against the minor who had avoided it by pleading that defence. There was consequently no contract to pay the sum sued for The obligation to pay could only continue, if the claim of Vasanta Rao has been given up which is not the case if the compromise was not enforceable. From the form of the bond it should be treated and construed as being one indivisible contract. Under the compromise there was, it was submitted, no personal liability on Jamna Bai to pay but only a liability to pay out of the estate when he obtained possession of it. The whole basis of the compromise was that Jamna Bai and Sethuram *should be jointly liable for the sum* now sued for, and Jamna Bai never intended or agreed to become solely or separately liable for the amount which, under the circumstances, would be inequitable. The parties to the compromise should be remitted to their rights before the compromise was made Reference was made to *Manohar Lal* v. *Jadunath Singh*(2), *Ganesha Row* v. *Tuljaram Row*(3) and *Subramanian Chettiar* v. *Rajeswara Dorai*(4).

(1)
(2) (1906) I L R., . .
(3) (1913) I L.R.,
(4) (

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One of two joint promisors could not be compelled to perform the whole of the promise; the liability was joint: there is in fact "an express agreement to the contrary," under section 43 of the Contract Act. Reference was made to *Kendall* v. *Hamilton*(1). [*Sir Erle Richard, K.C.*, referred to Pollock on Contracts (Edition 1913), page 233.] When the minor avoided the contract Jamna Bai was released. *Ellesmere Brewery Company* v. *Cooper*(2), *King* v. *Hoare*(3), *per* Baron PARKE and *Underhill* v. *Horwood*(4) *per* Lord ELDON. It was also contended that the suit was premature, as the whole of the property had not come into the possession of Sethuram and Jamna Bai at the date of the institution of the suit. As to this the Courts below had put a wrong construction on the words "as scheduled in the aforesaid suit," in the bond sued upon.

Sir H. Erle Richards, K.C., and *Kenworthy Brown* for Vasanta Rao (the respondent in the first appeal, and appellant in the second), contended that under the circumstances of the case section 462 had been wrongly applied by the High Court. The Court was aware that the parties were minors, and that they were properly represented before it. [Lord SHAW said that the sanction of the Court would nevertheless be necessary.] *Manohar Lal* v. *Jadunath Singh*(5) was a case where there was a confession of judgment, and it was distinguishable from the present case. [Sir JOHN EDGE. In that case Lord MACNAGHTEN held that the Court should have been expressly informed that one of the parties to the compromise was a minor.] The sanction of the Court, it was submitted, was practically and sufficiently given to the compromise. See *Virupakshappa* v. *Shidappa*(6). The minor in any event should not be allowed to avoid the bond unconditionally, and the plaintiff was, it was contended, entitled to a charge on the property in the hands of Sethuram for the amount claimed, or at any rate for the amount of the bond for Rs. 45,000 executed in his favour on the compromise. As to the form of relief to be given, the plaintiff was entitled to a decree in a form which would preserve his rights against

(1) (1879) L.R., 4 A.C., 504 at p. 516. (2) (1896) 1 Q.B., 75 at p. 82.
(3) (1844) 13 M. & W., 494 at p. 504. (4) (1804) 10 Ves. Jun., 209 at p. 223
(5) (1906) I.L.R., 28 All., 586, s.c., L.R., 33 I.A., 128.
(6) (1902) I.L.R., 26 Bom., 109.

Jamna Bai. He should be put as far as possible into the same position as if the compromise had not been made. The fact that the joint bond was not *enforceable against* Sethuram did not release Jamna Bai. Both Courts below had held that the suit was not premature.

Sir W. Garth for Sethuram (the respondent in the second appeal) was not called upon.

Dr. Gruyther, K.C., replied.

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The judgment of their Lordships was delivered by Sir LAWRENCE JENKINS.—These appeals arise out of a suit on a money bond of the 16th June 1897, expressed to be executed to the present plaintiff Vasanta Rao, by the defendant Sethuram Saheb, "represented by his grandmother and guardian," and by the defendant Jamna Bai.

Sethuram was then a minor and this was apparent on the face of the bond. The substantial question, *therefore, now in* dispute is whether Sethuram is under a personal obligation to pay the plaintiff the amount he claims, and if not, whether this furnishes Jamna Bai with an answer to the suit. The plea that the suit is premature has no real value. It does not touch the merits, and both Courts agree that the objection is not well-founded. This view is in accord with the meaning placed by the defendants themselves in their written statements on the phrase in the bond which is decisive of this point, and their Lordships see no reason to doubt its accuracy. This plea therefore fails. On the more important question the two Courts are not in complete agreement. The Subordinate Judge passed a decree against both defendants. The High Court on appeal upheld the decree against Jamna Bai, but dismissed the suit against Sethuram. This has led to the two present appeals. Though the circumstances connected with the passing of the bond are intricate, the real issues involved in the suit are simple. To establish Sethuram's liability the plaintiff relies on section 462 of the Code of 1882. But even if compliance with the terms of this section would have established the claim against Sethuram —a point on which no opinion is now expressed—this in no way helps the plaintiff, for the requirements of the section have not been observed in protection of Sethuram. The High Court, therefore, rightly held him not liable to the plaintiff under the bond. But this furnishes Jamna Bai with no answer to the

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plaintiff's claim against her. Stripped of all that is not relevant, the plea advanced on her behalf is that one of two promisors can plead the minority and consequent immunity of the other as a bar to the promisee's claim against him. This is a position that cannot be maintained, and the plea has been properly rejected by the High Court. On possible developments in the future it would be wrong for their Lordships to make any pronouncement; they will therefore humbly advise His Majesty that each of these appeals should be dismissed. There will be no order as to costs.

Appeals dismissed.

Solicitor for appellant in first appeal and the respondent in second appeal (defendants). } *Douglas Grant.*

Solicitors for respondent in first appeal and appellant in second appeal (plaintiff). } *Chapman, Walker Shepherd.*

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1915 January 6 and 7.

Re A. V. HANUMANTHA RAO AND ANOTHER (PETITIONER—ACCUSED AND SECOND RESPONDENT), PETITIONERS.*

Madras Estates Land Act (I of 1908), ss. 164—167—Officer, preparing record of rights under—Criminal Procedure Code (Act V of 1898), sec. 476, not a Court within the meaning of.

A Revenue Officer preparing a record of rights under sections 164 to 167 of the Madras Estates Land Act is only discharging an executive function of Government and is not a Court within the meaning of section 476 of the Code of Criminal Procedure.

PETITION under section 15 of the Charter Act praying the High Court to revise the order of G. VENKATANARAYANA NAYUDU, Revenue Officer, Record of rights, Pithapuram estate, in prosecution proceedings in Original Petition No. 1149 of 1912.

The facts appear from the judgment of SESHAGIRI AYYAR, J.

P. Narayanamurti for the appellants.

Nugent Grant, the Acting Government Pleader for the Crown.

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* Civil Revision Petition No. 603 of 1913.

SPENCER, J.—I am of opinion that a Revenue officer preparing a record of rights under sections 164 to 167 of the Madras Estates Land Act is only discharging an executive function of Government and is not a Court within the meaning of section 476 of the Code of Criminal Procedure.

In *Muhammad Subhanullah* v. *The Secretary of State for India in Council*(1), it was held that a settlement officer preparing a record of rights was not a Court but was simply an executive officer acting in his executive capacity. In *Nasarulla Mia* v. *Amiruddi*(2) and *Kurban Ali* v. *Jafar Ali*(3), the powers of a Revenue officer disposing of an objection under section 103-A of the Bengal Tenancy Act which corresponds closely in wording to section 166 of the Madras Estates Land Act were considered, and it was held that the legal effect of proceedings taken under this section was that the Revenue officer's order was not a judicial order, was not open to appeal and would not operate as *res judicata*. Section 106 of the Bengal Tenancy Act provides for the institution of suits before Revenue officers preparing records of rights and for suits instituted before them being transferred by them to a competent Civil Court for trial. Section 107 further provides that they shall adopt the procedure of the Code of Civil Procedure in trying such suits and that their decisions shall have the force and effect of a decree of a Civil Court.

In contradistinction to this, it may be observed that the Madras Act provides in section 173 for institution of suits in the Civil Courts having local jurisdiction, whenever the correctness of the record of rights is impugned in certain particulars.

In fact a Revenue officer proceeding under chapter XI of the Madras Estates Land Act is not anywhere referred to in that Act as a Court in the manner that Collectors and other Revenue officers who hear suits and applications specified in the schedule, are described in section 189 and elsewhere as Courts. Mr. Grant relies on the provision in section 164 (3) that the survey made by the Revenue officers proceeding under this chapter shall be made under the Madras Survey and Boundaries Act, 1897, and on the provision in section 29 of that Act applying the procedure of the Code of Civil Procedure for enforcing the

(1) (1904) I.L.R., 26 All., 382 (2) (1906) 3 C.L.J., 133.
(3) (1901) I.L.R., 28 Calc., 471.

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attendance of witnesses and for the recording of evidence, and also on the definition of "Court" in section 3 of the Evidence Act.

He has referred us to several decisions such as *Raghoobur Sahoy* v. *Kokil Singh* alias *Gopal Singh*(1), *Atchayya* v. *Gangayya*(2), and *Queen Empress* v. *Manda Shetti*(3), in which officers authorized to receive evidence and decide matters on evidence have been treated as Courts.

But the notification dated 3rd May 1910 in the *Fort St. George Gazette* Supplement for June under which the Revenue officer who passed the order under section 476 now under consideration was appointed does not invest him with powers to record evidence nor with the powers of a survey officer under Act IV of 1897. It merely appoints him to be a Revenue officer for the purpose of making a survey of the Pithapuram estate and for preparing a record of rights in respect of the said estate and it goes on to declare what particulars the record of rights shall show.

The said officer's order directing the prosecution of the petitioners for giving false evidence was therefore in my opinion *ultra vires* and must be set aside.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree. By a notification dated the 3rd May 1910, Mr. Venkatanarayana Nayudu was appointed to survey and to prepare a record of rights in the Zamindari of Pithapuram. It is conceded that this notification does not empower the officer to administer oath and to record evidence. In pursuance of this notification, the officer entered the name of one Venkataswami Gadu as the occupancy tenant of a holding. This was objected to by the first petitioner, the proprietor. The survey officer came to the conclusion that the petitioners had made false statements regarding the right of Venkataswami Gadu. He took action under section 476 of the Code of Criminal Procedure and directed the prosecution of the petitioners. The point for consideration is whether an officer recording rights under the Estates Land Act is exercising the function of a Civil or Revenue Court so as to enable him to take action under the Code of Criminal Procedure. I must answer this question in the

(1) (1890) I.L.R., 17 Calc., 872. (2) (1892) I.L.R., 15 Mad., 138.
(3) (1901) I.L.R., 24 Mad., 121.

negative. Under chapter XI of the Estates Land Act, the Local Government may empower a person to conduct three classes of operations : (*a*) to survey the fields; (*b*) to enter the names of the tenants in respect of the fields surveyed as occupancy ryots; and (*c*) to settle the rate of rent. In this case, the officer had no authority to settle the rate of rent. The false statement is alleged to have been made in the enquiry regarding the record of rights. Under section 166 of the Act, if the record of rights is not objected to, "it shall be conclusive evidence that the record has been duly made." No right to contest the record is given either by bringing a suit in that behalf or by perferring an appeal. The right of suit given by section 173 does not affect the present question Section 167 lays down in clause (3) that the entry shall be evidence of the tenant's rights. Neither section 166 nor section 167 gives power to the officer to take evidence. *Prima facie*, therefore, the entry as tenant is a purely administrative act, and the officer cannot be said to be exercising the functions of a Civil or Revenue Court The decisions in *Muhammad Subhanullah* v. *The Secretary of State for India in Council*(1) and *Nasarulla Mia* v. *Amiruddi*(2) which relate to the construction of similar provisions in the Tenancy Acts of the United Provinces and Bengal lay down that the officer entrusted with such duties is not acting judicially, but only in his executive capacity. The learned Public Prosecutor draws attention to the fact that the officer was also performing the duties of a survey officer and as under clause (3) of section 164, he is authorized as such to exercise all the powers contained in the Madras Survey and Boundaries Act, he must be deemed to have acted as a Court. In the first place section 29 of the Boundaries Act which is relied upon lays down that the power to take evidence must be either specially or generally conferred. There is no such authorization in this case. In the second place whatever may be the officer's duties in regard to survey, in recording rights he is not given power to administer oath to witnesses.

The fact that in section 195 of the Code of Criminal Procedure the legislature exempts the offices of the Registrar and of the Sub-Registrar from the designation of Courts

(1) (1904) I.L.R., 26 All., 382. (2) (1906) 3 C.L.J., 133

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strengthens the view that persons exercising quasi-judicial functions are not ordinarily to be regarded as Courts. The decision in *Queen Empress* v. *Munda Shetti*(1) proceeds on the language of Act III of 1869 which specially empowers the Tahsildar to take evidence during the course of the enquiry and to give his decision upon such evidence. The decision in *Atchayya* v. *Gangayya*(2) is no longer law, and I do not think that the *obiter dicta* of some Judges in that case can be relied upon. On the other hand, it has been laid down that the mere fact that an enquiry has to be made will not constitute the enquiring officer a Court. In *Durga Das Rukhit* v. *Queen Empress*(3) it was decided that an officer enquiring into the value of property under the Land Acquisition Act was not a Court. The proper test for ascertaining whether an officer is a Court or not has been stated in *Queen Empress* v. *Munda Shetti*(1) There must be power to record evidence, and to come to a judicial determination on the evidence so recorded. Mr. Justice AYLING and myself had to consider a similar question in *Re Vijiaraghava Pillai*(4), Applying the tests suggested in that case and *In re Nataraja Iyer*(5), I am of opinion that an officer charged with the duty of recording tenant rights in a zamindari under chapter XI of the Estates Land Act is not a Court within the meaning of section 476 of the Code of Criminal Procedure.

S V.

(1) (1901) I L R., 24 Mad, 121 (2) (1892) I.L.R, 15 Mad., 138.
(3) (1900) I.L R, 27 Calc, 820 (4) (1914) 27 M L J., 227.
(5) (1913) I.L R., 36 Mad, 72

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Napier.

1914, December, 10 and 11 and 1915. January 12

T. VENKATA SUBBA REDDI (PLAINTIFF), APPELLANT,

v.

BAGIAMMAL (DEFENDANT), RESPONDENT.*

Mortgage by two persons of two properties for a single debt—Payment by one of his portion—Suit against other for the balance—Transfer of Property Act (IV of 1882), sec 67.

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably on the mortgaged properties

Krishna Ayyar v. Muthukumaraswamiya Pillai (1906) I.L.R., 29 Mad., 217, followed.

Where, therefore, the plaintiff sued the defendant—one of the mortgagors, for the recovery of the balance of mortgage money due under a deed of mortgage, without joining the other mortgagor,

Held, that the plaintiff was entitled to a decree for a sale of the plaint mentioned properties for the whole of the balance due on the mortgage

SECOND APPEAL against the decree of L. G MOORE, the District Judge of North Arcot, in Appeal No. 414 of 1911 preferred against the decree of J. SUNDARANANA RAO PANTULU, the District Munsif of Sholinghur, in Original Suit No. 547 of 1910.

The facts appear from the judgment of SPENCER, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellant.

V. V. Srinivasa Ayyangar for the respondent.

SPENCER J.

SPENCER, J.—In this case the separate properties of two owners were mortgaged to secure a single debt of Rs 1,800. One of the mortgagors, Arunachala Mudali, paid up Rs. 1,631-14-0 and the mortgagee sought in this suit to recover the whole of the balance from the mortgaged properties in the possession of the other mortgagor. The lower Courts refused to allow the plaintiff to recover more than what the property he proceeded against was rateably liable for.

The questions for our decision are: (1) whether there was in law an extinguishment of the mortgagee's lien over Arunachala

* Second Appeal No. 2404 of 1912.

VENKATA SUBBA REDDI v. BAGIAMMAL. —— NAPIER, J.

Time six months from this date.

NAPIER, J.—Two questions are raised in this appeal: First whether the plaintiff has in fact extinguished the liability on the property of Arunachalam Mudali under his mortgage; and secondly whether if he has in fact done so, he is only entitled to recover a rateable proportion of the mortgage amount from the mortgaged properties in the possession of the defendant. The original liability arose on a single mortgage executed on the 9th March 1898 by Arunachalam Mudali and Sanjeevi Mudali, the father-in-law of the defendant, the mortgage amount being Rs. 1,800 with interest at twelve annas per cent per mensem. Both executants mortgaged distinct items of property, belonging to each of them, to cover the joint debt and it is admitted that Arunachalam Mudali, one of the original mortgagors, paid a sum of Rs. 1,631-14-0 in August 1910 which amount represented half the then existing liability. The plaintiff then brought a suit to recover the balance against the defendant and not making the co-mortgagor a party, defendant alleging that in consequence of his having paid a sum of Rs. 1,631-14-0, to the plaintiff, he and his property out of the hypotheca were excluded from the suit as was arranged with him.

The defendant set up in paragraph 10 of the written statement that she was not liable for this balance of Rs. 1,600 as the plaintiff was bound to apportion the mortgage amount rateably on the value of all the mortgaged properties, and, as Arunachalam Mudali's properties were worth Rs. 5,550 and her property only Rs. 1,020, she was only liable for an amount of Rs 450 as her share. The issue framed on this plea is, whether the plaint properties are liable to be sold only for a rateable amount due as the plaintiff has exonerated the other mortgagor and his properties." The District Munsif held in favour of the defendant on this issue.

On appeal to the District Court two points were taken, first, that the lower Court had erred in holding that the non-inclusion of Arunachalam Mudali, the co-mortgagor, and his properties operated as an extinguishment of the mortgage to that extent; and secondly, that the plaintiff was entitled to recover his debt on any portion of the mortgaged properties. Before the District Court the first point seems hardly to have been pressed: for, the learned Judge states that the only question argued in this appeal

related to the second point : it having been assumed that the plaintiff had exonerated the other mortgagor and his properties.

A long and careful argument has been addressed to us by Mr. Govindaraghava Ayyar urging that the plaintiff did not intend, by the language used in his plaint, to allege that he had exonerated the other mortgagor and his properties. I am unable to accept this contention. It is clear to me from the language of the plaint that the parties went to trial on this footing and, seeing that there can be an oral release, I accept the finding of both Courts that there had been such a release and that the endorsement on Exhibit A of the payment is evidence of that release.

Assuming, therefore, that the plaintiff had discharged one of the mortgagors from liability under the mortgage by receipt of half the amount due, the question remains, whether he is thereby debarred from seeking to recover more than a rateable proportion of the balance from the co-mortgagor Both Courts have held that he is so debarred, relying on the language of *Krishna Ayyar* v. *Muthukumaraswamiya Pillai*(1), and also on the dictum of MOOKERJEE, J., in *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*(2). The language used by the learned Judges on page 224 is as follows: "It remains only to observe, etc. . ." It is to be noted that in the view of the learned Judges the limitation of the mortgagee's right arises where his action has had the effect of relieving the discharged property from its liability to bear its proportion of the debt; and the argument addressed to us is based on the assumption that section 82 of the Transfer of Property Act which creates the right to contribution does not apply where one of the mortgaged properties has, at the time of the suit, been discharged from liability. The words are "where several properties are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt." It is argued that the words "are mortgaged" mean "are at the date of suit, liable on an existing mortgage" and that they cannot be read as meaning "where several properties have been mortgaged to secure one debt the right to contribution arises" and that therefore, the mortgagee having put it out of the power of one mortgagor to get contribution, an equity arises in favour of the

(1) (1906) I.L.R., 29 Mad., 217 at p. 224. (2) (1910) 11 C.L.J., 639 at p. 648.

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remaining mortgagor which limits the mortgagee's right to rateable contribution. It is, to my mind, a little difficult to see how a mortgage can be extinguished so as to prevent contribution but be kept alive for the purpose of ascertaining rateable proportion. But I do not think it necessary to decide here whether the right *of contribution has, in fact, been lost; that question may arise in* another suit: I am unable however to accept the view that even if it is lost this right of equitable limitation exists. It seems to me that we should be very slow in introducing equities into the statutory mortgage law of this country based on equitable doctrines applied to English mortgages. The right of contribution is itself an equity, and an equity specially introduced by statutes. If under the English Law of mortgages there is an equitable limitation to the mortgagee's right, it was perfectly open to the framers of the Act to introduce that equity by suitable provision. They have not chosen to do so and in my humble opinion, it is not the function of the courts to do so for them. The learned Judges in *Krishna Ayyar* v. *Muthukumaraswamiya Pillai*(1), examine the provisions of the Transfer of Property Act with great minuteness. They point out that there are only four or five sections which need be considered, namely, sections 56, 81, 82, 95 and 60 and conclude as follows: "It is scarcely necessary to say that there is nothing in any of these sections *suggesting the view that as between a mortgagee in* the position of the plaintiff and holders of the equity of redemption such as the appellants are, the law compels the former to distribute his debt upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded with." Section 81 deals with marshalling; section 82 is the contribution section; section 95 creates a charge by a co-mortgagor who has redeemed the whole debt on the share of the other co-mortgagors in the property for their due proportion; section 60 states that the rights of a mortgagor to redeem; section 56 gives a right to a purchaser of one of two properties subject to a common charge as against the seller to have the charge satisfied out of the other property as far as such property will extend. It is to be noted that sections 56, 81, 82 and 95 are statutory

(1) (1906) I.L.R., 29 Mad., 217.

equities in favour of persons owning properties liable to a charge against other persons and other properties equally liable on that charge. It has not been argued, and it cannot be argued, that any of these provisions raises the equity sought for here. The first difficulty in the way of this equity seems to me to be this: if the equity can be used as a defence to a mortgage suit, it obviously should be available to a mortgagor in a redemption suit, for, it is illogical to say that the mortgagee cannot claim more than a rateable proportion, but that the mortgagor in a suit to redeem would have to pay the whole amount. Therefore the right must be exercisable in redemption. Unfortunately, however, the Transfer of Property Act is definite in negativing this right. Section 60 gives a right to the mortgagor to redeem *on payment of the mortgage money* and specifically provides that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of the proportionate amount of the amount remaining due on the mortgage, except where a mortgagee has acquired another such share. Here is to be found the only statutory limitation to the liability of the mortgagor to pay the whole amount due on the mortgagee if he seeks to redeem. Section 67 states the rights of the mortgagee. It gives a right to foreclosure or an order for sale to the mortgagee as long as the mortgage money has not been paid. Among all the following sections from 69 to 84 there is not a single provision limiting the right of the mortgagee to recover the amount of his mortgage from any property made liable thereto by the mortgage document, except where he has lost his priority by fraud, misrepresentation or gross neglect, and except as to the right of a second mortgagee without notice of the mortgage to have the securities marshalled so as to protect himself as far as possible. It is clear, therefore, that this equitable limitation of the mortgagee's right is one which is directly opposed to the language of the various sections, introduces a right in the mortgagor impliedly negatived by section 60, and is, of course, in direct conflict with the rights and liabilities arising from the language of the document. When I am asked to read this equity into the statute and am pressed with the language used by learned Judges of this Court and of other Courts, I can only refer to the language of Lord MACNAGHTEN in *Norendra Nath Sircar* v. *Kamalbasini Dasi*(1),

(1) (1896) I.L.R., 23 Calc., 563.

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adopting the language of Lord HERSCHELL in *The Bank of England* v. *Vagliano*(1), which is, in effect, as follows, that the proper course is to examine the language of the statute uninfluenced *by any considerations derived from the previous state of* the law. If the statute is intended to embody in a code a particular branch of the law, the purpose of such statute surely was that the law should be ascertained by interpreting the language used and not by enquiring how the law previously stood. Bearing in mind that the chapter relating to mortgages in the Transfer of Property Act is as distinctly a "Code as any enactment could be, in that it begins by defining a mortgage and seeing that its provisions contain several equities known to English Law,—I must, with the greatest deference to the views taken by other Judges, decline to introduce provisions which the legislature has not thought fit to incorporate in the Act.

I now proceed to consider the question from another point of view. The mortgage is a simple mortgage under which each of the mortgagors bound himself personally to pay the mortgage money. Under section 68 of the Transfer of Property Act the mortgagee has a right to sue the mortgagor *for the mortgage money* where the mortgagor has bound himself to repay the same. There is no equitable limitation here and a reference to the Contract Act shows that no such limitation can be introduced. Section 43 of the Indian Contract Act provides that any one of joint promisors may be compelled to perform the *whole of the promise* and section 44 specifically enacts that where two or more persons have made a joint promise, a release of one of such joint promisors by the *promisee does not* discharge the other joint promisor. This is the very point under consideration in this case, and it is to be noted that these two sections 43 and 44 give the *right of contribution to joint promisors and also* specifically provide that the release of a joint promisor by the promisee does not free such promisor from responsibility to the other joint promisor. *I fail to see how it can be argued that a* mortgagee in a mortgage suit can only ask for sale of the mortgaged property for a rateable proportion of the mortgage debt, when in his claim on the covenant to pay he is entitled to judgment for the whole amount with, as a necessary corollary, a right to levy execution against the land. If there is an equity here it operates strangely, for, its only result will be, not to

(1) (1891) A.C. 107.

protect the mortgagor, but to give some advantage to a subsequent mortgagee if there be one.

Reliance is placed on the view embodied in *Ponnuswami Mudaliar* v. *Srinivasa Naickan* (1). There the learned Judges accept the statement of the law contained in Mr. Ghose's Law of Mortgages, dated 1875, prior to the Transfer of Property Act. With the very greatest deference I cannot follow the Court in disposing of this case without reference to the provisions of the Act, but this case does not help the respondent as the proposition stated is covered by sections 56 and 81 of the Act. The learned Judges in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(2), the case containing the *obiter dictum* relied on by the lower Court quote with approval two cases *Lala Dilawar Sahai* v. *Dewan Bolakiram*(3) and *Roghu Nath Pershad* v. *Harlal Sadhu*(4) which lay down that the mortgagee is entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants, though they limit it in a manner expressly provided by section 81. The decision in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(2) was considered by the High Court of Allahabad in a later case reported in *Sanwal Singh* v. *Ganeshi Lal* (5) and the Court adopted as correct the broad proposition, without any reservation, that where two properties are jointly mortgaged for the same debt, each of those properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property; and the proposition is stated equally broadly by a Full Bench of the same Court in an earlier case—*Sheo Tahal Ojha* v. *Sheodan Rai*(6). It is true that a different view appears to have been taken by the High Court of Calcutta in *Imam Ali* v. *Baij Nath Ram Sahu*(7). But there the learned Judges were considering the case of an assignee of the equity of redemption —a case which is covered by section 56 of the Act,—and no authority on the construction of any section of the Act is quoted for the proposition stated in page 622, that "a mortgagee, who has a security upon two or more properties, which he knows belong to different persons, cannot release his lien upon the one so as to

(1) (1903) I L.R., 31 Mad., 333. (2) (1906) I L R, 29 Mad., 217.
(3) (1885) I.L R., 11 Calc, 258 (4) (1891) I.L R., 18 Calc, 320.
(5) (1913) I L.R, 35 All., 441. (6) (1906) I.L.R, 28 All., 174 (F.B)
(7) (1906) I.L.R., 33 Calc, 613.

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increase the burden upon the others without the privity and consent of the persons affected." With the greatest deference I know of nothing in the Act to support this limitation and it is to be noted that in a later case—*Mir Eusuff Ali Haji* v. *Panchanu chatterjee*(1)—Justice MOOKERJEE, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgage premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release. Nothing could be more definite than the following language used by that learned Judge in this last case. "It is a firmly settled doctrine that as between the original parties the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (*vide* page 647)." In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights and I would refer to the language used by Lord DAVEY in *Webb* v. *Macpherson*(2) with reference to an endeavour to apply English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English vendor's lien "was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. Such a charge stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute." What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the statute, apart from equitable principles introduced by Courts of Chancery in England.

For the above reasons I would reverse the decision of the lower Courts and make a preliminary order for sale as prayed for in the plaint.

S.V.

(1) (1910) 11 C.L.J., 639 (2) (1904) I.L.R., 31 Calc., 57 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

M. KARUNAKARA MENON AND ANOTHER (RESPONDENTS), APPELLANTS,

1915. January, 5, 6 and 18.

v.

M. KRISHNA MENON AND FOUR OTHERS (PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O XXI, r. 89 (b) - Payment into Court of portion of a judgment-debt by persons other than the applicant—No right to take credit for—'Receipt,' meaning of

Order XXI, rule 89, Civil Procedure Code, is in the nature of an indulgence to judgment-debtors, and a judgment-debtor who wishes to take advantage of its provisions must strictly comply with the same, by paying all the amounts as directed by the rule, less any amount that may have been paid by *himself,* and he cannot take credit for any amount paid by a co-judgment debtor who has not joined him in the application, and according to the rule, credit can be taken only for any amount that may have been actually or constructively *received* by the decree-holder and not for one which, having been deposited could have been received by him, had he been minded to do so

Trimback v. *Ramchandra* (1899) I L.R., 23 Bom, 723 and *Kripanath Pal* v *Ram Lakshmi Dasya* (1897) 1 C W N, 703, followed

Anantha Lakshmi Ammal v. *Sankaran Nair* (1913) 24 M L.J, 205 and *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma* (1912) M W.N., 756, distinguished.

APPEAL under section 15 of the Letters Patent against the judgment of TYABJI, J., in *Krishna* v *The Collector of Malabar*(1).

In this case, in pursuance of the directions contained in the decree which corresponded exactly to the usual decree for sale *in a mortgagee's suit for sale, but which contained two* additional clauses by which the total amount due to the decree-holder was, without prejudice to his right to realize his whole amount from any or all of the properties of any or all of the judgment-debtors, distributed among the judgment-debtors in certain proportions, some of the judgment-debtors paid the amounts due by them, before the date fixed for the sale of their properties, while the others defaulted These others, after the sale of their properties in Court auction in which the counter-petitioners became purchasers, applied under Order XXI, rule

* Letters Patent Appeal No. 180 of 1913.

(1) Civil Revision Petition No. 57 of 1912.

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NAPIER, J.

increase the burden upon the others without the privity and consent of the persons affected." With the greatest deference I know of nothing in the Act to support this limitation and it is to be noted that in a later case—*Mir Eusuff Ali Haji* v. *Panchana chatterjee*(1)—Justice MOOKERJEE, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgage premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release. Nothing could be more definite than the following language used by that learned Judge in this last case. "It is a firmly settled doctrine that as between the original parties the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (*vide* page 617)." In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights and I would refer to the language used by Lord DAVEY in *Webb* v. *Macpherson*(2) with reference to an endeavour to apply English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English vendor's lien "was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. Such a charge stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute." What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the statute, apart from equitable principles introduced by Courts of Chancery in England.

For the above reasons I would reverse the decision of the lower Courts and make a preliminary order for sale as prayed for in the plaint.

S.V.

(1) (1910) 11 C.L.J., 632. (2) (1904) I.L.R., 31 Calc., 57 (P.C.).

Lakshmi Ammal v. *Sankaran Nair*(1) is distinguishable on its facts. The persons who made the deposits must be applicants, otherwise their deposit will be useless for the purposes of clause (1).

KARUNAKARA v. KRISHNA.

T. R. Ramachandra Ayyar for the respondents.—The High Court has jurisdiction to interfere in revision if the lower Court refuses to exercise jurisdiction on an erroneous construction of a section—*Anantha Lakshmi Ammal* v. *Sankaran Nair*(1), and *Vuppuluri Atchayya* v. *Seetaramachandra Rao*(2). Two of the applicants had interest in the property sold. Monies were deposited by the other judgment-debtors to the credit of the decree-holder, and he could have easily withdrawn. See also *Ramanatha Ayyar* v. *Subramania Ayyar*(3) and *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*(4).

J. L. Rosario in reply referred to *Adapa Subbarayudu* v. *Lakshminarasimma*(5) on the question of jurisdiction.

SPENCER AND SESHAGIRI AYYAR, JJ.

The following JUDGMENT of the Court was delivered by SESHAGIRI AYYAR, J :—It is with considerable hesitation that we have come to the conclusion that the learned Judge's order is wrong. It has to be noticed that the provision in Order XXI, rule 89, is in the nature of an indulgence to the judgment-debtors. Before the sale takes place, he has every opportunity of avoiding it by satisfying the decree Practically a *locus pœnitentiae* is given him after the conclusion of the sale to retain his property if he complies with certain conditions. Consequently Courts are bound to see that the provisions of law in this respect are very strictly conformed to. In this case we are not satisfied that the judgment-debtors have complied with the requirements of the law. Under rule 89, the judgment-debtor should deposit the money due under the proclamation of sale *minus* the amount "which may since the date of such proclamation of sale, have been received by the decree-holder."

Mr. Ramachandra Ayyar argues that monies deposited by the fourteenth defendant and the first defendant should be regarded as *monies received* by the decree-holder. Neither of them has joined in the application to set aside the sale. If the monies had been deposited by the applicants themselves, such monies can be taken to supplement the deposit actually made at the

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(1) (1912) 24 M.L.J., 205. (2) (1912) 24 M L J., 112 (F.B.).
(3) Civil Miscellaneous Appeal No. 82 of 1914.
(4) (1912) M.W.N., 756. (5) (1914) M.W.N., 174.

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time of the application to set aside the sale. But when the monies have been paid in by another and have not been received by the decree-holder, it seems impossible to suggest that they are either a part of the deposit or that they must be deemed to have been received by the decree-holder. None of the decided cases have gone this length. *Trimbak* v. *Ramchandra*(1) is distinctly against it. So also is *Kripa Nath Pal* v. *Ram Lakshmi Dasya*(2). In the decision in *Ramanatha Ayyar* v. *Subramania Ayyar*(3) referred to by Mr. Justice TYABJI, the money in Court deposit was due to the judgment-debtor and his co-parcener who assented to the course taken by him. The learned Judges held that the non-compliance with the formality of taking it back and depositing it with the balance due under the proclamation of sale was unnecessary. *Lakshmi Ammal* v. *Sankaran Nair*(4), only decided that where a decree-holder had agreed to give up a portion of the decree amount, he was not entitled to insist upon the deposit or payment of the full amount mentioned in the proclamation of sale. The suggestion is that what was given up must be regarded as having been received. The decision in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*(5), does not take the matter any further. In that case an agreement by the decree-holder to set off a portion of the decree amount was held to amount to payment. In the present case, the persons who made the previous deposits are not the applicants; and although we do not agree with Mr. Rosario's contention that every judgment-debtor who has separate interests in the property advertised for sale should join in applying to set aside the sale, we are of opinion that it is not open to the applicants to claim that the monies deposited by the non-applying judgment-debtors should be regarded as theirs. We must therefore hold that the application of the respondents is not in accordance with Order XX, rule 89, of the Civil Procedure Code, 1908.

The order appealed against must be set aside and that of the lower Appellate Court must be restored. The parties will bear their own costs in this appeal.

N.R.

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(1) (1899) I.L.R., 23 Bom., 723. (2) (1897) 1 C.W.N., 703.
(3) Civil Miscellaneous Appeal No. 82 of 1911.
(4) (1913) 24 M.L.J., 205. (5) (1912) M.W.N., 756.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

P. M. GOVINDAN NAIR (PLAINTIFF), APPELLANT,

1915 January, 5, 6 and 19.

v

M. ACHUTHA MENON (SECOND DEFENDANT), RESPONDENT.*

Torts - Defamation— Suit for damages—Defamatory statement made and published outside British India—Defendant resident in British India—Suit in British India, if maintainable—Order of excommunication from caste, passed by the Raja of Cochin—Communication of, to the Kariasta of a temple in British India—Transmission by Kariasta to Pattamalai—Publication, meaning of,—Justification.

A Court in British India has jurisdiction to entertain a suit for damages for a personal tort committed by a person beyond the limits of British India, if he resides within the local limits of its jurisdiction at the time of the suit.

This rule is in accordance with the principles of Private International Law recognised in England and the Code of Civil Procedure (Act V of 1908) indicates that the same rule is to be followed by the Courts in British India.

When the cause of action alleged in a plaint is a personal tort committed outside the local limits of the jurisdiction of the Courts of British India, unless the act is wrongful according to the law both of British India and of the place where the act is committed, the suit will not be sustainable.

The M. Moxam (1876) P D., 107, *The Halley* (1868) L R., 2 P.C., 193, *Phillips* v. *Eyre* (1870) L.R, 6 Q B, 1 and *Carr* v *Francis, Davies & Co.* (1902) A C., 176, followed.

Publication in regard to libel and slander does not require communication to more persons than one, there need not be anything like publication in th common acceptance of the term.

King v. *Burdett* (1820) 4 B. and Ald, 95 and *Pullman* v. *Hill & Co.* (1891) 1 Q.B, 524, referred to.

Where a subordinate officer received from his superior in the course of his official duty a copy of an order alleged to contain defamatory statements regarding the plaintiff, and transmitted the same in his turn (as he was bound to do) to his official subordinate,

Held, that he was not liable in damages for defamation against the plaintiff as his action was justified in law

SECOND APPEAL against the decree of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Appeal No. 627 of 1910, preferred against the decree of U. GOVINDAN NAIR, the District Munsif of Chowghat, in Original Suit No. 379 of 1904.

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* Second Appeal No. 857 of 1912.

GOVINDAN NAIR v. ACHUTHA MENON.

The plaintiff brought the suit in the District Munsif's Court of Chowghat in British India, for damages for defamation against the first and second defendants who were subjects of the Cochin State, the former residing in Cochin Territory outside British India, while the second defendant resided in British India at the time of the institution of the suit. The plaintiff along with some others were charged with having committed adultery with a Nambudri woman in Cochin Territory. An inquiry was held in accordance with custom, under the orders of the Raja of Cochin, into the conduct of the woman concerned; the first defendant, who was directed by the Raja to hold the inquiry, held the vicharana (an investigation) against the woman; the latter made a statement accusing the plaintiff and some others of the misconduct with herself behind the back of the plaintiff and the others who were given no opportunity to answer the imputations made by her. The first defendant sent up a report to the Raja as the result of the enquiry inculpating the plaintiff and others. The Raja thereupon passed an order declaring that the plaintiff and others were excommunicated on account of their misconduct; copies of the order of excommunication were sent by the Diwan to the subordinate officers for necessary action to be taken in pursuance of the order or for information and guidance, among others to the second defendant, who was the kariasta of the Triprayar temple, situated within British Malabar. The second defendant transmitted, as he was bound to do in the course of his official duty, the copy of the order received by him to the Pattamalai (servant) of the temple, who was his subordinate in the temple. The suit as against the first defendant was dismissed as incompetent for want of jurisdiction inasmuch as he was a subject of a foreign State, residing beyond British India; and the judgment was confirmed by the High Court by its order passed in *Govinda Nair* v. *Jadavedan Nambudiri*(1). The order referred to was as follows:—
"The only question is whether the District Munsif had jurisdiction to try the suit.

"The first defendant under the orders of the Maharaja of Cochin held an inquiry into the conduct of a Brahman woman who was charged with adultery. He announced the result to

(1) Second Appeal No. 210 of 1906.

the Maharaja who put the persons found to have committed adultery out of caste. The first defendant is a native of the Cochin State and the proceedings also were held in that State. He does not reside within the jurisdiction of the District Munsif and the cause of action also did not arise within it. He denied the jurisdiction and there was no waiver of his right or submission to jurisdiction.

"The *second defendant though* a native of the Cochin State resides within the jurisdiction and it was argued by the appellant's counsel that the Court has therefore jurisdiction over him. Mr. Sundara Ayyar did not seriously dispute this proposition, but he chiefly relied upon the fact that the plaint alleges publication of the defamatory statement at Triprayar while the finding is that the publication was within the Cochin State

"The *second defendant is the kariastan of the Triprayar* Devaswam which is in British Malabar and owns properties also in British Malabar. The Devaswam office is in the Cochin State. He delivered the proceedings to his subordinate, the Pattamalai, so that he might prohibit the persons named therein, one of them being the plaintiff, from entering the temple on the alleged ground of his adultery with the woman *and consequent* excommunication The real *publication proved*, therefore, was in the Devaswam office and not the Devaswam or temple itself. The plaint, therefore, in alleging that the publication was in the temple did not put forward the real cause of action. Both the lower Courts, however, dismiss the suit not on that ground, but on the ground that as the cause of action arose *in the Cochin State, the British Courts* had *no jurisdiction* though the second defendant has been a resident in *British* Territory for the last seven years. In this we are of *opinion* they are wrong. If the objection had been taken in the *lower* Courts, the plaint might have been amended and *considering the* nature of the error, we do not think at this stage the suit should be *dismissed* on *that ground. We will, therefore, take it that* the real cause of action is that which is proved by the plaintiff's second witness, on which the two lower Courts proceeded, i.e., delivery of the order to the Pattamalai at the Devaswam office, to enforce the same at the Devaswam or temple.

"We are therefore of opinion that the decrees of the Courts below must be set aside so far as the second defendant is

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concerned; we direct the Munsif to restore the suit to his file and proceed to dispose of it in accordance with law. Costs will abide the result.

"It was also argued before us that the transaction was one continuous proceeding and that the first defendant was therefore rightly made a party, if the suit was rightly instituted so far as the second defendant is concerned. The first defendant swears he had nothing to do with the matter after his report to the Maharaja.

This ground is, therefore, unsustainable.

"The Second Appeal is dismissed with costs against the first defendant, first respondent."

In pursuance of the above order of the High Court, the lower Courts tried the suit as against the second defendant and holding that there was no publication in law dismissed the suit. The plaintiff preferred a Second Appeal to the High Court The further facts appear from the judgment of the High Court.

K. P. M. Menon for the appellant.

C. V. Ananthakrishna Ayyar for the respondent.

TYABJI, J.

TYABJI, J.—One Sridevi Anterjanam of Thazhakolam Illom was suspected of having committed adultery. In accordance with a custom which is referred to in some detail in *Vallabha* v. *Madusudanan*(1) an enquiry was held in the matter presided by the Raja of Cochin within his own territory. The enquiry was ceremonious but hardly in accordance with natural justice inasmuch as it consisted in effect of a bare statement by the suspected woman giving the names of persons whom she charged with having committed adultery with her. On this statement without any opportunity being given to the persons named of defending themselves or rebutting the accusation, they were declared to be excommunicated. The plaintiff was one of the persons purported to be so excommunicated.

Subsequently an officer of the Cochin State, styled Sarvadhi Kariakar (literally general agent) addressed a letter Exhibit B to the Diwan to the effect that the woman "was caused to be brought here after the vicharana (investigation) . . . . and as a decision has been pronounced regarding her real state it has been decided to lodge the abovesaid sadhanam (suspected

(1) (1889) I.L.R., 12 Mad., 495.

woman) in a place near the Chalakudy Cottupara (choultry). As it has been ordered to arrive at once at a conclusion regarding the following—that as soon as the suspected woman (Sadhanam) is brought to Chalakudy she ought to be made to reside at a place in the neighbourhood, if available, if not she ought to be made to reside in a house constructed with mud walls and with beams, frame [illegible] and bolt made of bamboos, proper precaution ought to be taken so that she may not have any opportunity to hold intercourse with any. She ought to be provided with expenses at the rate of Edangalis of paddy and [illegible] per [illegible] from the [illegible] at Chalakudy till the end of her time. And that [illegible] were implicated when the trial of the suspected woman (Sadhanam) was conducted, arrangements ought to be made to excommunicate the houses and [illegible] to which they belong so that they may not frequent the temples, [illegible] frequented by stainless persons and that they may not touch tanks and wells, etc. This matter is reported for information. Thus (written by) Gopala Desika Charar, the [illegible] kariakar (Agent for all things), of your honour." Exhibit B bears endorsements to the effect that copies were forwarded to various officers of the State of Cochin "for necessary action and report" or for "information and guidance."

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The plaintiff sued in defamation. As against the first defendant it was alleged that he had announced, in the course of the investigation to which I have referred, that the plaintiff had committed adultery with the said woman The first defendant is no more before the Court, the suit having been dismissed against him, and the dismissal upheld by a decision of this Court in *Govinda Nair* v *Jadavedan Nambudiri*(1). His legal position need not therefore be further referred to.

The cause of action alleged against the second defendant is that he delivered a copy of the order (Exhibit B) to an officer (styled the Pattamalai) who is in charge of the Triprayar devaswam or temple.

It is not denied that Exhibit B is defamatory—*Coopoosami Chetty* v. *Duraisami Chetty*(2), and it has been found that the second defendant knowing its contents delivered a copy of it to

(1) Second Appeal No 210 of 1908. (2) (1910) I.L.R., 33 Mad., 67.

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TYABJI, J.

the Pattamalai. The decision of the lower Courts that there was no publication by the second defendant of the libel is therefore clearly wrong—*The King* v. *Burdett*(1). Publication in regard to libel and slander does not require communication to more persons than one. There need not be anything like publication in the common acceptance of the term—*Pullman* v. *Hill & Co.*(2). The fact that the investigation above referred to was opposed to natural justice—*Vallabha* v. *Madusudanan*(3) and *Krishnasami* v. *Virasami*(4) is not at present relevant for we are concerned not with the question whether the plaintiff's rights or status can in the Courts of British India be deemed to have become altered by the proceedings of the quasi-judicial tribunal, such as a caste-meeting, or under the authority of a person recognized by custom as the head or patron of a caste. We have to deal solely with the question whether the plaintiff is entitled to claim damages from the second defendant for publishing or communicating a defamatory statement concerning the aintiff.

In the decision of this question whether the plaintiff is entitled to damages for defamation the fact that the alleged defamation was committed outside British India will not necessarily take away the jurisdiction of the Courts of British India though it may affect the law to be administered.

With reference to the jurisdiction of the Courts, the sections of the Code of Civil Procedure that need be considered are sections 9—20.

Section 9 gives jurisdiction to the Courts to try *all suits* of a civil nature excepting suits of which the cognizance is either expressly or impliedly barred; section 10 prevents a contemporaneous trial in several Courts; sections 11 to 14 bar suits on the ground of *res judicata*; these sections are not relevant.

Sections 15 to 20 contain provisions about the place of suing. These provisions are based on five considerations: (1) the grade of the Court, section 15; (2) the situation of the property to which the suit refers, sections 16 to 18; (3) the place where a wrong is done to the person or to movable

(1) (1820) 4 B. & Ald., 95.
(2) (1891) 1 Q.B., 524.
(3) (1889) I.L.R., 12 Mad., 495.
(4) (1887) I.L.R. 10 Mad., 133 at p. 143.

property, section 19; (4) the residence or place of business of *the defendant, section 20 (a), (b); (5) the place where the* cause of action has arisen, section 20 (*c*).

The grade of the Court is not in dispute, nor does the suit relate to any property, so that sections 15 to 18 do not furnish any aid.

Section 19 deals with suits for compensation for wrong done to the person or to movable property, where it is evident that "the relief sought can be entirely obtained through the personal obedience of the defendant" (proviso to section 16). The wrongs contemplated may therefore be referred to as "personal torts." Section 19, however, assumes that the tort is committed *within British India*; in such a case if (*a*) the tort is committed within the local limits of the jurisdiction of one Court and (*b*) the defendant resides or carries on business or personally works for gain within the local limits of another Court, there both Courts have jurisdiction. Section 19 is not directly applicable as the tort here was not committed within the local limits of any *Court in British India. But it indicates* that the fact that the defendant resides in British India is sufficient to give the Court, within whose local limits he resides, jurisdiction over suits in tort of the nature referred to though the tort may have been committed outside the local limits of the jurisdiction of the Court in which the suit is brought. This indication is strengthened by section 20 (*a*) which fixes the residence of the defendant as one of the determining factors for the choice of the Court in a suit on a personal tort; and this ground is independent of the place where the cause of action arises: clause (*c*).

The omission in the Code to provide specifically for a case where the defendant resides in British India but is alleged to have committed a personal tort beyond the limits of British India, does not however take away the general jurisdiction of the Courts in British India under section 9. To assume jurisdiction where a person residing within the local limits of the jurisdiction of the Court is alleged to have committed a tort beyond such limits, is in accordance with the principles of Private International Law recognized in England: *The Halley*(1). The Code

(1) (1868) L.R., 2 P.C., 193.

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of Civil Procedure indicates that the same rule is to be followed by the Courts in British India.

The question of jurisdiction is distinct from the question, which law will be administered by the Court adjudicating upon a personal tort alleged to be committed outside the local limits of that Court's jurisdiction. The Civil Courts Act III of 1873, section 16, was not cited to us and is obviously not applicable, and there seems to be no other legislative direction to the British Courts in Madras as to the law that they have to administer, except such directions as are impliedly contained in the preliminary sections of most Acts, fixing the limits within which those Acts shall have effect or be enforceable. The law of torts has not been codified in India and we have therefore no determinate law delivered to the Courts by the Sovereign that sets the question of the choice of law at rest. The choice of law being thus open to the Courts, it is obviously in accordance with justice, equity and good conscience not to hold a person liable in tort for an act which would be justifiable in accordance with the law of the place where it is done; nor will the Courts hold a person liable unless the act is wrongful by the law of the country in which the Court is situated, and by which the parties would have been governed if the act had been done within the local limits of its own jurisdiction. The law is thus stated by Lord Justice MELLISH in *The M. Moxam*(1): "Now the law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the Courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country. *The Halley*(2) and *Phillips* v. *Eyre*(3) together with the other cases in conformity with them, seem to be conclusive upon the subject." This judgment is referred to with admiration by Lord LINDLEY in *Carr* v. *Francis Davies & Co* (4). The arguments for the respondent therefore that there was no cause of action, that the occasion was privileged and that there was justification for

(1) (1876) 1 P.D., 107 at p. 111. (2) (1868) L.R., 2 P.C., 193.
(3) (1870) L.R., 6 Q.B., 1. (4) (1902) A.C., 176 at p. 184.

the acts of the second defendant, may be conveniently considered under two main heads (1) whether the acts complained of would have been justifiable if they had been committed in British India, (2) whether they were justifiable in Cochin under the law prevalent there.

With reference to first head *Chatterton* v. *Secretary of State for India in Council*(1), *Jevoure* v. *Delmege*(2) and *Narasimha* v. *Balwant*(3) have been cited. These decisions and the principles enunciated in them are not very helpful in the decision of the present question. The second defendant can justify his act only on the basis of his official position, and as I have already indicated if he had in his private capacity done in British India the acts he is found to have done in Cochin, he would have been liable for defamation.

Was the second defendant, then justified in accordance with the law of Cochin in publishing the libel as he did in Cochin by handing a copy of Exhibit B to the Pattamalai? It was suggested that on this question two issues should be framed for findings by the lower Court:—

(1) Was there any order by the Raja of Cochin that the Sarvadhikariakar should publish the libel:

(2) Is the act of publication actionable in Cochin?

These issues no doubt raise definitely the points on which the ultimate decision of the case depends, and they have perhaps not been considered, with as great a clearness as the appellant desires. But the Subordinate Judge finds that the initial enquiry was authorized by His Highness the Raja of Cochin, that Exhibit B is the copy of the Raja's order communicated to the temple, that in the usual course the Diwan sent it to the Superintendent of the temple, that the second defendant received it in his official capacity, and gave it (as he was bound to give) to the Pattamalai, the manager of the temple. It is expressly found that the second defendant did nothing more. We are bound by these findings. But a perusal of Exhibit B itself indicates its official nature and supports the view that the second defendant was doing what his office required him to do in transmitting it from his superior officer to the Pattamalai.

(1) (1895) 2 Q.B., 189. (2) (1891) A.C., 73.

(3) (1903) I.L.R., 27 Bom., 585.

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In these circumstances it would be useless to call for any fresh finding on the first of the two questions just mentioned. The Subordinate Judge has already answered it in the affirmative.

Then it is argued that the act of the second defendant might be actionable in Cochin and that whether it is so or not should be determined by a specific issue, on which parties may be permitted to adduce evidence, and that the law of Cochin should be determined in British India as a question of foreign law, and therefore of fact. The appellant's contention is supported by the omission of the Subordinate Judge, to determine as a question of fact, what the law of Cochin is. But the respondent relies on *Carr* v. *Francis Daras & Co.*(1), for the proposition that if the act is authorized by the Raja of Cochin, as the Subordinate Judge holds, then, inasmuch as he is the sovereign authority in Cochin and his will must prevail, this is sufficient to show that the act was justified in Cochin.

The question in Carr's case was whether the seizure of certain ammunition by an officer of the British Navy acting under the orders of the British Government was lawful. The seizure had taken place in the territorial waters of Muscat. It was justified on the ground that it was authorized by a proclamation issued by the Sultan, the sovereign ruler of Muscat, and pronounced to be lawful by a Court of Enquiry in Muscat whose decision was confirmed by the Sultan. Lord HALSBURY said in that case: "My Lords, the argument on behalf of the respondents comes to this—that the Sultan of Muscat is *not* entitled within his own territory to say what shall and what shall not be the subject of traffic. Here the Sultan has pronounced what his law is; and I may say at once that, looking at these two documents upon the true construction of which as it appears to me, the whole question turns the Sultan himself has pronounced, by an authoritative declaration that what was done was lawful." Lord MACNAGHTEN said that the real question was whether the documents (consisting of a proclamation by the Sultan authorizing the seizure and the certificate of a Muscat Court countersigned by the Sultan, stating that the actual seizure was authorized and legal) showed that the act complained of was an act done by the Sultan's authority as his act, which he adopted as his own, and declared

(1) (1902) A.C., 176.

to be legal. He therefore answered the question in the affirmative. Lord LINDLEY *also considered the documents as proving that the* act was legal according to the law of Muscat.

It is true that in the present case we have nothing equivalent to the subsequent declaration by the Sultan of Muscat that the seizure was lawful. But when Exhibit B is looked at and the nature of the suit considered it seems clear that the absence of such a subsequent declaration is immaterial. For here as I have already said, no question arises whether the proceedings in Cochin ought to prevail or to have effect in British India. All that has to be determined is whether the second defendant was justified in transmitting a copy of the document to his official subordinate; his act would be justifiable if it appears that the Raja of Cochin authorized the transmission. Exhibit B itself leaves no doubt on this point. It is in effect the decree of the Court of Enquiry presided over by the Raja. To hold that the second defendant was liable in damages for defamation for performing his official duty of handing over Exhibit B to his *subordinate would be to dictate to the Raja of Cochin the* method of procedure in his own territory. This the British Courts cannot do. All that they can do is to refuse to recognize the inquiry as a judicial proceeding affecting the rights of a person whose rights or status have been purported to be adjudicated upon. As the right of the Raja of Cochin to hold the enquiry in the way he chooses has to be conceded, a fair report of the proceedings would be justified. *Allbutt* v. *General Council of Medical Education and Registration*(1). Much more therefore would an order based on such an enquiry be privileged.

Much reliance was placed by the appellant on the following statement in *Rogers* v. *Rajendro Dutt*(2): "On this state of facts it does not appear to their Lordships material to consider whether the demand made on the part of the plaintiffs was exorbitant or not, nor whether the opinion expressed by the defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the action that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a

(1) (1882) 23 Q.B D., 400 (2) (1860) 8 M.I A., 103 at pp. 130 and 131.

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public servant with perfect good faith, and with an entire absence of any malice particular or general, against the plaintiffs. For if the act which he did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own spontaneous and unauthorized or whether it was done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances in which the act may be quite innocent, even laudable as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie."

These words however are expressly referred to the "state of facts" before their Lordships; the facts consisted of an allegation that the defendant had wrongfully and unjustly and with the intention of injuring the plaintiffs prohibited the officers of the Bengal pilot service from allowing the plaintiff's steam tug to be employed. The Privy Council held that the act of the defendant was not wrongful; that he merely instructed his own subordinates as to those whom they should employ under them and that this was quite lawful

They point out that no malice was alleged (135).

In the present case also the question would be whether the second defendant's act was wrongful in itself; it is only if the act itself is wrongful, that it will not avail the second defendant to allege that he acted on the directions of a superior whose person is not subject to the jurisdiction of the Court; in such a case the responsibility of the second defendant may be enforced in the Courts, and then there may (as pointed out by the Privy Council) arise in his favour a moral claim of indemnity from his superior.

In the consideration of this point the plaintiff cannot put his case higher than on the assumption that by handing over a copy similar to Exhibit B the second defendant himself made the representations contained in Exhibit B, i.e., stated that an enquiry into the plaintiff's conduct had been held and that in consequence of the enquiry it had been ordered that certain steps should be taken on the assumption that the plaintiff had committed adultery. The second defendant's liability in transmitting a copy of the original of Exhibit B cannot be greater than if he had himself *communicated its contents to the Pattamalai though the repetition* of a slanderous rumour is actionable as well as its original invention. *Watkin* v. *Hall*(1) and *Tidman* v. *Ainslie*(2). Hence a case which is more nearly applicable than *Rogers* v. *Rajender Dutt* (3) is *Hart* v. *Gumpach*(4). There the plaintiff alleged that the appellant who was Inspector-General of Customs invested with the general superintendence of a College at Peking had made certain false representations, relating to the plaintiff who was a professor of the College. Their Lordships say at pages 458, 459, 460 and 461 —

"The representations made by the Inspector-General were privileged communications in the ordinary sense in which those words are understood; that is to say, communications so far justified by the occasion on which they are made, that the inference of malice which *prima facie* arises from defamatory statements is rebutted and the burden of proving express malice thrown on the plaintiff.

"The appellant was entrusted by the Government with the General Superintendence of the College and its professors, and it was his duty to make reports to the *Tsung-li-yamen* upon matters relating to its managment and welfare. The resignation of a professor, his absence from Peking, and any avowed disinclination or refusal to perform the duties for which he was engaged, were matters which it would be within his province to report. Reports so made, although defamatory, are *prima facie* justifiable and the duty of making them rebuts the malice which the law implies, and renders proof of actual malice, that is, of some wrong and improper motive, necessary to the maintenance of an action

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(1) (1868) L.R., 3 Q.B., 396. (2) (1854) L.R., 10 Ex., 93.
(3) (1860) 8 M.I.A., 103. (4) (1872) L.R., 4 P.C., 439.

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(1) (1868) L R , 3 Q B , 396.
(2) (1854) L.R., 10 Ex., 93.
(3) (1860) 8 M I.A., 103.
(4) (1872) L.R , 4 P.C., 439.

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"The Judge ought, therefore, to have explained to the jury the relation and position of the parties, and (assuming for the present the existence of a limited privilege only) he should have told them that the action would not lie if the statements were made honestly and in a belief of their truth, and that the burden was on the plaintiff to prove they were not so made.

* * * * *

"The question is, whether the statements are so groundless that they afford evidence that the appellant knew and believed they were untrue, and acted from malicious motives in making them. Their Lordships think that the appellant might have honestly believed he was reporting what was substantially true and that there is no evidence from which it can be reasonably inferred that he was acting otherwise than in the *bona fide* discharge of what he conceived to be his duty. But it is enough to say that it is consistent with the evidence that such were his belief and motives in the absence of any proof that he really entertained hostile or unfriendly feeling towards the respondent. The respondent, therefore, failed to sustain the burden, thrown upon him by the law of proving actual malice."

The answer to this last question (whether the second defendant acted with malice) is in the present case quite clear from the facts proved The defendant did nothing beyond handing the copy of the original of Exhibit B, which he had received, to another officer and he did so as a part of his official duties. The decision last cited no doubt contains the law that would be applicable in British India and not the Cochin law. It is not however necessary to consider whether on the materials before us we can assume that the Cochin law is the same as the law applicable in British India. For as I have already pointed out where the cause of action alleged is a personal tort committed outside the local limits of the jurisdiction of the Courts of British India unless the act is wrongful according to the law both of British India and of the place where the act is committed, the suit will not lie. The lower Courts were therefore in my opinion right in dismissing the suit against the second defendant and the appeal should be dismissed with costs.

AYLING, J.

AYLING, J.—So I agree.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Hannay.

1915, February 10.

M. JALLALDEEN MARAKAYAR AND OTHERS (DEFENDANTS NOS. 1, 2, 12, 13, 14, 21, AND THE LEGAL REPRESENTATIVE OF SECOND DEFENDANT), APPELLANTS,

v.

VIJAYASWAMI *alias* MUTHU VIJAYA RAGHUNATHA ANNASWAMI THEVAR AND NINETEEN OTHERS (PLAINTIFFS NOS. 1, 3, 5 AND 6 AND DEFENDANTS NOS. 4—7, 9—11, 15—20 AND THE LEGAL RE-PRESENTATIVES OF THE DECEASED FIRST PLAINTIFF), RESPONDENTS.*

Madras Civil Courts Act (III of 1873), ss. 12 and 13—Court Fees Act (VII of 1870), sec 7 (ix)—Suits Valuation Act (VII of 1887)—Suit to redeem—Suit in a Subordinate Court—Valuation for purposes of jurisdiction and Court Fees same - Court Fees, rightly payable only on principal debt secured below Rs 5,000—Erroneous order of Subordinate Court to pay Court Fees on total amount payable on redemption above Rs. 5,000—Appeal—No jurisdiction to the High Court but to the District Court

In a suit for redemption of a mortgage instituted in the Subordinate Judge's Court, the amount of the principal of the debt was Rs 3,[illegible] and odd, the plaintiffs paid court fees on that amount, but the Subordinate Judge erroneously ordered the plaintiffs to pay court fees on the total amount payable on redemption, viz , Rs 7,218 and odd, and the plaintiffs paid the [illegible] fees. The Subordinate Judge passed a decree in the suit in favour of the plaintiffs The defendants preferred an appeal to the High Court. The respondents objected that the appeal did not lie to the High Court but to the District Court

Held, that the amount of the principal debt must be taken as [illegible] the jurisdiction under the Civil Courts Act, and consequently that the [illegible] in the Subordinate Judge's Court and that the appeal lay to the District Court and not to the High Court

The authority of the Full Bench decision in *Zamorin of Calicut v. [illegible]*, (1882) I L.R., 5 Mad , 284, is unaffected by the Suits Valuation Act (VII of 1887).

The order of the Subordinate Judge, erroneously levying court fees on the total amount payable on redemption, cannot deprive the District Court of jurisdiction to hear the appeal and confer it on the High Court.

Vasudeva v Madhava, (1893) I L.R., 16 Mad , 326, followed.

Ijjatulla Bhuyan v. Chandra Mohan Bannerjee, (1907) I.L.R., [illegible] Calc., 954 (F B.), distinguished.

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* Appeal No. 203 of 1908.

JALLALDEEN MARAKAYAR v. VIJAYASWAMI.

APPEAL against the decree of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Madura (East) in Original Suit No. 18 of 1900.

The material facts of the case appear from the judgment.

C. V. Ananthakrishna Ayyar for the appellants Nos. 1 and 3 to 10.

S. Srinivasa Ayyangar and *S. Desikachariyar* for the respondents Nos. 18 and 19.

WALLIS, C.J. AND HANNAY, J.

The JUDGMENT of the Court was delivered by WALLIS, C.J, A preliminary objection is taken that the appeal lay to the District Court and not to this Court. The suit was to redeem a mortgage and an amount of the principal debt was Rs. 3,899–4–0 Prior to the enactment of the Suits Valuation Act, 1887, it was held in *Zamorin of Calicut* v. *Narayana*(1), by a Full Bench of this Court following earlier decisions that under the provisions of the Madras Civil Courts Act the method of valuation prescribed by the Court Fees Act for suits of this description ought to be followed in ascertaining the valuation of the suit for purposes of jurisdiction. The Suits Valuation Act has not fixed any method of valuing such suits, nor has it apparently enabled such a method to be prescribed by rule. Consequently the authority of the decision in *Zamorin of Calicut* v *Narayana*(1) is unaffected, and the amount of the principal debt must be taken as determining the jurisdiction under the Civil Courts Act. The suit therefore lay in the Subordinate Court and the appeal lay to the District Court. The Subordinate Judge erroneously insisted on the payment of a court fee on Rs. 7,218-6-11, the total amount payable on redemption and the plaintiff paid the deficiency. The question then is whether this has deprived the District Court of jurisdiction to hear the appeal and conferred it on the High Court. Following the decision in *Vasudeva* v. *Madhava*(2), we think it has not. A reference to the printed papers shows that in that case the District Munsif erroneously returned a plaint in a redemption suit as beyond his jurisdiction although it was properly valued on the principles laid down in *Zamorin of Calicut* v. *Narayana*(1). The plaintiff accepted the valuation and filed the

(1) (1882) I.L.R., 5 Mad., 284 (F.B.) (2) (1893) I.L.R., 16 Mad., 326.

suit in the Subordinate Court and the Subordinate Court entertained it no doubt on payment of the appropriate court-fee. It was held by this Court that the appeal lay none the less to the District Court, although the suit had been valued by the Subordinate Court at over Rs. 5,000. This appears to be a direct authority in support of the objection. The decision in *Ijjatulla Bhuyan* v. *Chandra Mohan Bannerjee*(1), related to a case in which the plaintiff was authorized to make a tentative valuation under section 50 of the Code of Civil Procedure and MOOKERJEE, J., expressly confined his decision to such cases and abstained from expressing any opinion on a case like the present. The objection is allowed with costs, and the appeal will be returned for presentation to the proper Court.

JALLALDEEN MARAKAYAR v. VIJAYASWAMI.

WALLIS, C.J. AND HANNAY, J.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

Re ANNAVI MUTHIRIYAN (PRISONER), APPELLANT.*

1915 February 8, 9 and 11.

Indian Evidence Act (I of 1872), sec. 33—Court's duty before admitting evidence under—Consent or want of objection on the part of the accused to the reception of inadmissible evidence—Duty of prosecution to prove the case—Indian Evidence Act (I of 1872), sec. 58—Hearsay evidence, inadmissibility of.

Before admitting under section 33 of the Evidence Act, a deposition, given on a previous occasion, a Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect, and even consent or want of objection on the part of the accused's pleader to the reception of such evidence will not, in spite of section 58 of the Evidence Act, entitle the Court to admit it under section 33.

Hearsay evidence as to the complicity of the accused in the crime charged and evidence as to the commission of other offences by the accused not relevant for the purpose of the trial are inadmissible.

Where a Sessions Judge convicted the accused relying mainly upon such inadmissible evidence as above described and did not warn the jury against acting on the same, their Lordships set aside the conviction as illegal.

Per SESHAGIRI AYYAR, J.—The Evidence Act is not exhaustive of the rules of Evidence.

(1) (1907) I.L.R., 34 Calc., 954 (F.B.)

* Criminal Appeal No. 641 of 1914.

RE ANNAVI MUTHIRIYAN.

APPEAL against the order of F. H. HAMNETT, the Sessions Judge of the South Arcot, in Calendar Case No. 29 of 1914.

In this case the Sessions Judge who tried the accused with a jury found him guilty of the offence of decoity and convicted him of the same. The accused preferred this appeal.

The other facts appear from the judgment of SESHAGIRI AYYAR, J.

T. Arumanatha Pillai, for the appellant.—The conviction is vitiated by the following illegalities and irregularities and by the misdirection of the Sessions Judge in not warning the jury against accepting inadmissible evidence: (1) The Sessions Judge admitted under section 33 of the Evidence Act the evidence of a person who had given evidence before the committing Magistrate without satisfying himself as to the impracticability of procuring the attendance of the witness, without an unreasonable delay or expense. See *Empress of India* v. *Mulu*(1), *In re Rami Reddi*(2) and *Emperor* v. *Kangal Mali*(3). In spite of the consent on the part of the pleader for the accused the prosecution must prove the circumstances enabling it to get the deposition admitted under section 33; (2) The Sessions Judge erred in admitting hearsay evidence as to the guilt of the accused and evidence as to the complicity of the accused in crimes other than the one charged when such evidence was utterly irrelevant for any other purpose in the case.

The Acting Public Prosecutor for the Crown.—The deposition of the person who gave evidence before the committing Magistrate is relevant under section 33 of the Evidence Act. The Public Prosecutor found it impossible to procure the attendance of the witness and his statement to that effect must be taken to have been accepted by the Judge as in fact he admitted the deposition under section 33. Moreover, the accused's pleader consented to the admission of that evidence Section 58 of the Evidence Act dispenses with the necessity to prove anything which the other party admits or agrees to admit, and the Evidence Act is self-contained and exhaustive as to the rules of evidence, and rulings either in India or in England which lay down that even when the accused admits certain matters or to a certain mode

(1) (1880) I.L.R., 2 All., 646. (2) (1881) I.L.R., 3 Mad., 48.
(3) (1914) I.L.R., 41 Calc., 601.

of proof, the prosecution is bound to let in evidence to bring the guilt home to the accused are unsupportable. Moreover there was no prejudice to the accused and there was no misdirection to the jury and even if there was any misdirection it did not affect the merits of the case.

T. Arumanatha Pillai in reply.—This is not a civil case, but a criminal one and the consent of the accused's pleader to the admission of inadmissible evidence will be of no avail and does not relieve the prosecution from the necessity of proving the gap in its evidence. *Mohideen Abdul Kadir* v. *Emperor*(1), *Rangaswami* v. *Emperor*(2), *The Queen* v. *Bholonath Sen*(3) and *King Emperor* v. *Sakhram*(4).

SPENCER, J.

SPENCER, J.—Apart from the question of the improper admission at the trial of the evidence of Akilanda Soma Naik given before the committing Magistrate without proof that it was impossible to procure his attendance before the Sessions Court with which my learned brother has fully dealt, I think that the accused is likely to have been further prejudiced in his trial by the misreception of hearsay evidence and that on this account also, the appeal must succeed. The only evidence to connect the accused with this dacoity is the statements of two witnesses, viz., Akilanda Soma Naik examined in the committing Magistrate's Court and prosecution witness No. 2 examined in the Sessions Court. Both of these persons, on their own admission, are men employed by the police to do private detection work in Kallar villages on behalf of the police and in my opinion, the jury should have been cautioned against acting too readily upon such evidence. Both of these witnesses have given a detailed statement as to the enquiries made by them to obtain a clue to the dacoity in the course of which they employed one Chinnapayal as an agent. The statements of Chinnapayal who has not been examined as a witness in the trial of this accused are not admissible in evidence, but in the depositions of both of these witnesses, the statements as to what Chinnapayal said have been recorded as though it was direct evidence. One of the statements made by Chinnapayal as given by prosecution witness No. 2 is that four persons named

(1) (1904) I.L.R., 27 Mad., 238.
(2) (1908) 18 M.L.J., 330.
(3) (1887) I.L.R., 2 Calc., 23.
(4) (1902) I.L.R., 26 Bom., 50.

by him had taken part in this dacoity and some others whose names he did not remember: one of those names was that of the accused under trial. What Chinnapayal said was not evidence and should not have been admitted by the Sessions Judge, and it is likely to have prejudiced the jury in deciding whether the accused was guilty or not. There are other statements in these depositions referring to other offences which were irrelevant for the purposes of this trial. If the Sessions Judge found it necessary to admit such evidence for other purposes, he should have cautioned the jury as to its relevancy against the present accused. For these reasons, I agree that the conviction must be set aside and that the accused should be re-tried.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The jury brought in a verdict of "guilty" against the accused in this case and the Sessions Judge convicted them of the offence of dacoity.

It is argued in appeal that there have been misdirections by the Judge and improper admission of evidence which have prejudiced the accused and the verdict of the jury. I do not think it has been proved that there has been any positive misdirection to the jury except it be the failure of the Sessions Judge to draw pointed attention to the fact that they have to rely upon the testimony of an absent witness in the case. He refers in paragraph 7 of his summing up to the fact that the jury are not dependent on the evidence of Akilanda Soma Naik alone. That cannot be regarded as a direction to disregard the evidence of this absent witness. Other points relating to misdirection were mentioned but they all affect the appreciation of the evidence and do not point to any failure on the part of the Sessions Judge to direct the jury aright.

But on the question of improper admission of evidence, I am of opinion that the conviction should be set aside. In the course of the examination of the second witness for the prosecution reference was made to the accused having taken part in another dacoity; this evidence ought not to have been allowed to go in. The nature of the evidence is such that it would have prejudiced the jury against the accused. But the more serious objection relates to the admission of the evidence of one Akilanda Soma Naik who was examined before the trying Magistrate. The Sessions Judge says: "This man has not put in an appearance

in this Court and it does not appear why he has not come." Further on he says that "the Public Prosecutor asked that his deposition in the lower Court might be filed as evidence here, as it seemed that it would be causing unnecessary delay in the disposal of the case if it had to be adjourned for securing his attendance." Again he says that the accused's pleader does not object to the evidence given before the Magistrate being admitted under section 33 of the Evidence Act. Under the Evidence Act, the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect. There must be independent evidence before him before he can exercise the powers given to him under the Evidence Act; further the appellate Court may not be prepared to act upon representations which have satisfied the trial Judge. It is therefore incumbent on the lower Courts to have on record some legal evidence on which he could act. It was held in *Empress of India* v. *Mulu*(1), that it is the duty of the Court acting under section 33 to have reliable evidence regarding the impracticability of procuring the attendance of a witness. In *In the matter of Rami Reddi*(2), this conclusion seems to have found favour with the learned Judges of this High Court In a recent case in Calcutta in *Emperor* v. *Kangal Mali*(3), under similar circumstances, the learned Judges pointed out the danger of allowing statements made in the Court below to be used as evidence without having taken the necessary steps to ensure the attendance of the witness in the Court. The same view was taken in *Noshai Mistri and Ram Chunder Haldar* v. *Empress*(4) and in *The Queen* v. *Lukhun Santhal*(5). I am therefore of opinion that the procedure of the Sessions Judge in acting upon the statement of the Public Prosecutor was irregular.

Does the fact that the accused's pleader consented to the course make any difference in the matter? This question is not altogether free from difficulty. It is true, as pointed out in *Imperatrix* v *Pitamber Jina*(6) that the provisions of the Evidence Act relating to the admissibility of evidence are as applicable to

(1) (1880) I.L.R., 2 All., 646 (2) (1881) I.L.R., 3 Mad. 48
(3) (1914) I.L.R., 41 Calc., 601 (4) (1880) I.L.R., 5 Calc. 958.
(5) (1874) 21 W.R. 56 (Cr R.). (6) (1878) I.L.R., 2 Bom., 61.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915.
February 11, 15 and 23

C. T. N. NARAYANAN CHETTIAR (DEFENDANTS 2-4, AND 11-13), APPELLANTS,

v.

V. S. V. LAKSHMANAN CHETTIAR (DECEASED) (PLAINTIFF, DEFENDANTS 5, 6, 8-10, AND LEGAL REPRESENTATIVES OF THE DECEASED FIRST PLAINTIFF), RESPONDENTS.*

*Trustees of a temple—Transfer of management—Void or voidable—Setting aside, if necessary—Suit by trustees to recover temple properties and for account—Indian Limitation Act (IX of 1908), art. 91 or 124, applicability of—Some trustees, joined as defendants—Denial of their title by plaintiffs—Abandonment of the denial—Decree in favour of plaintiffs and defendants if can be given—*De facto *trustees—Expenses during management—Right for reimbursement—Right to retain possession of trust property—Indian Trusts Act (II of 1882), sec 32—Decree for possession and for account—Provision for account of expenses incurred in the final decree.*

The plaintiffs, who were the *hukdars* (trustees) of a temple brought the suit on the 30th January 1911 to recover possession of the temple properties from the defendants to whom the trustees had made over the management of the temple under an agreement dated 21st June 1901. The plaintiffs alleged in the plaint that the ninth and the tenth defendants (who were also originally *hukdars*) had lost their right to the office owing to their neglect to discharge its duties and that they were joined as defendants merely because they asserted a right to it But at the trial in the original Court the plaintiffs abandoned this contention The defendants contended, *inter alia*, that the suit was bad for non-joinder of all the trustees as plaintiffs and was barred under article 91 of the Limitation Act, and that the defendants were entitled to be reimbursed out of the trust properties for expenses properly incurred by them during their management and to retain possession of the properties until they were so reimbursed. The lower Court passed a decree in favour of the plaintiffs and the ninth and the tenth defendants for possession and a preliminary decree for accounts against the defendants.

Held, that the objection as to non-joinder was not sustainable, but that a decree could be passed in favour of the plaintiffs and the ninth and the tenth defendants as trustees with the consent of the latter and the other defendants.

Kokilasari Dasi v. *Mohunt Rudran and Goswami* (1907) 5 C.L.J., 527, distinguished.

The transfer to the defendants being void, did not require to be set aside. Article 91 of the Limitation Act did not apply to the suit but article 124 was

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* Appeal No. 236 of 1912.

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the article that was applicable, and under that article the suit was not barred.

Malkarjun v. *Narhari* (1901) I.L.R., 25 Bom., 337 (P.C.), followed.

Gnanasambhanda Pandara Sannadhi v. *Velu Pandaram* (1900) I.L.R., 23 Mad., 371, explained.

Sidhu Sahu v. *Gopicharan* (1913) 17 C.L.J., 233 referred to.

A trustee of a public charitable endowment, like a trustee of a private trust, is entitled to reimburse himself all expenses properly incurred in connection with the trust, and has a first charge enforceable only by prohibiting any disposition of the trust property without previous payment of such expenses—not, that is to say, in the ordinary way by sale of the property subject to such charge.

It is the duty of the Court especially in the case of a public charitable trust to take the trust property out of the possession of persons not entitled to hold it, while making due provision for any claims that they may have in respect of expenditure properly incurred in connection therewith.

Held, consequently, that the defendants were not entitled to retain possession of the suit properties, but that the preliminary decree should direct that accounts should be taken as to what was due to the defendants from the trust, leaving it to be determined by the final decree how such claim, if established, should be enforced.

APPEAL against judgment of C. V. VISWANATHA SASTRIYAR, the Subordinate Judge of Rāmnād, in Original Suit No. 58 of 1911.

The material facts appear from the judgment of the High Court.

K. Srinivasa Ayyangar, *S. Srinivasa Ayyangar* and *A. Krishnaswami Ayyar* for the appellants.

S. Sundararaja Ayyangar for the second respondent.

C. V. Anantakrishna Ayyar for the respondents Nos. 4 and 5.

S. T. Srinivasagopala Achariyar for the ninth respondent.

WALLIS, C.J. AND COUTTS TROTTER, J.

The following JUDGMENT of the Court was delivered by WALLIS, C.J.—This is an appeal by some of the defendants against a decree in favour of the plaintiffs in a suit brought by certain trustees as *hukdars* of a temple to recover possession of the temple properties from the defendants (appellants) to whom the trustees had made over the management of the temple under an agreement (Exhibit 1), dated 21st June 1901. Four questions were argued before us. In the first place it was said that the suit is bad for non-joinder, as, though all the *hukdars* including the ninth and tenth defendants were impleaded, the plaintiffs in paragraph 16 of the plaint stated that these defendants had lost the office owing to their neglect to discharge its duties, and that they were joined merely because they asserted a right to it. At

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WALLIS, C J, AND COUTTS TROTTER, J.

the trial this contention was abandoned by the plaintiffs, and a decree was passed in favour of the ninth and tenth defendants with their consent as well as of the other defendants. In these circumstances, I do not think *Kokilasari Dasi* v. *Mohunt Rudranand Gosami*(1) cited for the appellants has any application. In that case the plaintiff persisted both in the original and the lower Appellate Courts in denying the joint trusteeship of his minor brother whom he had made defendant; and it was only after this issue had been finally decided against him, that he applied in the second appeal that a decree might be passed in favour of himself and this defendant jointly. Here the contention was abandoned during the trial and the title of the defendants Nos. 9 and 10 as trustees was admitted.

The second contention was that the suit was barred by limitation under article 91 of the Indian Limitation Act as the plaintiffs did not sue within three years to set aside the transfer, Exhibit I. The High Court having already held that this transfer was void, Exhibit G, and this being so, it does not require to be set aside. The Limitation Act merely prescribes within what periods suits must be brought and cannot be construed as of itself creating an obligation to sue where none existed. In *Malkarjun* v. *Narhari*(2), their Lordships of the Judicial Committee clearly distinguished between sales which were a nullity and sales which were only voidable and valid until set aside. At page 350 after pointing out that the words "to set aside an adoption" in one of the articles were incorrect as an adoption may be declared invalid but cannot be set aside, their Lordships observed that there is no such difficulty in the case of suits to "set aside a sale" in the same Act "because a sale valid until set aside can be legally and literally set aside; and any body who desires relief inconsistent with it may and should pray to set it aside." See also *Sidhu Sahu* v. *Gopicharan*(3). This is a more recent decision of their Lordships than *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(4), which is relied on by the appellants. In that case two persons Nataraja and Chockalingam shared the management of a religious endowment, and successively transferred their respective rights of management by registered

(1) (1907) 5 C L.J, 527.
(2) (1901) I.L.R., 25 Bom., 337 (P.C.)
(3) (1913) 17 C.L.J, 233
(4) (1900) I L R, 23 Mad., 271 (P.C.)

instruments to a third party in 1868 and 1869, Chockalingam who was a minor being represented by his mother. In 1892, Velu the son of Nataraja sued to recover the trusteeship joining Chockalingam as defendant as he was apparently unwilling to sue. Their Lordships held that article 124 of the Indian Limitation Act was applicable and that, as the defendants had held adversely to the plaintiff's father, Nataraja, for more than twelve years the plaintiff's suit was barred. They did actually rule as contended by the appellants, that the suit was barred under article 91 of the Indian Limitation Act because Nataraja had failed to set the transfer aside in three years which is what is now contended. Adverting to the case of the defendant Chockalingam who was minor at the date of the sale of his share, their Lordships, with a view of showing that his claim was also barred, observed that he attained majority in 1880 "and had by article 44 of the Act three years for setting aside the sale by the guardian." Mr. K. Srinivasa Ayyangar relies on the fact that, although their Lordships might have simply said that Chockalingam had a further period of three years to sue under section 7, they expressly stated that he had three years under article 44 which is for suits to set aside a sale by a guardian, although the sale was one which in an earlier part of the judgment they had held to be void; and he invites us to hold on this authority, that sales which are void *ab initio* become valid under the provisions of the Limitation Act if not set aside within three years by suit. Such a view, as already pointed out, appears to be inconsistent with another part of the same judgment and to be opposed to the ruling of their Lordships in the later case in *Mallarjun* v. *Narhari*(1) and we are not prepared to accept it as correctly representing what their Lordships intended to lay down. This very decision of their Lordships is express authority that article 124 is the article applicable, and under that article the suit is not barred. The other cases cited were cases of sales by guardians which were not void and have no application to the present case.

The third point is as to the alleged improper rejection of evidence. It appears from the B diary that, after the evidence had been closed and during the arguments for the defence, it was observed that no issue had been framed about the validity of

(1) (1901) I.L.R., 25 Bom., 337 (P.C.)

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the agreement (Exhibit I), and leave was given to the plaintiffs to ask for a further issue on 11th April 1912. This the seventh issue is as *follows*:—

"Is the agreement and arrangement mentioned in the plaint as the one under which the defendants got into possession illegal and void in law, having regard to its nature, the circumstances and the objects for which it was made and are the plaintiffs entitled to all or any of the reliefs asked for; and if it is valid and legal under special circumstances and for special objects, are the circumstances and objects such as to make it valid and good?"

Reading this with the pleadings and with Exhibit I the agreement in question it would appear that the question intended to be raised was whether such an agreement of this nature, even if ordinarily void, might in special circumstances be valid and, if so, whether such special circumstances existed in the present case. At the further hearing, when the defendants wanted to call evidence as to the practice of the temple the Subordinate Judge objected that this evidence should have been given at the trial of the other issues and that the question of usage did not arise on the seventh and other additional issues. We think the special circumstances mentioned in the issue referred to the recitals in Exhibit I as to the circumstances in which that document came into existence. It says nothing about a usage under which Exhibit I could be supported and we think the Subordinate Judge was justified in refusing to allow a defence of this kind to be raised at this late stage of the case.

The fourth question relates to the form of the decree which makes the appellants liable to account for what may be found due from them but gives them no right to recover anything that may be found due to them for expenses properly incurred out of their own pockets in the course of de facto management. It is contended that they are entitled to be reimbursed and to retain possession of the temple properties until they are so reimbursed. The decision, as yet unreported, in *Abkan Sahib* v. *Saran Bibi Saiba Ammal*(1) on which the appellants rely, does not on examination support the proposition but rather the reverse, as it is mentioned in the judgments and appears from the printed papers

(1) (1915) I.L.R., 38 Mad., 260.

that the de facto trustee in that case had in an earlier suit claimed to retain possession of the temple properties until he was reimbursed and that this claim was rejected by the District Judge whose decree was affirmed by this Court in *Afghan Sahib* v. *Choram Bivi*(1). There is no reason for allowing trustees of public charitable endowments any larger rights against the trust property than are recognized in the case of private trustees by section 32 of the Indian Trusts Act. That section says that a trustee is entitled to reimburse himself all expenses properly incurred in connection with the trust and that he has a first charge enforceable only by prohibiting any disposition of the trust property without previous payment of such expenses—not that is to say in the ordinary way by sale of the property subject to the charge. No authority has been cited before us to show that in the case of either private or public trusts the Court is bound to leave the trust estate in possession of a person not entitled to the character of a trustee merely because he has expended money on it whilst acting as trustee. On the contrary it would appear to be the duty of the Court especially in the case of a public charitable trust to take the trust property out of the possession of persons not entitled to hold it whilst making due provision for any claims they may have in respect of expenditure incurred in connection therewith. Turning now to the facts of the present case, the defendants' case on the pleadings and at the trial was that they were entitled to remain in possession until recouped under an express agreement supplemental to Exhibit I. It is only after the rejection of this contention by the Subordinate Judge that the defendants fell back in appeal on this alleged equitable right. Apart from this we do not think the appellants are entitled to any modification of that part of the preliminary decree which directs the defendants to give up possession to the plaintiffs, but we are prepared to amend paragraph 2 of the preliminary decree by directing accounts to be taken in respect of temple as between the plaintiffs and defendants Nos. 6, 8, 9 and 10 of the one part and defendants Nos. 2 to 5 and 11 to 13 of the other part, so as to enable the latter to establish any claim they may have against the trust properties on the taking of the accounts, leaving it to be determined by the final decree how such claim, if established,

(1) Appeal Suit No. 147 of 1902.

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should be enforced. Otherwise the appeal fails and must, we think, be dismissed with costs. Fresh evidence may be taken if the modification of the preliminary decree should be found to render it necessary.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1915 February 1 and 2 and March 1.

AVULA CHARAMUDI (FIRST DEFENDANT), APPELLANT,

v.

MARRIBOYINA RAGHAVULU AND ANOTHER (PLAINTIFFS Nos. 2 AND 3), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 54—Agreement to sell land not creating any interest therein—Rule of perpetuities, not offending—Specific Relief Act (I of 1877), sec 27 (b)—Indian Contract Act (IX of 1872), sec. 37.

A contract to convey or reconvey immoveable properties, *whenever demanded*, for a certain amount is only a personal contract and does not create any interest in immoveable property and is therefore enforceable and not void as contravening the rule against perpetuities.

South Eastern Railway v *Associated Cement Manufacturers* (1900), *Limited* (1910) 1 Ch , 12 at p. 33, followed.

Kolathu Ayyar v. *Ranga Vadhyar* (1915) I L.R , 38 Mad , 114, distinguished.

Per Curiam.—The contract is also enforceable according to section 37 of the Indian Contract Act (IX of 1872) against the representatives of the contracting parties.

SECOND APPEAL against the decrees of J. W. HUGHES, the District Judge of Nellore, in Appeal No. 68 of 1910, preferred against the decree of V. BHASHYAM AYYANGAR, the District Munsif of Kavali, in Original Suit No. 489 of 1908.

The following statement of facts is taken from the judgment of the lower Appellate Court:—

"First defendant is the undivided father of second defendant and brother of the third defendant. He is the manager of the family. On the 13th of July 1905 it was found that plaintiff was indebted to the defendants in the sum of Rs. 1,100. The case for the plaintiff is that on that date he executed a mortgage deed for Rs. 600 and a sale-deed conveying the

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* Second Appeal No. 2058 of 1913.

plaint lands for Rs. 500 but the first defendant on the same date executed an agreement (Exhibit G) to reconvey the plaint lands to plaintiff whenever demanded on payment of the sale amount and interest at 10 per cent per annum. Plaintiff claims that he is entitled to redeem the lands or at least to enforce specific performance of the contract in Exhibit G. Defendants deny the genuineness of Exhibit G and claim that the sale-deed (Exhibit A) was an out and out sale of the plaint lands."

The Munsif found that Exhibit G was genuine and gave the plaintiff a decree for specific performance not only against the first defendant who was the executant of Exhibit G but also against the other defendants.

The District Judge on appeal held that the contract was not void as offending the rule of perpetuities but modified the decree for specific performance by restricting it only as against the first defendant.

The first defendant preferred this Second Appeal.

A. Krishnaswami Ayyar for the appellant.—The contract to reconvey whenever a demand is made is void as contravening the rule against perpetuities. It creates an interest in land as it is a covenant running with the land and there is really no difference between the English law and the Indian law on the subject, and the difference, if any, is really in my favour; for if the contract creates only a right against the promisor personally and not against the property, the law will not allow specific performance of such a contract, as it does in section 27, clause (*b*) of the Specific Relief Act even as against third parties with notice of the contract. I rely on *London and South Western Railway Company* v. *Gomm*(1). I refer to the observations in my favour in *Kolathu Ayyar* v. *Ranga Vadhyar*(2).

T. V. Muttukrishna Ayyar for the respondents.—The contract creates only a personal right between parties and not any interest in immoveable property—vide section 54, last two paragraphs of the Transfer of Property Act. Even in England it has been held so—see *South Eastern Railway* v. *Associated Portland Manufacturers* (1900), *Limited* (3), and other cases therein quoted. The fact that the Specific Relief Act allows specific performance even as against others having notice of the contract, does not

(1) (1882) 20 Ch D., 562. (2) (1915) I.L.R., 38 Mad., 114.
(3) (1910) 1 Ch., 12 at p. 33.

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militate against this view, for if it is a covenant running with the land, even people having no notice must be affected. Moreover to give a decree for specific performance is a matter of discretion with the Court. Compare also section 55 (6) (b) of the Transfer of Property Act.

AYLING AND TYABJI, JJ.

The following judgment of the Court was delivered by TYABJI, J.—It has been argued before us that the agreement (Exhibit G) on which the plaintiff sues for a reconveyance of the land to him is void as being opposed to the rule against perpetuities inasmuch as no period is fixed during which the plaintiff may claim to have the land reconveyed : the argument is that under Exhibit G the land would be tied up for an indefinite period, as the plaintiff would be entitled to assert his right at any time however remote. The short answer to this argument is that the land is not tied up by Exhibit G; and that there is a mere personal contract between the contracting parties; which does not create any interest in land, though it may have some reference to the land. This answer is met by the contention that if the agreement to reconvey contained in Exhibit G is a valid contract, then specific performance of it could be had under the Specific Relief Act, section 27 (b) from any subsequent purchaser of the land who had notice of it; that therefore the agreement to reconvey must be taken to be a covenant running with the land and as such amounting to an interest in land, and that if so the attempt to create such an interest for an indefinite period of time must fail under the Transfer of Property Act, section 14, which must be applied as the rule of Hindu law is not less stringent than that contained in the section: *Ramasami Pattar* v. *Chinnan Asari*(1).

Our attention was drawn to *London and South Western Railway Company* v. *Gomm*(2), which has been referred to or followed in India in *Kolathu Ayyar* v. *Ranga Vadhyar*(3), *Hari Paik* v. *Jahuruddi Gazi*(4), *Nobin Chandra Soot* v. *Nabab Ali Sarkar*(5) and *Kalimaddin Bhuya* v. *Reazuddin Ahmed*(6).

The decisions of English Courts cannot be followed without caution, inasmuch as the rules of law and equity relating to

(1) (1901) I.L.R., 24 Mad., 449 at pp. 467–469.
(2) (1882) 20 Ch.D., 562.
(3) (1915) I.L.R., 38 Mad., 114; s.c. 24 M.L.J., 84.
(4) (1897) 2 C.W.N., 373.
(5) (1900) 5 C.W.N., 343.
(6) (1909) 10 C.L.J., [illegible]

covenants running with the land as laid down in *Tulk* v. *Moxhay*(1) with the limitations placed upon those rules by such decisions as *Haywood* v. *The Brunswick Permanent Benefit Building Society*(2) and *London and South Western Railway Company* v. *Gomm*(3) may have a very different effect from the law which has to be enforced in British India by reasons of section 27 (*b*) of the Specific Relief Act and section 40 of the Transfer of Property Act. It may be that covenants which would not run with the land in England would in British India be enforceable as against persons having notice of them. We refer however to English decisions not so much for taking from them the law as if it were directly and in terms applicable to India but for the elucidation of some of those general principles with which the statutory law of India deals.

The first point to be borne in mind in connection with the questions that arise in this appeal is expressed with very great clearness by FARWELL, L.J., in *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Limited*(4). He says. "It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities. It is sufficient to refer to *Witham* v. *Vane*(5) in the House of Lords reported in Challis on Real Property, appendix V. There, there was a 'covenant by a purchaser of lands in fee simple contained in the conveyance made to him by the vendor, that the purchaser, his heirs, appointees, and assigns will from time to time and at all times pay, or cause to be paid, to the vendor, his heirs, executors, administrators, or assigns the sum of six pence for every chaldron of coals wrought and gotten out of the lands conveyed, and which shall be shipped for sale.' That was entered into by the Earl of Darlington (afterwards Duke of Cleveland) in 1824. He died in 1842, the benefit of the covenant was assigned to certain other persons, and they sued the executors of the Duke in the year 1883, and this question of perpetuity was swept aside as having no relevancy whatever to a mere personal covenant, although such covenant was connected in some way at any rate with the land. But the fact that there is some connection with or reference to

(1) (1848) 2 Ph., 774.
(2) (1881) 8 Q.B.D., 403.
(3) (1882) 20 Ch.D., 562.
(4) (1910) 1 Ch., 12 at p. 23.
(5) Challis on Real Property, Appx. V.

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land does not make a personal contract by *A* less a personal contract binding on him, with all the remedies arising thereout unless the Court can by construction turn it from personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant."

"The real answer," continues FARWELL, L.J., "to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case. So far as I see I should have no hesitation whatever in decreeing specific performance. There certainly is no honesty in the Company's case; there is a clear covenant by them to do a certain thing when called on by a particular person. They are so called on by that person. They have had the benefit of the covenant in the reduction of the amount of money which they have had to pay, and now they refuse to perform their own personal covenant on the ground of perpetuity."

The distinction between an agreement merely personal and an agreement creating an interest in land was not lost sight of in *London and South Western Railway Company* v. *Gomm*(1), on which the appellant greatly relied.

There a Railway Company had sold land in 1865 with an agreement by their vendee on behalf of himself "his heirs, assigns, owner, and owners for the time being of the land, and all other persons who should or might be interested therein": the agreement so entered into contained an option to the Railway Company to repurchase at any time. Sir GEORGE JESSEL, M.R., says, at pages 580 and 581: "Whether the rule (as to remoteness) applies

(1) (1882) 20 Ch.D., 562.

or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature."

SIR GEORGE JESSEL's remarks read in the light of what FARWELL, L.J., said in *South Eastern Railway* v. *Associated Portland Cement Manufacturers (1900), Limited*(1) had reference only to that aspect of the agreement which purported to create an interest in the land; that aspect alone had any relevance to the question that the Master of the Rolls was considering. But as FARWELL, L.J., pointed out parties may by the same agreement purport to do two things: (1) to create an interest in land in perpetuity; (2) to enter into a personal covenant unrestricted in point of time; the rule against perpetuities cannot be obnoxious to the latter, though it invalidates the former.

Lord Justice LINDLEY in *London and South Western Railway Company* v. *Gomm*(2) said. "This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must show is, upon what legal principle the defendant is bound by a contract into which he did not enter. It is not contended that he is bound by it on the ground that the covenant entered into by Powell runs with the land and binds him at law, but *it is said* that though it does not bind him at law it binds him in *equity*.

"Then upon what principle is it that he is bound in *equity*? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in [illegible] entered. That proposition, stated generally, assumes [illegible] purchaser of land with notice of covenants into which [illegible]

(1) (1910) 1 Ch. D., 12 at p. 31. (2) [illegible]

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land does not make a personal contract by *A* less a personal contract binding on him, with all the remedies arising thereout unless the Court can by construction turn it from personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant."

"The real answer," continues FARWELL, L.J., "to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case. So far as I see I should have no hesitation whatever in decreeing specific performance. There certainly is no honesty in the Company's case; there is a clear covenant by them to do a certain thing when called on by a particular person. They are so called on by that person. They have had the benefit of the covenant in the reduction of the amount of money which they have had to pay, and now they refuse to perform their own personal covenant on the ground of perpetuity."

The distinction between an agreement merely personal and an agreement creating an interest in land was not lost sight of in *London and South Western Railway Company* v. *Gomm*(1), on which the appellant greatly relied.

There a Railway Company had sold land in 1865 with an agreement by their vendee on behalf of himself "his heirs, assigns, owner, and owners for the time being of the land, and all other persons who should or might be interested therein": the agreement so entered into contained an option to the Railway Company to repurchase at any time Sir GEORGE JESSEL, M.R., says, at pages 580 and 581: "Whether the rule (as to remoteness) applies

(1) (1882) 20 Ch.D., 562.

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"Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition, stated generally, assumes that every purchaser of land with notice of covenants into which his vendor

(1) (1910) 1 Ch D., 12 at p. 33.

(2) (1882) 20 Ch.D., 562 at p. [illegible]

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has entered with reference to the land is bound in equity by all those covenants."

The learned Lord Justice then considers which classes of covenants run with the land, in other words which classes of agreements are enforced in England not only against the person who entered into them but against a purchaser of the land with notice of the agreement entered into by his predecessor in title. That portion of his judgment is not directly applicable as we have the law laid down in the Specific Relief Act, section 27 (b) and the Transfer of Property Act, section 40. He concludes by saying that the agreement then before the Court could be enforced (if at all) as against the defendants only as a covenant running with the land; that the agreement for repurchase went beyond the doctrine of covenants running with the land laid down in *Tulk* v. *Moxhay*(1) and could not therefore be said to be a covenant running with the land, and could not consequently be enforced against a person who did not enter into it. He then agrees with the observations of the other members of the Court that the covenant purports to create an interest in land but that that interest is void for remoteness.

Thus it is clear that the Court was not deciding in *London and South Western Railway Company* v. *Gomm*(2) upon the personal aspect of the agreement at all. What was then decided was (1) that the agreement could not prevail as between the parties before the Court in any aspect other than that by which it purported to create an interest in land and that in so far as it purported to create an interest in land, it was void for remoteness and (2) that the defendant could not be bound by an agreement to which he was not a party on the ground that it was a covenant running with the land, for the agreement was not of that class which could run with the land, not being within the principle laid down in *Tulk* v. *Moxhay*(1). In other words the decision may shortly be thus stated: *the agreement* either created an interest in the land, or it did not; if it created an interest in land, then it was void for remoteness; if it was merely a personal covenant it did not bind the defendant, who was not a party to it, and was not bound by it under *Tulk* v. *Moxhay*(1).

It seems clear on a consideration of the cases to which we have referred, that very different sets of rules apply according

(1) (1848) 2 Ph., 774. (2) (1882) 20 Ch.D., 562 at p. 587.

as the juristic act in question creates, (1) an interest in land or (2) a mere personal contractual liability.

With reference to the former (1) the policy of the law is expressed in the rule against perpetuities and a transaction (whether it is a contract or a declaration of trust, or a bequest) in so far as it purports to create an interest in land is void to the extent that it contravenes the rule against perpetuities; what is void is the interest which is sought to be created so as to come into operation at a remote time, not the contract. If however the sole object of a contract is to create such an interest, it is of course wholly void.

With reference to the latter (2) however, as FARWELL, L.J., pointed out, the rule against perpetuities has no application. A contract which is binding only personally would in strictness and according to its literal import be enforceable only so long as both the contracting parties are alive: for if one of them is dead, then there is either no person to enforce it, or no person against whom it can be enforced. It would have been meaningless for the law to apply the rule against perpetuities to such a transaction: for the transaction can (in its strictness) prevail for only a fragment of the period mentioned in the rule against perpetuities. Far from limiting the period during which such a transaction is to operate, the law has enlarged the scope of its operation from its strict limits (viz., during the life-time of both contracting parties) so as to bind the representative of the promisors (Indian Contract Act, section 37).

It is also clear that a contract does not create an interest in land merely because it has reference to land. This is well recognized in England. In India there cannot be a more emphatic enunciation of this principle than that contained in the Transfer of Property Act, section 54, last paragraph, which is explained and contrasted with section 55 (6) (b) in *Kurri Veerareddi* v. *Kurri Bapireddi*(1). The law in England seems to be different from that contained in section 54—*London and South Western Railway Company* v. *Gomm*(2). Moreover the scheme of the Indian law differs widely from that of English law. The Indian Legislature has given great extension to the personal liability of parties, having notice of a contract made by one under whom

(1) (1906) I.L.R., 29 Mad., 336 at p. 340 (F.B.). (2) (1882) 20 Ch.D., 562.

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they claim, though such liability is tempered by the discretion of the Court that is asked to enforce specific performance. On the other hand the Indian Legislature has been stringent in allowing interests to be created in land either for remote periods, or without registered documents. In any case having an interest in land or any other property implies having existing rights in them; and that is very different from having personal rights against some one who may (at the discretion of the Court) be required by law to do some specific act or in lieu of it to give compensation.

It is argued that because under section 27 (*b*) of the Specific Relief Act the contract may be enforced against transferees with notice, therefore it creates an interest in the land. But in the first place if as between the parties themselves a contract for sale does not create an interest in land, it is inconceivable that an interest should be created when the liabilities under the contract are transferred to a third party. Secondly section 27 (*b*) read with section 22 of the same Act only gives a discretionary power to the Court to enforce a contract specifically; it is difficult to see how an interest in land can be considered to be created when it is in the discretion of the Court whether to recognise it or not. If an interest already exists there can be no power in the Court to take away the existing rights of the parties.

Moreover assuming that under section 27 (*b*) some interest might be created in the land itself which can avail to a limited extent as against transferees, it does not follow that the personal liability of the contracting parties is lessened because certain right in *rem* are attempted to be created and the attempt is unsuccessful by offending the rule against perpetuities. The argument as put by the appellant is self-destructive. For if any interest in land may be created by operation of section 27(*b*) then that may be a ground for upholding that interest as against transferees, and it may be that the transaction by virtue of which the interest arises, viz., the contract, may thus have an extended operation: the section cannot, on the assumption that it creates an interest in land, affect the operation of the contract in its personal aspect. If the object of the section is assumed to be to give an enhanced efficacy to a contract, by the creation of

interests in the property itself, in addition to mere personal rights and liabilities, the section cannot be utilized for taking away the binding force of the contract as between the parties themselves.

There are observations in *Kolathu Aiyar* v. *Ranga Vadhyar*(1) to the effect that one who has obtained a promise for the conveyance of land has by virtue of the Specific Relief Act, section 27 (*b*) and the Trusts Act, section 91 "a substantial interest in it": such an interest is apparently meant as is implied in section 14 of the Transfer of Property Act. These observations were perhaps not necessary for the decision, as in the earlier portion of the judgment it is intimated that the intention of the parties as appearing from the contract was that the heirs of the covenantor should not be bound by it and the suit was against the heirs—*Stocker* v. *Dean*(2)—Indian Contract Act, section 37, paragraph 2. In any case we are unable to reconcile these observations with section 54 of the Transfer of Property Act and *K[illegible] Veerareddi* v. *Kurri Bapireddi*(3).

The two cases decided in Calcutta, *Nobin Chandra Soot* v. *Nabab Ali Sarkar*(4) and *Kalimaddin Bhuya* v. *Reazuddin Ahmed*(5), are not easily reconcileable on principle. The attempt in the latter to distinguish the former on the ground that the application of the rule against perpetuities may depend upon whether the person sued is the original covenantor or one on whom the interest had devolved, cannot be accepted in the face of the authorities. Thus in *Witham* v. *Vane*(6), decided by the House of Lords, the covenant was enforced as between the executors of one party to the contract and the assignees of the other, the ground of decision being that the covenant sought to be enforced was a personal contract and there was no reason why specific performance could be refused On the other hand if the right that is sought to be enforced depends upon the existence of an interest in the land, and that interest itself is void in law, it does not matter whether the persons that are before the Court are those who have themselves been parties to the transaction attempting to create the interest, or that they are strangers or transferees.

(1) (1913) 24 M L J., 81.
(2) (1852) 51 E R, 739
(3) (1906) I.L.R., 29 Mad, 336 (F.B.).
(4) (1900) 5 C.W.N., 343.
(5) (1909) 10 C.L.J, 626.
(6) Challis on Real Property, Appx. V.

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Our decision must therefore be that the rule against perpetuities is applicable only in reference to an attempt to create an interest in land, that no interest in land is created by an agreement to sell the land, still less by reason of there being a possible claim to have an agreement for sale specifically enforced as against a transferee with notice of the agreement. The lower Courts were therefore right in holding that the agreement for resale now in question was enforceable and the appeal is dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Coutts Trotter.

1915. March 3

APPADU (PETITIONER), APPELLANT,

v.

APPAMMA (RESPONDENT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 488—Maintenance—Criminal revision petition to the High Court—Order of a single Judge—Appeal against, if maintainable—Letters Patent, article 15—Criminal trial, order in.

No appeal lies under article 15 of the Letters Patent against an order of a single judge of the High Court dismissing a criminal revision petition filed against an order of a Joint Magistrate passed under section 488 of the Code of Criminal Procedure (Act V of 1898)

APPEAL under clause 15 of the Letters Patent against the order of AYLING, J., in Criminal Revision case No. 756 of 1914 preferred against the order of T. G. BUTLER, the Joint Magistrate of Parvatipur, in Maintenance No. 9 of 1914.

This appeal was preferred under clause 15 of the Letters Patent against the order of a single judge (AYLING, J.) of the High Court dismissing a Criminal Revision Petition (No. 756 of 1914) filed against the order of the Joint Magistrate of Parvatipur division in a maintenance case. A preliminary objection was taken that the appeal was not maintainable, as the order of the single judge was passed in a criminal trial, and that no appeal was allowed under clause 15 of the Letters Patent.

* Letters Patent Appeal No. 376 of 1914.

V. Ramesan for the appellant.

APPADU *v.* APPANNA.

The Honourable Mr. *B. N. Sarma* for the respondent.

The following judgment of the Court was delivered by SPENCER, J :—A preliminary objection has been taken that no appeal lies, as an order under section 488, Criminal Procedure Code, awarding maintenance is an order passed in a criminal trial. We think the objection is good. Clause (7) describes the person against whom proceedings are taken as an "accused" and provides that he may give evidence on his own behalf, a right which would exist without being conferred by statute if the proceedings were civil.

SPENCER AND COUTTS TROTTER, JJ.

Clause (6) provides that the evidence shall be recorded in the manner prescribed for the trial of summons cases and clause (3) provides that a person neglecting to comply with the order may be imprisoned.

The Bombay High Court in *Reg v. Thaku bin Ira*(1) took the view that the proceedings were, under the Code of Criminal Procedure then in force, a "judicial proceeding of a criminal Court" from which no appeal lay. We agree with that decision and dismiss this appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

AUDIAPPA PILLAI (PETITIONER), APPELLANT,

1915. March 5

v.

NALLENDRANI PILLAI (RESPONDENT), RESPONDENT *

Guardians and Wards Act (VIII of 1890), ss. 17 and 19—Guardianship of minor children—Father, marrying a second time—No disability

Under section 19 of the Guardians and Wards Act, the Court must be satisfied that the husband or father is unfit to be the guardian of his wife or child respectively before it can appoint another person as guardian. The fact of the father marrying a second time is no ground for depriving him of the guardianship of his minor children.

Bindo v. Sham Lal (1907) I.L.R., 29 All., 210, dissented from.

(1) (1868) 5 Bom. H.C.R., 81 (Cr. Cas.).

* Appeal Against Order No. 76 of 1914.

AUDIAPPA v. NALLENDRANI.

APPEAL against the order of H. O. D. HARDING, the District Judge of Trichinopoly, in Original Petition No. 296 of 1913.

The material facts of this case appear from the judgment.

T. R. Krishnaswami Ayyar for *T. R. Ramachandra Ayyar* for the appellant.—I rely on section 17 of the Guardians and Wards Act. The Court will have regard to the welfare of the minor. [NAPIER, J.—What section refers to the case of a father?] Section 19 (*b*) refers to the father. [NAPIER, J.—How is the father unfit?] *Bindo* v. *Sham Lal*(1) supports my position. [SESHAGIRI AYYAR, J.—On the facts of that case, the Court found the father unfit.] [NAPIER, J.—In that case there is no reference to the section by the Judges.] The step-motherly treatment is enough to put the father out. [NAPIER, J.—The question is.—Is the father unfit?] Section 17 must be considered. [SESHAGIRI AYYAR, J.—Section 17 is subject to section 19.] *Bindo* v. *Sham Lal*(1) is followed by the Bombay High Court. See *Re Galbai and Lalbai*(2). [SESHAGIRI AYYAR, J.—This is not the case of the father.] I request special attention to the concluding portion of the section 17, namely, "who have lost their natural guardians." [NAPIER, J.—This is not a case where the minors have lost their natural guardian.] [SESHAGIRI AYYAR, J.—In none of these cases section 19 was considered.] [NAPIER, J.—Section 19 excludes the whole chapter when the father is fit.] [SESHAGIRI AYYAR, J.—You must satisfy us that in this case the father is unfit and then only other considerations would arise. Unless you show evidence of cruelty, you have no case.] I refer to the deposition of the petitioner as to cruelty of the father. [SESHAGIRI AYYAR, J.—Where is anything in this man's deposition to find that the father is unfit?] The father is entitled to their property after them. That is a disqualifying circumstance. [SESHAGIRI AYYAR, J.—A man being a next heir to property is a disqualification under Roman Law, but not under Hindu Law.]

S. Varadachariyar for the respondent was not called upon.

SESHAGIRI AYYAR AND NAPIER, JJ.

The following JUDGMENT of the Court was delivered by SESHAGIRI AYYAR, J:—The District Judge held that no circumstances have been proved which would deprive the father of the right of guardianship of his minor daughters. We agree with

(1) (1907) I.L.R., 29 All., 210. (2) (1908) I.L.R. 32 Bom., 50 at p. 54.

him. Mr. Krishnaswami Ayyar has taken us through the whole of the evidence. Accepting in their entirety the depositions of appellants' witnesses, we are unable to find that any circumstance has been spoken to which would render the father unfit to be the guardian of his minor daughters. There is some evidence that the deceased mother of the girls was not properly treated : that is not a ground for presuming that the children will not be properly looked after. The eldest girl was twelve years of age at the time of the enquiry and the grandfather is unable to depose to any single act which shows that either the father or the step-mother ill-treated the girl. The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

The learned vakil for the appellant relies on *Bindo* v. *Sham Lal*(1), which seems to lay down that if the father marries again, he ought to be deprived of his legal right of guardianship. The learned Judges refer only to section 17 and say that the welfare of the girls is the primary consideration. There is no doubt that that would be the consideration which would influence the Court ultimately; at the same time, it ought not to be forgotten that the legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship: the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations. It is for these reasons that section 19 of the Guardians and Wards Act lays down that the Court must be satisfied that the husband or the father is unfit to be the guardian of his wife or child respectively before it can appoint another person as the guardian For these reasons we are unable to follow the decision in *Bindo* v. *Sham Lal*(1). The decision in *Re Gulbai and Lalbai*(2) deals with the guardianship of other near relations. To such cases section 19 does not apply and the only consideration which

(1) (1907) I.L.R., 29 All., 210. (2) (1908) I.L.R., 32 Bom., 50.

AUDIAPPA *v.* NALLENDRANI. SESHAGIRI AYYAR AND NAPIER, JJ.

should weigh with Courts is the welfare of the minor; we think the order of the District Judge is right; we must dismiss this appeal. Having regard to the fact that the grandfather is deeply interested in the minors, we think the provision for consulting the Court before giving the girls in marriage is a salutary one. We see no reason to think that the security is not sufficient. We make no order as to costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

1915. March 9.

G. PERIAH *alias* ETHIRAJAYYA (PETITIONER), APPELLANT,

v.

G. LAKSHMIDEVAMMA AND FOUR OTHERS (RESPONDENTS), RESPONDENTS.*

Costs—Order of Appellate Court remanding a case—"Costs to abide the result," meaning of—Discretion of lower Court, if fettered—Costs to abide and follow the result and costs to follow the event, distinction between.

Where the High Court, in remanding a case to the lower Court, ordered that the costs should abide the result,

Held, that the words "abide the result" only connote that the order as to costs is to await the passing of the final decision in the case, and have not the effect of fettering the discretion of the trying Judge.

Distinction between "abide the result" and "abide and follow the result" or "follow the event" pointed out.

APPEAL under article 15 of the Letters Patent against the judgment of TYABJI, J., in *Periah* v. *Lakshmidevamma*(1).

The material facts appear from the judgment.

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* Letters Patent Appeal No. 234 of 1914.

(1) (1916) I.L.R., 39 Mad., 473 (footnote).

CIVIL REVISION PETITION No. 343 of 1913.

Before Mr. Justice Tyabji.

1914 March 20.

G. PERIAH (PETITIONER), PETITIONER,

v.

G. LAKSHMIDEVAMMA AND FOUR OTHERS (RESPONDENTS), RESPONDENTS.*

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of the District Judge of Ganjam, in Original Petition No. 961 of 1910.

PERIAH v. LAKSHMI-DEVAMMA.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

T. Ramachandra Rao for the appellant.

V. Ramadoss for the respondents.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—In remanding the Civil Miscellaneous Appeal, the High Court ordered "that the costs shall abide the result." On the rehearing, the Court below in the exercise of its discretion refused to give costs to the appellant. It is contended that the language of the order of the High Court makes it incumbent upon the Court below to award costs to the person who succeeds and that the District Judge had no jurisdiction to pass any other order. We are not prepared to agree with this contention. If the words used were "to abide and follow the result," they may be interpreted as conveying the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await the passing of the final decision in the case. They have not the effect of fettering the discretion of the trying Judge. In *Templeton* v. *Laurie*(1) the language was "to follow the event." The learned Judges held that the Court below had no discretion in the matter. The expressions used in the Bombay judgment have the same import as the words "to abide and follow the result." The words "abide the result" broadly speaking are equivalent to the words "costs in the cause." We are of opinion that the Courts below had a discretion to apportion the

(1) (1901) I.L.R., 25 Bom., 230 at p. 237

T. Ramachandra Rao for the petitioner

V. Ramadoss, P. Duraiswami Ayyangar and *A. N. Seetharam Sastri* for the respondents

TYABJI, J.—The question is whether the order of the High Court of the 9th August 1912 which is in the following words "the costs will abide the result" left the District Judge any discretion in awarding costs. *Fani Bhusan Roy Choudhury* v. *Bama Sundari Debi* (1) is cited to show that no discretion was left.

The words "cost will abide the result" do not mean in my opinion that the cost will follow the result. The order of the High Court of 9th August

(1) (1899) 4 C.W.N., 343

PERIAH v. LAKSHMI-DEVAMMA.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

costs. The observations of Lord ESHER in *Brotherton* v. *Metropolitan District Railway Joint Committee*(1) support this view. The decision in *Fani Bhusan Roy Chowdhury* v. *Bama Sundari Debi*(2) is not inconsistent with this conclusion as pointed out by Mr. Justice TYABJI. The learned Judge is right in the view he has taken.

This Letters Patent Appeal is dismissed with costs.

K.R.

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(1) (1894) 1 Q B, 666. (2) (1899) 4 C.W.N., 343.

1912 did not in my opinion deprive the lower Court of the discretion ordinarily vested in any Court to decide how the costs shall be borne.

The lower Court therefore had it in its discretion to award the costs as it seemed most proper. I do not see any ground to interfere with the exercise of the discretion which so far as I can judge was not wrongly exercised. It may well have appeared to the learned Judge (1) that the respondents having been appointed trustees had not done anything to be mulcted of costs, (2) that the testator by the form of his will had caused the litigation and (3) that the proper order was that the costs would be borne by the estate of the testator

The petition is dismissed with costs

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

TIRUVENKATACHARIAR (AUCTION PURCHASER), APPELLANT,

1915. February 25 and March 9.

v.

THANGAYIAMMAL AND ANOTHER (PETITIONER AND INSOLVENT), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 20 and 22—Properties advertised for sale by the Official Receiver as subject to mortgage—Change in the sale proclamation on the day of sale—Sale free of incumbrance—Irregularity vitiating the sale.

Section 22 of the Provincial Insolvency Act gives unfettered discretion to the Court to set aside a sale held by the Official Receiver if the change in the conditions of the sale-proclamation had the effect of preventing intending bidders from coming forward.

In re Bhukhandas (1905) 7 Bom L R, 954, distinguished.

Ex parte Lloyds, Re Peters (1882) 47 L.T., 64, explained.

A creditor who is entitled to a decision in respect of the sale of the property of the insolvent is a person aggrieved if the decision goes against him.

In re Lamb Ex parte Board of Trade (1894) 2 Q.B., 805 and *Ex parte Official Receiver* (1887) 19 Q B.D, 174, followed.

APPEAL against the order of H. R. BARDSWELL, the Acting District Judge of Tanjore, in Insolvency Application No. 168 of 1914 in Insolvency Petition No. 13 of 1913 (in Insolvency Petition No. 90 of 1910) on the file of the Official Receiver, Tanjore, O. G. Ramachandra Ayyar.

Certain properties of the insolvent were advertised for sale by the Official Receiver of Tanjore as certainly subject to one mortgage and as likely to be subject to another. But on the day fixed for the sale, the Official Receiver announced that the sale would be free of encumbrances and sold the properties for Rs. 22,000. One Thangayi Ammal, ninth respondent in the insolvency petition, an unsecured creditor of the insolvent, put in a petition to the District Judge, praying for the cancellation of the sale on the ground that she had been aggrieved by this action of the Receiver and that the change from selling subject to one encumbrance and possibly to two encumbrances to selling free of encumbrances was a very important

* Appeal Against Order No. 174 of 1914.

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one as the properties would naturally have a higher sale value in the latter case and had the altered condition of sale been published in time to become generally known, it was to be expected in the natural order of things that bidders would be attracted who would bid higher than if the sale was subject to any encumbrance. The District Judge agreeing with the above contention set aside the sale and directed the holding of a fresh sale after due notice as to time and conditions of sale. The auction purchaser appealed against the above order of the District Judge.

T. Rangachariyar for the appellant:—This is not a matter in which the lower Court could interfere; secondly no case is made out for such interference. The Receiver in whom the power is vested has the power to sell without leave of the Court and his contract of sale cannot be cancelled. See section 22. [SESHAGIRI AYYAR, J.—Can the Court compel him to sell, if he does not sell?] The Court can remove him. If he has acted fraudulently the sale can be set aside. If his act has caused loss, he may be sued for the loss, but the sale should stand. This arises for the first time under the Act: *In re Bhukhandas*(1). *Woonwalla & Co.*, v. *Macleod*(2) is a case under section 31 of the Presidency Insolvency Act. There the language is stronger in favour of the Court to interfere. But section 20 of the Provincial Insolvency Act gives him unlimited power of sale. Section 22 is taken from section 90 of the English Bankruptcy Act. [SESHAGIRI AYYAR, J.—Is there any English authority on the question?] *There is no English authority except the cases referred to in In re Bhukhandas* (1). *Section* 22 does not apply to cases coming within 20 (*a*) and (*b*). There is no power to cancel the sale as he has no power to sanction it as in the Bombay case. I am a private person who has contracted with a person who has power to sell by the law. If it was the intention of the Legislature, then it would have said so. It must have an object in making the distinction. [SESHAGIRI AYYAR, J.—Certain matters can be done with the preliminary permission of the Court. Certain matters without that. But Court can interfere in both.] Third parties' rights cannot be interfered by a summary procedure like this. The language of section 22 is wide, but a construc-

(1) (1903) 7 Bom. L.R., 954. (2) (1906) I.L.R., 30 Bom., 615.

tion not inconsistent with section 20, should be given. Property valued at Rs. 18,000 was sold for Rs. 22,000. Could it be said that there was any loss? Mere irregularity will not vitiate sale unless there is loss also. No person can be said to be aggrieved. In *Hanseswar* v. *Rakkal Das*(1), a person aggrieved is a person who has suffered a legal grievance.

R. Kuppuswami Ayyar for the respondent.—The object of the Act is to catch hold of the property. [SESHAGIRI AYYAR, J.—The opening sentence shows that the Receiver is subject to control of Court.] Section 22 makes all the acts revisable by Court and is perfectly general. *Hansesuar* v. *Rakhal Das*(1) is authority for my position. Indian Insolvency Act is much narrower. Another bidder deposits Rs. 7,000 and this is received by the Receiver and there is a purchase for Rs 25,000. So every creditor is aggrieved. [SESHAGIRI AYYAR, J.—There was a loss of Rs. 3,000 and your creditor suffered his proportionate loss.]

T. Rangachariyar in reply —As regards jurisdiction I have nothing to add. The receiver acted *bona fide*.

SPENCER AND SESHAGIRI AYYAR, JJ.

The following JUDGMENT of the Court was delivered by SESHAGIRI AYYAR, J.—The Official Receiver of Tanjore, in whom the property belonging to the insolvent vested under an adjudication order, issued a proclamation for the sale of the properties in dispute. In it he stated that the properties would be sold subject to two mortgages subsisting in favour of certain secured creditors. The sale was fixed for the 21st March 1914. On that day the Official Receiver noted in the sale-proclamation "intending bidders present say that the properties would fetch a better price if they are sold free of mortgage. . . Under these circumstances in modification of the terms of the sale-proclamation, I propose to sell now the properties free of encumbrance" The properties were purchased by the appellant for Rs. 22,000. This was on the 22nd March. On the 9th of April an application was made to the District Court by the respondent, who is also one of the creditors of the insolvent, for setting aside the sale on the ground that the variation in the sale-proclamation was irregular, that if the properties had been advertised to be sold free of encumbrance, a larger number of bidders would have been present, that she was prejudiced by the action of the Official Receiver in directing the

(1) (1913) 18 C.L.J., 359.

THIRUVENKATACHARIAR v. THANGAYIAMMAL.

SPENCER AND SESHAGIRI AYYAR, JJ.

was irregular and has prejudiced the general interests of the creditors, it should not set aside the order passed by the Receiver.

The third objection of Mr. Rangachariyar is that the petitioning creditor, the respondent, is not an aggrieved party under section 22 of the Provincial Insolvency Act. He relies upon a judgment of the Calcutta High Court—*Hanseswar* v. *Rakhal Das*(1). In that case a stranger, not a creditor, who had been *injuriously affected by the procedure adopted by the Official* Receiver was held not to come under the designation of "persons aggrieved." MOOKERJEE, J., quotes the language of JAMES, L.J., and points out in *Ex parte Sidebotham; In re Sidebotham*(2) that a third party had his remedy by way of suit, that no act of the Receiver can conclude his title. He came to the conclusion that he was not a person aggrieved under the Insolvency Act. In the present case the respondent is a creditor and the fact that she happens to be an unsecured creditor is a point in her favour. It was pointed out in *In re Langely; ex parte Stephenson*(3), that a creditor, though he had not tendered his proof at the date of the order, was a person aggrieved with reference to a scheme of arrangement which injuriously affected the rights of creditors. In *In re Lamb; ex parte Board of Trade*(4), Lord ESHER points out that any person who is brought before the Court to submit to a decision is, if the decision goes against him, a person aggrieved; and he refers to his own decision in *Ex parte Official Receiver*(5), where he explains the language of JAMES, L.J., in *Ex parte Sidebotham; In re Sidebotham*(2), as meaning a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.

In the case before us the creditor is entitled to a decision in respect of the sale of the property of the insolvent, and she is certainly a person who would be damnified if the decision goes against her. Therefore in the language of Lord ESHER she is a person aggrieved. We must hold for these reasons that the decision of the District Judge is right and that this appeal should be dismissed with costs.

S.V.

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(1) (1913) 18 C.L.J., 359.
(2) (1880) 14 Ch.D., 458.
(3) (1894) 63 L.J., Q.B., 570; s.c., 70 L.T., 736.
(4) (1894) 2 Q.B., 805.
(5) (1887) 19 Q.B.D., 174.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

P. M. M. VELLIAPPA CHETTIAR AND ANOTHER (RESPONDENTS—DECREE-HOLDERS), APPELLANTS,

1915. March 4 and 10.

v.

S. N. SUBRAHMANYAM CHETTY (PETITIONER), RESPONDENT.*

Civil Rules of Practice, r. 161 (*a*)—*Fixing six months for applying for execution in Court to which decree is transferred for execution—Object of the rule—Execution application after six months and partial execution thereon, validity of—Time, not the essence of the rule—Civil Procedure Code (Act V of* 1908), *sec* 24; *cl.* (1) (*b*)—*Right of District Court to recall a case sent to a Subordinate Court for execution.*

Rule 161 (*a*) of the Civil Rules of Practice which enacts that "if after a decree has been sent to another Court for execution, the decree-holder does not within six months from the date of the transfer, apply for the execution thereof, the Court to which the decree has been sent shall certify the fact that no application for execution has been made to the Court which passed the decree and shall return the decree to that Court" is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court if no steps are taken by the decree-holder within six months to execute the decree. A violation of this rule does not render the proceeding taken, as in this case, after six months after transmission, void *ab initio*. The rule is only directory and not mandatory and the time mentioned is not of the essence of the rule.

Caldow v. *Pixell* (1877) 2 C.P D., 562, followed.

Where a decree is sent to a District Court for execution by another Court and the District Court transfers the decree for execution to a Subordinate Court, the period of six months allowed by the rule for execution in favour of the decree-holder is to be counted from the time the decree is sent to the District Court and not to the Subordinate Court. Under section 24 (1) (*b*), Civil Procedure Code, the District Court is entitled to withdraw to its own file the execution proceedings transmitted by it to the Subordinate Court and to dispose of it.

APPEAL against the order of A. C. DUTT, the District Judge of Rāmnād at Madura, in Original Petition No. 249 of 1913 (Execution Petition No. 179 of 1913 on the file of the Subordinate Judge of Rāmnād in Original Suit No. 467 of 1909 on the file of the High Court of Judicature at Fort William in Bengal).

The material facts of this case appear from the following opening paragraph of the judgment of the High Court.

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* Appeal Against Order No. 45 of 1914.

VELLIAPPA v. SUBRAHMANYAM. —— SESHAGIRI AYYAR AND NAPIER, JJ.

We think the reason underlying these pronouncements is applicable to the present case. The effect of holding that the Sub-Court was *functus officio* after six months and that the proceedings in execution are a nullity would be to allow the judgment-debtor to escape the liability which the law subjects him to. The rule in question is not an adjunct to the Code of Civil Procedure. It is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. Although section 148 of the Code of Civil Procedure may not apply in terms to the present case, its analogy may be utilised for the purpose of showing that the legislature regards such provisions as directory in their nature and not mandatory. We must reverse the order of the District Judge and direct him to return the records to the Sub-Court to enable the appellants to execute the decree under the process already issued Appellants are entitled to their costs in this Court.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier

1915. March 2, 3, 5 and 10.

LAKSHMI ACHI (PETITIONER), APPELLANT,

v.

SUBBARAMA AYYAR AND THREE OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 47, and O. XXII, r. 10—Decree in mortgage suit—Preliminary decree—Final decree, procedure to, not by way of execution—Application to continue the suit after preliminary decree, order disallowing, not appealable

After the passing of the preliminary decree in a mortgage suit, the suit is continued until the stage of the final decree is reached.

Ashfaq Husain v. Gauri Sahai (1911) I.L.R., 33 All., 264 and *Mamoo Lal v. Sarat Chunder* (1915) 21 C.L.J., 118, explained.

Where under the will of *A*, his executors filed a suit on a mortgage and one of them died before, and the other after the passing of the preliminary decree, and his senior widow made an application to continue the suit,

Held, that an order disallowing such an application is not appealable, under O. XXII, r. 10 of the Code.

Ferrall v. Curran (1898) I. R., 2 Ir. R., 470, followed.

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* Civil Miscellaneous Appeal No. 151 of 1914.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

P. M. M. VELLIAPPA CHETTIAR AND ANOTHER (RESPONDENTS—DECREE-HOLDERS), APPELLANTS,

1915. March 4 and 10.

v.

S. N. SUBRAHMANYAM CHETTY (PETITIONER), RESPONDENT.*

Civil Rules of Practice, r. 161 (*a*)—*Fixing six months for applying for execution in Court to which decree is transferred for execution—Object of the rule—Execution application after six months and partial execution thereon, validity of—Time, not the essence of the rule—Civil Procedure Code (Act V of* 1908), *sec.* 24: *cl.* (1) (*b*)—*Right of District Court to recall a case sent to a Subordinate Court for execution.*

Rule 161 (*a*) of the Civil Rules of Practice which enacts that "if after a decree has been sent to another Court for execution, the decree-holder does not within six months from the date of the transfer, apply for the execution thereof, the Court to which the decree has been sent shall certify the fact that no application for execution has been made to the Court which passed the decree and shall return the decree to that Court" is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court if no steps are taken by the decree-holder within six months to execute the decree. A violation of this rule does not render the proceeding taken, as in this case, after six months after transmission, void *ab initio*. The rule is only directory and not mandatory and the time mentioned is not of the essence of the rule.

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APPEAL against the order of A. C. DUTT, the District Judge of Rāmnād at Madura, in Original Petition No 249 of 1913 (Execution Petition No. 179 of 1913 on the file of the Subordinate Judge of Rāmnād in Original Suit No. 467 of 1909 on the file of the High Court of Judicature at Fort William in Bengal).

The material facts of this case appear from the following opening paragraph of the judgment of the High Court.

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* Appeal Against Order No. 45 of 1914.

VELLIAPPA v. SUBRAMANYAM. — SESHAGIRI AYYAR AND NAPIER, JJ.

The judgment of the Court was delivered by SESHAGIRI AYYAR, J. The appellants obtained a decree for money against the respondent in the Calcutta High Court. As the respondent was residing within the jurisdiction of the Subordinate Judge's Court of Rāmnād, the decree was transmitted on the 2nd September 1912 under the latter portion of Order XXI, rule 5, to the District Court of Rāmnad for execution. This latter Court sent the decree to the Subordinate Judge. An application for execution was made to him on the 22nd of April 1913 and certain properties were attached. While the application was pending in the Sub-Court, the respondent moved the District Court to call up the records from the Sub-Court on the ground that under rule 161-A of the Civil Rules of Practice the proceedings taken in execution were void as they were instituted more than six months after the transmission of the decree by the Calcutta High Court. The District Judge upheld this contention and ordered "that the decree will be recalled from the Sub-Court and returned to the High Court of Calcutta." The present appeal has been presented against this order.

A. Krishnaswami Ayyar for the appellants.—My contentions are (1) that rule 161 (*a*) of the Civil Rules of Practice is *ultra vires* as it puts an arbitrary limit of time within which execution must be taken in the Court to which the decree is sent for execution. This rule is inconsistent with Civil Procedure Code. In such cases time is not of the essence of the rule. See Maxwell's Interpretation of Statutes, 5th edition, pages 598 and 599(2). The period of six months must be counted from the time the decree is sent to the Subordinate Court by the District Court and in that view the present application is not barred as it was made within six months from that date(3). The District Court had no power to recall the decree from the Subordinate Court.

A. Venkataramayya for the respondent.—The rule is not *ultra vires* as it was made under powers given to the High Court by the Civil Procedure Code. Being a rule of procedure the High Court is entitled to fix a time-limit within which execution should be taken in the Court to which the decree is transmitted. The Sub-Court is *functus officio* after the six months and further execution is a nullity. The rule clearly enacts that the six months' period should be counted from

the time the decree is first transmitted for execution and the District Judge had power to recall the case under section 24, clause (1) (*b*), Civil Procedure Code, in case execution is not taken out within the time fixed in rule 161 (*a*).

[After stating the facts as mentioned above the judgment of the High Court proceeded as follows :—] Mr. Krishnaswami Ayyar has argued a number of points against the view of the District Judge. He contended that there will be a further period of six months from the date of the District Court transferring the decree for execution to the Sub-Court. This is obviously untenable. He next contended that the District Judge had no power to recall the decree from the Subordinate Judge. Section 24, clause (*b*) is comprehensive enough to enable the District Court to withdraw a transmitted execution proceeding to its own file and to dispose of it. The learned vakil has also argued that the exceeding of the time-limit does not render the proceedings infructuous.

The aim of the rule is to compel the decree-holder to take prompt steps to enforce the decree. The rule is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court, if no steps were taken by the decree-holder within six months to execute the decree. A violation of this rule does not render the proceedings taken void *ab initio*. In such cases, time is not of the essence of the stipulation. Mr. Justice DENMAN points out in *Caldow* v. *Pixell*(1): "The cases cited before us establish that, where a public officer is directed by a statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from its terms." Mr. Justice LOPES says that in deciding whether a rule is mandatory or directory the possibility of justice suffering from a too rigid application of the time-limit should be taken into account. In *The Queen* v *Ingall*(2), both MELLOR and LUSH, JJ., enunciate the principle. Reference may also be made to *Brumfitt* v. *Bremner*(3) and to *The Queen* v. *Lofthouse*(4).

(1) (1877) 2 C.P D., 562.
(2) (1876) 2 Q B D., 199.
(3) (1860) 9 C.B. (N.S.) 1 at p. 11.
(4) (1866) L.R., 1 Q B., 433.

VELLIAPPA v. SUBBRAHMANYAM. — SESHAGIRI AYYAR AND NAPIER, JJ.

We think the reason underlying these pronouncements is applicable to the present case. The effect of holding that the Sub-Court was *functus officio* after six months and that the proceedings in execution are a nullity would be to allow the judgment-debtor to escape the liability which the law subjects him to. The rule in question is not an adjunct to the Code of Civil Procedure. It is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. Although section 148 of the Code of Civil Procedure may not apply in terms to the present case, its analogy may be utilised for the purpose of showing that the legislature regards such provisions as directory in their nature and not mandatory. We must reverse the order of the District Judge and direct him to return the records to the Sub-Court to enable the appellants to execute the decree under the process already issued. Appellants are entitled to their costs in this Court.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1915. March 2, 3, 5 and 10.

LAKSHMI ACHI (PETITIONER), APPELLANT,

v.

SUBBARAMA AYYAR AND THREE OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 47, and O. XXII, r. 10—Decree in mortgage suit—Preliminary decree—Final decree, procedure to, not by way of execution—Application to continue the suit after preliminary decree, order disallowing, not appealable.

After the passing of the preliminary decree in a mortgage suit, the suit is continued until the stage of the final decree is reached.

Ashfaq Husain v. Gauri Sahai (1911) I.L.R., 33 All., 264 and *Nunes Lal v. Sarat Chunder* (1915) 21 C.L.J., 118, explained.

Where under the will of *A*, his executors filed a suit on a mortgage and one of them died before, and the other after the passing of the preliminary decree, and his senior widow made an application to continue the suit,

Held, that an order disallowing such an application is not appealable, under O. XXII, r. 10 of the Code.

Ferrall v. Curran (1899) I. R., 2 Ir. R., 470, followed.

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* Civil Miscellaneous Appeal No. 151 of 1914.

APPEAL against the order of P. S. SESHA AYYAR, the Subordinate Judge of Mayavaram, in Judicial Application No. 6 of 1914, in Original Suit No. 40 of 1911.

The facts appear from the judgment.

S. Srinivasa Ayyangar for the respondent —I raise a preliminary objection that the appeal does not lie. Section 47 does not apply, for this is not in execution. [*T. Rangachariyar* for the petitioner.— I rely on section 47 also because Privy Council has decided that an application for decree absolute is in execution.] Order XXII rule 10 does not apply; the phrase used is not only "devolution of interests", but also "either by assignment or creation"; only rule 4 applies. It is not an interest which comes to her by the death of the executor. She has a pre-existing interest. It must be an interest that devolves. Under Order XXII there are two instances of appeal and nothing more. Order XLIII has to be read with section 104. The ground that it is an order in execution proceedings is not tenable. In *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1) they so held. But in a later case—*Rungiah Gounden Co* v. *Nanjappa Row*(2)—they held it so for purposes of limitation. In *Ashfaq Husain* v. *Gauri Sahai*(3) which is a decision under the new Code, they have held it is not an executable decree. [SESHAGIRI AYYAR, J.—There is a later Privy Council decision in *Abdul Majid* v. *Jawahir Lal*(4).] If there is a preliminary decree, the question is whether it is executable. *Munna Lal* v. *Sarat Chunder*(5) and other cases have no application because they are under the old Code. They refer to order absolute and not a decree absolute. In *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1), BHASHYAM AYYANGAR, J. says: "There is only one decree and that is the earlier decree. In order to bring it in line with English practice, they introduced the new Order. The legislature has repealed the sections of Transfer of Property Act and brought them in the Procedure Code under a different procedure." The original wording is "pass an order" The old section is section 89. Therefore it was treated as an order in execution. The only decision under the new Code is *Ashfaq Husain* v *Gauri Sahai*(3) followed in

(1) (1902) I.L.R., 25 Mad., 244. (2) (1903) I.L.R., 26 Mad., 780.
(3) (1911) I.L.R., 33 All., 264. (4) (1914) I.L.R., 36 All., 350 (P.C.).
(5) (1915) 21 C.L.J., 118.

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LAKSHMI ACHI v. SUBBARAMA AYYAR.

Vembu Iyer v. *Srinivasa Iyengar*(1). This Court follows the Allahabad view and says limitation follows from the second decree. [NAPIER, J.—Mr. Rangachari's contention seems to be inconsistent with the Code.] The whole question rests on Order XXXIV, rule 5. What is execution is execution under the Code. There being a special provision in Order XXII, section 47 is excluded.

T. Rangachariyar for the petitioner.—Under section 36 of the Code, execution applies to orders; see section 47, clause (3); the language of section 47 read with section 36 speaks of decrees. Decree includes both preliminary and final. [NAPIER, J.—Does not section 47 merely give the form?] It gives the right. There may be a purely preliminary decree. It may be preliminary and final or final decree. [NAPIER, J.—Did you put it in the form of an execution petition?] No form is prescribed. The word execution is not defined in the Code. [NAPIER, J.—We must understand it in conformity with the Code.] A preliminary decree gives a right to the final decree. A preliminary decree may enforce a personal covenant and is in that sense final. My argument is that "decree" "includes preliminary decree" [reads definition of decree]. [SESHAGIRI AYYAR, J.—The suit continues.] The suit may not be disposed of. It may exist for other purposes. My friend's contention is that section 47 applies to final decrees; if not, why is it not applicable in this case? [NAPIER, J.—Because there is distinct chapter; if it is kept in the Transfer of Property Act, will you call it execution?] So they put it; the chapter applies to the execution of orders and decrees. The word "execution" must include an order to get a right to execute the decree. [NAPIER, J.—Why is it not included in Order XXI?] Because they want a special provision for mortgage suits. The order provides forms of decrees as in suits for accounts—partnership accounts. Order XXI, rule 15 onwards to dissolution. [SESHAGIRI AYYAR, J.—This Court has held that there is no decree in ordinary partition suits till the final decree.]

My second point is:—On the death of both the executors, property devolved on the widows; and therefore Order XXII, rule 10 applies. [NAPIER, J.—Is it a statutory vesting; how does it vest in the widows?] The language of Order XXII, rule 10

(1) (1912) 23 M.L.J., 638 at p. 641.

runs thus :—" in other cases of any devolution of any interest, etc." There is a case of vesting by consent of executor. [See sections 112 and 113 of the Probate and Administration Act.] The assent operates to transfer the property from the executor to the legatee. In such a case it will be devolution. Here the executor has died; and by operation of law, the property has devolved. [NAPIER, J.—What does the Act provide?] It does not provide. All that can be done is to take out execution—See sections 20, 21 and 18 and succeeding sections. [NAPIER, J.—This is by proving the will and that does not affect the question.] It must be left to the general law. Then it comes under Order XXII, rule 10, and therefore there is a right of appeal.

S. Srinivasa Ayyangar in reply :—Section 36 helps me: the definition of decree does not help my friend. [SESHAGIRI AYYAR, J.—How does your client come in?] She has been brought in and a decree passed in her favour I only raise the question of appeal or no appeal.

SESHAGIRI AYYAR AND NAPIER, JJ.

The following Judgment of the Court was delivered by SESHAGIRI AYYAR, J.—One Arunachellam Chetty died leaving two widows. Prior to his death, he executed a will on the 25th July 1904. Two persons were appointed executors under it. They brought Original Suit No. 49 of 1911 on a deed of mortgage executed to the deceased testator. One of the executors died before the preliminary decree in the suit was passed, and the other after it. An application was presented by the appellant, the senior widow of the deceased to continue the suit. It was opposed by the respondent, the junior widow. The Subordinate Judge dismissed the application. This appeal is against that order.

Mr. S. Srinivasa Ayyangar raised the preliminary objection that no appeal lies against the order of the lower Court. The question has been argued very fully before us by the learned vakils for the appellant and respondent; we have come to the conclusion that the preliminary objection must be upheld.

Mr. T. Rangachariyar's first contention is that after the passing of the preliminary decree in a mortgage suit, the procedure leading up to the final decree is only by way of execution and that consequently his client, the appellant, is entitled to initiate proceedings in that behalf. We are of opinion that this argument

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is not open to the appellant after the amendment of the Code Civil Procedure which by Order XXXIV now regulates t procedure relating to the execution of mortgage decrees. was held in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(that the preliminary decree passed in a mortgage suit is the or executable decree and that proceedings for obtaining the fi decree could be taken by way of execution. This view w based mainly on the language of section 89 of the Transfer Property Act which says: "The plaintiff or the defendant as t case may be may apply to the Court for an *order* absolute f sale of the mortgaged property." The recent decision of the Jud cial Committee in *Abdul Majid* v. *Jawahir Lal*(2) is in favo of the view taken in the Madras Full Bench case. The use the word *order* in section 89, in contradistinction to the wo *decree* in section 88 was responsible for numerous decisions whic were not easily reconcilable. The legislature intervened, an in Order XXXIV speaks of both the adjudication as decrees See rules 2 and 3. Therefore after the passing of the prelim nary decree, the *suit* is continued until the stage of final decre is reached. It is not by the process of execution that the fina decree is obtained under the new Code. Mr. Rangachariya refers to the explanation to the definition of decree and argue that when read with section 47, the proceedings referred t in the explanation really relates to execution. Had it no been for the deliberate change in the language of Order XXXIV, this contention would have force. The decisions of the Judicial Committee of the Privy Council in *Ashfaq Husain* v. *Gouri Sahai*(3) and *Munna Lal* v. *Sarat Chunder*(4), relate to the language of sections 88 and 89 of the Transfer of Property Act and not to the amended provision in the Code of Civil Procedure. In the former case, counsel expressly stated that under the Code it would not be possible to argue that the preliminary decree is executable. It was further argued by the learned vakil that as the preliminary decree relating to possession (under Order XX, rule 12) is executable independently of the final decree as to mesne profits, it follows that a preliminary mortgage decree is executable. A decree for mesne profits is not strictly

(1) (1902) I.L.R., 25 Mad., 244. (2) (1914) I.L.R., 36 All., 350 (P.C.)
(3) (1911) I.L.R., 33 All., 264. (4) (1915) 21 C.L.J., 118 (P.C.)

speaking the final stage of the decree for possession. They relate to two different rights; and the fact that an exception is made in such cases is not an argument for holding that all preliminary decrees are executable.

Mr. Rangachariyar's next contention is that his client is a person on whom the estate has devolved upon the death of the executors and that her application must be treated as one falling under Order XXII, rule 10, of the Code of Civil Procedure. We were at first inclined to think that the devolution referred to in this rule was of the same character as is referred to in the definition of *Legal Representative* in the Code (section 2, clause 11).

Mr. S. Srinivasa Ayyangar has satisfied us that rule 10 is not open to that interpretation. The term "legal representative" is used in rules 3 and 4 of the order and does not find a place in rule 10. The plain language of the rule suggests that the devolution of the interest must be that of the plaintiff who has instituted the suit. The words "assignment" and "creation" indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit. We think that "devolution" which is by operation of law must also relate to the interest of the party to the suit. Under the corresponding rule in the Judicature Act (Order XVII, rule 2), it was held that where a tenant for life who brought the suit died, the remainder man was not entitled to continue the suit—*Ferrall* v. *Curran*(1). The same construction must be adopted with reference to rule 10. The legislature has provided for cases in which the interest devolving is not that of the deceased plaintiff, but is that of the person whose right of action the deceased plaintiff sought to enforce as representing his estate. Rules 3 and 4 of Order XXII read with section 2, clause 11, cover such cases It is on this principle it has been held that a reversioner can continue the suit instituted by a widow. See *Rikhai Rai* v. *Sheo Pujan Singh*(2) and *Gandi Ramaswami* v. *Puramsetti Pedamunayya*(3). It has to be noted that the application of the appellant in the lower Court was under rule 3 of Order XXII. The legislature has chosen not to give a right of appeal against orders passed under that rule, whereas under Order XLI (1) (*l*) orders with

(1) (1899) L.R., 2 Ir R., 470 (2) (1911) I.L.R., 33 All., 15

(3) (1915) 17 M.L.T., 160.

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reference to rule 10 are appealable. We must therefore hold that this appeal is incompetent.

The appellant will pay the costs of the respondent.

S.V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915 February 24 and March 5 and 12

M. BALKRISHNA RAO (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF CUDDAPAH (DEFENDANT), RESPONDENT.*

Madras Forest Act (XXI of 1882), ss. 6, 10, 16 and 17—Notification under section 16—Notice under section 6, a condition precedent—Irregularity due to absence of notice, not cured by knowledge under section 17—Grant of personal inam of lands including poramboke, meaning of.

A Forest Settlement Officer who is constituted a court for the decision of claims to lands which it is proposed to include in a reserved forest, has, in the absence of notice required by section 6 of the Act, no jurisdiction to make any decision affecting the right to those lands

Nusservanjee Pestonjee v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadur (1855) 6 M.I.A., 134 and *Sunnby v. London (Ont) Water Commissioners* (1906) A.C., 110, followed.

Poramboke in the phrase, grant of "lands besides poramboke," means poramboke or unassessed waste

Secretary of State for India v. Raghunathathathachariar (1913) 24 M.L.J., 31, followed.

Narayanasami Naidu v. Secretary of State for India (1913) 24 M.L.J., 2 distinguished

APPEAL against the decree of Diwan Bahadur V. SUBRAHMANYAM PANTULU, the District Judge of Cuddapah, in Original Suit No. 10 of 1911.

K. Srinivasa Ayyangar for the appellant.—I submit that notice, under section 6, to the owner of lands to be included is a condition precedent to the vesting of jurisdiction in the

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* Appeal No. 108 of 1913

Forest Settlement Officer. He is constituted a special Court. The question of actual notice to my client depends on Exhibits I and II. [WALLIS, C.J.—What is the date within which objection should be put in.] Three months [WALLIS, C.J.— This petition is five years after.] [Dr. Swaminathan. He had time till 1902.] It does not show that there was a proclamation under section 6. It was lodged I refer also to Exhibit II. [WALLIS, C.J.—Is there no evidence against you?] Absolutely none. My client is a resident of Mysore territory. He manages by agent. [What evidence is there that this notification came to the knowledge of the jagirdar?] Absolutely none. I refer to paragraphs 45—47 of the judgment. [WALLIS, C.J.—The Judge interprets Exhibits I and II as plaintiff being answered.] Exhibit I is "It is lodged." [WALLIS, C.J.—Exhibits I and II prove nothing.] [COUTTS TROTTER, J.—It is a condition precedent that actual or constructive notice should reach the owner.] I say "actual" in terms of section 6. [COUTTS TROTTER, J.— Suppose he never hears of a proclamation under section 4 or section 6. Then you say no jurisdiction arises.] Yes, my Lord. [WALLIS, C.J —This is an *inam* village registered in the name of a known owner to whom notice ought to be given.] Then it becomes a question of law. What is the effect of not serving the notice? [WALLIS, C.J.—The special object of investing the Forest officer with this jurisdiction is that a special notice ought to be given to the reputed owner. You say that rights about which no claim is preferred under section 16 are not affected.] Section 17 comes into operation only when there is a publication in the Government Gazette which can only be done after the necessary preliminaries are gone through. The provision as regards notice is as obligatory as the proclamation under the first part—I rely on *Saunby* v. *London (Ont) Water Commissioners*(1) and *Herron* v *Rathmines and Rathgar Improvement Commissioners*(2). Another point is under section 3, the land must be at the disposal of Government before they can reserve [WALLIS, C.J.—It is never then land owned by Government].

Dr. *Swaminathan* (for the *Government Pleader*) for the respondent.—I invite attention to the scheme of the Act. The notification is the important thing to give the Forest Settlement

(1) (1906) A.C., 110 at p. 115. (2) (1892) A.C., 498 at p. 523.

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Officer jurisdiction and notice is additional. Coming to section 16, if the second portion is important it would have been so indicated; but it says only the following events:—[WALLIS, C.J.—That assumes that the procedure has been followed.] If personal service upon all neighbours were intended and is a condition precedent under section 16, the language would have been different. [WALLIS, C.J.—The real question is the construction of the second part of section 6. We do not know the period within which objection to notice should be taken.] The language is adopted advisedly after the period has elapsed. Notice under section 16 was published in 1902. There were seven years between the date of notification in 6 and 16. He had time till 1902. The reasonable inference is he waived his undoubted right to prefer his objection. [WALLIS, C.J.—You want us to presume he got answers and did not care to reopen the question.] I refer to the evidence of the second witness, a clerk in the District Forest Office. [COUTTS TROTTER, J.—This man does not carry the point further. He does not know anything.] [WALLIS, C.J.—No body knows what the endorsement on his petition was.] [COUTTS TROTTER, J.—Why should we suppose that if he had been told, he would have taken no steps.] He writes the next letter asking for the page of the gazette. [WALLIS, C.J.—Is that the same year?] Next year. [COUTTS TROTTER, J.—You are assuming something we do not know, you are assuming that the communication too was in consequence of a reply.] [WALLIS, C.J.—Have you any authority for the position that a person entitled to statutory notice and not getting it, must yet come in. He knew and waived his right. [WALLIS, C.J.—His getting some knowledge is no waiver.] The non-issue of a notice is an irregularity and by his conduct, he has acquiesced in the irregularity. [WALLIS, C.J.—This is a summary procedure and the provisions of the Act ought not to be relaxed.] [COUTTS TROTTER, J.—You admittedly did not send any notice. It is clear you did not treat him as owner.] Then on the merits, the inam title-deed gave him the revenue only. [WALLIS, C.J.—No. It gave revenue rights of certain lands and also poramboke in addition.] I refer to *Narainasamy Naidu* v. *Secretary of State for India*(1) [WALLIS, C.J.—That has nothing to do

(1) (1913) 24 M.L.J., 20

speaks of common things reserved. This is unassessed waste here. The decision is by Mr. Justice BENSON who is an authority on revenue matters. This is conclusive against you.]

WALLIS, C.J.—This is a suit brought by the plaintiff against the Secretary of State in Council to establish his title to, and to recover possession of certain lands in the village of Putlampalli, which in the year 1905 were declared to be reserved forest by notification under section 16 of the Madras Forest Act and have since been in the possession of Government. The plaint alleges that the declaration and taking possession were illegal and ultra vires, because the Forest Settlement Officer did not give notice to the plaintiff or his agent as is required by section 6 of the Act before proceeding to constitute the lands a Reserved Forest. The plaintiff gave evidence that he was never served with notice, and in the absence of any evidence to the contrary the District Judge found that this was so, and this finding has not been seriously contested. He inferred however from Exhibits Nos 1, 2, and 3 that the plaintiff was presumably aware that the suit lands were being included in the reserved forest nearly a year before the publication of final notification under section 16 and held that as the plaintiff did not avail himself of his right under section 17 to satisfy the Forest Settlement Officer, if he could, before the publication of the notification that he had sufficient cause for not preferring his claim within the period prescribed for the submission of the claims in the notices issued in the year 1895 and so secure an investigation of his claim, the irregularity was cured and did not present the plaintiff being barred under that section. No authority has been cited before us in support of this view and I am unable to accept it. Under the Act the Forest Settlement Officer is constituted a Court for the decision of claims to lands which it is proposed to include in a reserved forest as between Government and the claimant, and in the event of the claim being allowed he is required under section 10 if no arrangement is come to with the claimant either to exclude the land in question from the proposed forest or to acquire it for Government under the Land Acquisition Act. Under section 6 he is required besides publishing notices calling for claims at the headquarters of each taluk in which any part of the land is situated and at every town and village in the neighbourhood of

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WALLIS, C.J.

such land to serve special notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest or his agent or manager; and it is not disputed that the plaintiff as the registered inamdar of the village in which the suit land was situated should have received notice under this section. It should also be stated that there is no evidence that the steps which were being taken under the Act came to the knowledge of the plaintiff until more than five years after the issue of the proclamation under section 6. In these circumstances, it is, I think, clear that the Forest Settlement Officer in the absence of the notice required by the section had no jurisdiction to make any decision affecting the right of the plaintiff. Numerous cases might be cited in support of this position, but it is sufficient to cite the decisions of their Lordships in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(1) and *Saunby* v. *London (Ont) Water Commissioners*(2). In the latter it was held by their Lordships that the statutory Commissioners having proceeded without serving the notice required by the Act the appellant had not lost his ordinary right of action for the trespass on his property. Reference may also be made to the forcible language of Lord MACNAGHTEN in *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(3) and to *Rameswar Singh* v. *Secretary of State for India*(4).

If, as I hold, the notification issued under section 16 is not binding on the plaintiff and his rights are not barred by section 17, I agree with the District Judge that he is entitled to a decree. Under the terms of his inam title deed, Exhibit K, the inam tenure has been converted into a permanent freehold, to use the language of the grant; and the only question is whether it includes the unassessed waste lands in the village, which have been included in the reserved *forest*. Exhibit K acknowledges his title to a personal inam consisting of the right to the Government revenue on land claimed to be 201·[illegible] acres of dry and 287·69 acres of wet land situated in the shrotriem village of Pullampalli "besides poramboke." The poramboke here mentioned obviously means the poramboke or unassessed

(1) (1855) 6 M.I.A., 134 at p. 155.
(2) (1906) A.C., 110.
(3) (1892) A.C., 498 at p. 523.
(4) (1907) I.L.R., 34 Calc., [illegible]

waste of the shrotriem village in question and this is the construction put upon the words in similar grants in *Secretary of State for India* v. *Raghunatha Thathachariar*(1) and *Narayanaswami Nayudu* v. *Secretary of State for India*(2) where however it is held that certain lands including lands used for communal purposes, etc., do not pass under such a grant. The inam register (Exhibit J) which was before the survey no doubt underestimates the area of the poramboke in the village; but there is no ground for interpreting the grant as not conferring the whole poramboke of the village. The appeal must be allowed and the suit decreed for the plaintiff with costs throughout.

COUTTS TROTTER, J.—I am of the same opinion. The Act which we have to construe is Expropriating Act and to a certain extent ousts the jurisdiction of the ordinary Courts of law in favour of tribunals consisting wholly or in part of executive officers Certain machinery is provided by the Act for the purpose of giving notice to persons who may be injuriously affected by the Act and enabling them to prosecute their claims before the tribunal set up by the Act. It is conceded that in one respect the procedure outlined by the Act has not been followed in this case, inasmuch as no notice has in fact been served upon the appellant as a known or reputed owner of lands affected, in accordance with the concluding paragraph of section 6 of the Act. It also appears that there was some evidence to show that the appellant in fact knew that it was proposed to include his lands in the new forest area, notwithstanding the absence of a notice directed to him personally. In these circumstances it was urged on behalf of the respondent that the broad policy of the Act must be looked at, and that all that was essential to give jurisdiction under it was that the appellant *quoquo modo* should have knowledge in fact of the proposal to include his lands. In support of this contention reliance was placed on the language of section 6 and of section 16. No doubt section 6 fixes no limit of time within which the personal notice to owners must be given; and section 16 fixes the date for notification of the reservation of the proposed forest only by reference to the time limited by the proclamation prescribed by the first part of section 6. From that it is argued that the second part of

(1) (1913) 24 M.L.J., 31 (2) (1913) 24 M.L.J., 30.

BALKRISHNA RAO v. THE SECRETARY OF STATE FOR INDIA.

COUTTS TROTTER, J.

section 6 is only directory, and that neglet to carry out its directions is a mere irregularity, which can be cured by proving that notice in fact reached the appellant. The appellant contends on the contrary that the sending of the notice prescribed by the second part of section 6 is as much a condition precedent to the exercise of the jurisdiction conferred by the statute as the issuing of the proclamation enjoined by the first. Looking at the language employed in the two parts of section, its terms are as mandatory in the one as in the other; "the Forest Settlement Officer shall publish a proclamation" is followed by "the Forest Settlement Officer shall also serve a notice." Where such language is used I think its proper construction has been determined in a series of cases in the House of Lords and Privy Council of which I need only refer to *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(1). The result of those cases in my opinion is that every such statutory mandate in expropriating statute must be strictly observed and that its observance is a condition precedent to the whole jurisdiction conferred. I therefore hold that the appellant never became amenable to the special jurisdiction of the Madras Forest Act and that the present suit lies if he can prove his title as inamdar to the property sought to be afforested That is a question of fact upon which, in my opinion, the evidence is conclusive in his favour.

S.V.

(1) (1892) A.C., 498.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

1915. March 8 and 18.

SYED AHMED SAHIB SHUTARI (PLAINTIFF), APPELLANT,

v.

THE MAGNESITE SYNDICATE, LIMITED (REPRESENTED BY THEIR AGENT AND MANAGER, G. TURNER) AND SIX OTHERS (DEFENDANTS NOS. 1, 2 AND 4 TO 8), RESPONDENTS.*

Right of suit—Co-owners—Suit in ejectment against trespasser—Suit by one co-owner alone—Other co-owners, not parties—Suit, if maintainable—Local inspection by judge—Judgment based solely on such inspection, if valid—Civil Procedure Code (Act V of 1908), O XXVI, r 9—Civil Procedure Code (XIV of 1882), sec. 392.

One of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action.

A judgment should not be based solely on the result of the personal local inspection made by the judge This rule applies to cases instituted under the new *Code of Civil Procedure (Act V of 1908) as under the old Code (Act XIV of 1882).*

SECOND APPEAL against the decree of H. O.D. HARDING, the District Judge of Salem, in Appeal No. 43 of 1912, preferred against the decree of T. A. NARASIMHA ACHARIYAR, the Principal District Munsif of Salem, in Original Suit No. 292 of 1911.

The material facts appear from the judgment of the High Court.

M. O. Parthasarathi Ayyangar and *T. Ranga Achariyar* for the appellant.

D. Chamier for the first respondent.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—In this suit the plaintiff complains that the first defendant has trespassed on property not included in the lease, and prays for an injunction and for damages. The trespass was denied. The District Munsif found for the plaintiff and awarded damages.

In appeal, the District Judge held that as the plaintiff was only one of the tenants in common who laid claim to the property, he was not entitled to maintain the suit alone. The judge personally inspected the locality and on the strength of that inspection found that the property was included in the lease.

BALKRISHNA RAO v. THE SECRETARY OF STATE FOR INDIA.

COUTTS TROTTER, J.

section 6 is only directory, and that neglect to carry out its directions is a mere irregularity, which can be cured by proving that notice in fact reached the appellant. The appellant contends on the contrary that the sending of the notice prescribed by the second part of section 6 is as much a condition precedent to the exercise of the jurisdiction conferred by the statute as the issuing of the proclamation enjoined by the first. Looking at the language employed in the two parts of section, its terms are as mandatory in the one as in the other; "the Forest Settlement Officer shall publish a proclamation" is followed by "the Forest Settlement Officer shall also serve a notice." Where such language is used I think its proper construction has been determined in a series of cases in the House of Lords and Privy Council of which I need only refer to *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(1). The result of those cases in my opinion is that every such statutory mandate in expropriating statute must be strictly observed and that its observance is a condition precedent to the whole jurisdiction conferred. I therefore hold that the appellant never became amenable to the special jurisdiction of the Madras Forest Act and that the present suit lies if he can prove his title as inamdar to the property sought to be afforested. That is a question of fact upon which, in my opinion, the evidence is conclusive in his favour.

S.V.

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(1) (1892) A.C., 498.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastriyar.

1915. April 15.

Re R. SOBHANADRI AND TWO OTHERS, (PETITIONERS), ACCUSED.*

Criminal Procedure Code (Act V of 1898), sec. 256—Summons-case and warrant-case, trial of—Procedure, that of warrant-case—Warrant-case, withdrawn—Charge framed in summons-case—Right of accused to recall and cross-examine prosecution witnesses—Magistrate, refusal of, illegal—Prejudice—Onus on prosecution.

When a summons-case and a warrant-case are tried together, the procedure to be followed is that prescribed for the warrant-case.

Rajnarayan Koonwar v. *Lala Tamoli Raut* (1885) I.L.R., 11 Calc., 91, followed.

If the complaint in respect of the offence triable as a warrant-case is not proceeded with, but a charge be framed only in respect of the offence triable as a summons-case, the accused is entitled to recall and cross-examine the prosecution witnesses under section 256 of the Code of Criminal Procedure, as he could not have anticipated the withdrawal of the former charge and cannot be said to have been in default.

A refusal of the Magistrate to allow the accused to recall and cross-examine the prosecution witnesses is illegal and it is for the prosecution to show that the accused are not prejudiced thereby.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of E. A. HARVEY, the Joint Magistrate of Bezwada, in Criminal Appeal No. 24 of 1914, preferred against the judgment of K. SUBBA RAO, the Stationary Sub-Magistrate of Bezwada, in Calendar Case No. 474 of 1913.

The material facts appear from the order.

P. Nagabhushanam for the appellants.

P. R. Grant for *the Public Prosecutor* for the Crown.

KUMARASWAMI SASTRIYAR, J.—The chief ground urged in appeal is that the accused were prejudiced by the refusal of the Magistrate to allow them to recall and cross-examine the prosecution witnesses.

KUMARASWAMI SASTRIYAR, J.

The accused were tried for offences under sections 504 and 352 of the Indian Penal Code and during the course of the proceedings the Magistrate dismissed the complaint under section 504 and proceeded with the charge under section 352.

* Criminal Revision Case No. 851 of 1914.

SRUTARI v. THE MAGNESITE SYNDICATE, LTD.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

We are unable to agree with the District Judge. Although there is a difference of opinion regarding the right of one of the tenants in common to eject the lessee from the leased premises, there is no doubt that as against a trespasser any one of the co-owners can maintain an action. *Radha Proshad Wasti* v. *Esuf*(1), *Harendra Narain Choudhry* v. *Moran*(2), *Hira Lal* v. *Bhairon*(3) and per BEST, J., in *Gopalasami* v. *Periasami Tevar*(4). Even in *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh*(5), which lays down that one of the co-sharers is not entitled to sue the lessee in ejectment, it is recognised that the case of a trespasser will be different. This principle has been extended to members of a joint Hindu family. See *Pateswari Pratap Narain Singh* v. *Rudra Narain Singh*(6). We have not been referred to any authority in support of the position taken by the learned District Judge.

The District Judge is equally in error in basing his decision on the knowledge gained by him during the local inspection. The language of Order XXVI, rule 9, slightly differs from that of section 392 of the old Code. Under the Act of 1882 a Commissioner should be appointed only if the inspection "*cannot be conveniently conducted by the judge in person.*" Under rule 9, no such condition is imposed. Even under the old Code it was held by the Judicial Committee of the Privy Council that a judgment should not be based solely on the result of the personal inspection by the judge. *Kessowji Issur* v. *G.I.P. Railway Company*(7). The same reasoning applies to cases instituted under the new Code. See *Raikishori Ghose* v. *Kumudini Kanta Ghose*(8). The inspection which a judge makes *should be used by him only to test the accuracy of the evidence* let in. He should not, without submitting himself to the test of cross-examination make his knowledge the sole evidence for determining the question raised before him. We have no hesitation in holding that the procedure of the learned judge has seriously prejudiced the appellant.

For both these reasons, we must reverse the decree of the District Judge and direct him to dispose of the appeal according to law. *Costs will abide the result.*

Messrs. King and Partridge attorneys for the first respondent.

K.R.

(1) (1881) I.L.R., 7 Calc., 414. (2) (1893) I.L.R., 15 Calc., 40.
(3) (1883) I.L.R., 5 All., 602. (4) (1896) 6 M.L.J., 27.
(5) (1908) I.L.R., 35 Calc., 807. (6) (1904) 1 A.L.J., 541.
(7) (1907) I.L.R., 31 Bom., 381. (8) (1912) 15 C.L.J., 138.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastriyar.

1915.
April
15 and 20.

VELLAYANAMBALAM (COMPLAINANT), PETITIONER,

v.

SOLAI SERVAI AND ANOTHER (ACCUSED), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), ss 439, 422 and 423—Order of acquittal—Revision petition to the High Court by private parties—Power of High Court to interfere—Interference, in what cases—Service of notice of appeal on District Magistrate—Omission of service, effect of—Irregularity.

The High Court has power to interfere in revision against an order of acquittal on the application of private parties, but will do so only when it considers that interference is urgently demanded in the interest of public justice.

The High Court will not interfere with an order of acquittal where the question is one as to the appreciation of evidence or where there is no patent error or defect in the order which has resulted in grave injustice.

Mere omission to serve notice of appeal on the District Magistrate, under sections 422 and 423 of the Code of Criminal Procedure, is only an irregularity and will not render the proceedings *ab initio* void

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of J. W. GLASSON, the First-class Magistrate (Joint Magistrate) of Dindigul Division, in Criminal Appeal No. 52 of 1914, preferred against the judgment of N. SUNDARAM AYYAR, the Stationary Second-class Magistrate of Nilakottai, in Calendar Case No. 144 of 1914.

M. O. Parthasarathy Ayyangar and *C. Rajagopala Ayyangar* for *R. Sadagopa Achariyar* for the petitioner.

K. S. Jayarama Ayyar for the respondents.

P R Grant for *the Public Prosecutor* for the crown.

KUMARA-SWAMI SASTRIYAR, J.

ORDER.—This is an application to revise the order of the Joint First-class Magistrate of Dindigul Division reversing the conviction and sentence passed by the Stationary Second-class Magistrate of Nilakottai in Calendar Case No. 144 of 1914.

The complainant filed a complaint against the two accused, who are the present counter-petitioners, charging them with offences under sections 352 and 426 of the Indian Penal Code and section 24 of Act I of 1871 (Cattle Trespass Act). The Stationary

* Criminal Revision Case No. 660 of 1914. (Criminal Revision Petition No. 558 of 1914)

VELLAYAN-AMBALAM v. SOLAI SERVAI. — KUMARASWAMI SASTRIYAR, J.

Sub-Magistrate fined each of the accused Rs. 15 for each of the offences and directed them to pay Rs. 5-4-0 as costs to the complainant. An appeal was preferred and Mr. GLASSON, the Joint Magistrate of Dindigul Division, reversed the conviction after going through the evidence and material papers, as he was of opinion that the case was not proved.

A preliminary objection has been taken by Mr. Jayarama Ayyar for the respondents that no Criminal Revision Petition lies to set aside an order of acquittal and that the only remedy in such cases is an appeal by the Government as provided for by section 417 of the Criminal Procedure Code. It has been argued that a private person has no *locus standi* in such cases and reference has been made to *Thandavan* v. *Perianna*(1) and *In re Sinnu Goundan*(2). The right of a private party to prefer a revision petition against an order of acquittal and the circumstances under which the High Court would interfere, if at all, have been considered in numerous cases. In *Thandavan* v. *Perianna*(1) it was held that an appeal against an order of acquittal by way of revision was not contemplated by the Criminal Procedure Code and their Lordships refused to hear the petitioner's counsel. The observations of MILLER, J., in *In re Sinnu Goundan*(2), to the effect that to entertain proceedings by way of revision where an appeal would lie from an acquittal under section 417 of the Code of Criminal Procedure is contrary to the spirit if not to the letter of sub-section (5) of section 439 of the Code of Criminal Procedure, also support the view taken in *Thandavan* v. *Perianna*(1). There are, however, numerous cases where the High Court has held that it has power to interfere in revision although the powers were exercised within very narrow limits. I need only refer to *Sukho* v. *Durga*(3), *Queen Empress* v. *Ala Baksh*(4), *In the matter of Aminuddin*(5), *Emperor* v. *Madar Bakhsh*(6), *Heerabai* v. *Framji Bhikaji*(7), *In re the Municipal Committee of Dacca* v. *Hingoo Raj*(8), *The Deputy Legal Remembrancer* v. *Kuruna Baistobi*(9), *Rupa Mandal* v. *Keshab Mandal*(10), *Bellew* v *Mrs. Parker*(11), *Rakhal Das Roy* v. *Kailash Banu*(12), *Kangali Sardar* v. *Rama Charan*

(1) (1891) I.L.R., 14 Mad., 363
(2) (1914) 26 M.L.J., 100.
(3) (1880) I.L.R., 2 All., 448
(4) (1884) I.L.R., 6 All., 484.
(5) (1902) I.L.R., 24 All., 346.
(6) (1903) I.L.R., 25 All., 129.
(7) (1891) I.L.R., 15 Bom., 349.
(8) (1882) I.L.R., 8 Calc., 895
(9) (1895) I.L.R., 22 Calc., 164
(10) (1907) 5 C.L.J., 452
(11) (1903) 7 C.W.N., 521.
(12) (1910) 11 C.L.J., 113.

Bhattacharjee(1), *Ramjiwan Rai* v. *Abilakh Barai*(2) and *Shaikh Bagu* v. *Raika Singh*(3).

The view taken by the Allahabad High Court in *Sukho* v. *Durga*(4) and *Queen Empress* v. *Ala Baksh*(5) was that the Court would not interfere on facts but only on questions of law apparent from the record In *Heerabai* v. *Framji Bhikaji*(6), their Lordships observed that though the High Court has power to review an order of acquittal under section 439 of the Code of Criminal Procedure yet it would not ordinarily interfere with such an order in the exercise of its revisional jurisdiction, because an appeal can always be made by the Local Government against such an order under section 417 of the Code and that it is open to the complainant to move the Government if so advised to appeal against the order. Though in some cases above referred to, the Calcutta High Court went further than the other Courts as to the extent of the scope of interference in such cases, the decision of the CHIEF JUSTICE and Justice FLETCHER in *Faujdar* v. *Kasi Choudhisri*(7) is to the effect that the power should be exercised only sparingly and when urgently demanded in the interests of public justice. I entirely agree with the remarks of JENKINS, C.J., in the above case, and, while I am not prepared to hold that there is no power for the High Court to interfere in revision, I am of opinion that the applications by private parties ought to be discouraged and that the Court should only interfere when it considers that interference is urgently demanded in the interests of public justice. It seems to me that the Court should not interfere with an order of acquittal where the question is one as to the appreciation of evidence or where there is no patent error or defect in the order of acquittal passed by the lower Court which has resulted in grave injustice. The mere fact that the High Court, if it was sitting as a Court of Appeal would have come to a different conclusion on facts, is no ground for exercising revisional jurisdiction in petitions against orders of acquittal.

Turning to the merits the chief ground urged before me is that notice did not go to the District Magistrate as required by the Criminal Procedure Code and rules of criminal practice and

(1) (1911) I.L.R., 38 Calc. 786. (2) (1913) 18 C.W.N., 584.
(3) (1914) 13 C.W.N., 1214. (4) (1880) I.L.R., 2 All., 448.
(5) (1884) I.L.R., 6 All., 484. (6) (1891) I.L.R., 15 Bom., 349.
(7) (1914) 19 C.W.N., 184.

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that consequently the reversal of the judgment of the Second-cla[ss] Magistrate by the Joint Magistrate was erroneous. A report wa[s] called for as to the alleged want of notice to the District Magis[-]trate and it appears that although notice was ordered by th[e] Joint Magistrate when he admitted the appeal, no notice was, as a matter of fact, served on the District Magistrate. The case has been argued on both sides on the footing that notice did not go. Section 422 of the Code of Criminal Procedure enacts that, if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf · and section 423 of the Code of Criminal Procedure directs that the appeal shall be disposed of after hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears. The practice in all these cases is for the notice of appeal to be served on the District Magistrate and for the District Magistrate to instruct the Public Prosecutor to appear if, in his opinion, the case is a fit one for the Public Prosecutor to appear and argue in support of the conviction. It very often happens that the District Magistrate does not think it worth while to instruct the Public Prosecutor to appear. There can be no doubt that the action of the Joint Magistrate in hearing the appeal when no notice was, as a matter of fact, served on the District Magistrate, is irregular, having regard to the provisions of sections 422 and 423 of the Code of Criminal Procedure. I don't think that the mere omission to serve notice of appeal on the District Magistrate is anything more than an irregularity and do not agree with the arguments of the petitioner's counsel that the proceedings are *ab initio* void.

Mr. P. R. Grant, who appeared for the Public Prosecutor, states that he has no instructions to urge for a reversal on the ground that the District Magistrate had no notice and I must take it that so far as this case is concerned, the District Magistrate does not consider that the interests of justice have suffered owing to his not having received notice of the appeal.

I have gone through the records and do not think that any grounds exist for the exercise of the revisional powers of the High Court.

The petition fails and is dismissed.

K.B

PRIVY COUNCIL.*

SRI RAJAH
MALRAJU LAKSHMI VENKAYYAMMA RAO BAHADUR
(PLAINTIFF),

v

SRI RAJAH
VENKATA NARASIMHA APPA RAO BAHADUR AND OTHERS
(DEFENDANTS) AND

PARTHASARADHI APPA RAO BAHADUR (THIRD DEFENDANT),

v

MALRAJU LAKSHMI VENKAYYAMMA RAO BAHADUR
(PLAINTIFF).

TWO APPEALS CONSOLIDATED.

1916.
March
8, 9, 23, 28,
29, 30.
May 15.

[On appeal from the High Court of Judicature at Madras.]

Contract—Conditional proposal to make provision for the plaintiff by purchase of immoveable property on condition of her living with the promisor until her death—Acceptance by plaintiff and performance of condition—Suit against heirs of promisor to recover village purchased for plaintiff by relative a wealthy and childless Rani—Limitation—Representation—Practice of Privy Council—Grant of special leave to cross-appeal

This appeal arose out of a suit brought by the appellant for possession of a village called Repudi which had belonged to her great-aunt, a wealthy, childless and widowed Rani, and to which, on her death in 1899, the three defendants had in litigation between themselves been declared to be entitled in equal shares as her heirs. The appellant had been brought up by the Rani from an early age, and had lived with her until 1886, when she was married; and then the Rani being anxious that the appellant should not leave her offered (amongst other things) to make ample provision for her by the purchase of immoveable property, in consideration that she and her husband would continue to reside with her. This they did until 1893 during which time the Rani purchased two small properties in her own name, and transferred them after a time to the appellant. In 1893 the Rani purchased Repudi also in her own name though making no concealment of her intention that the appellant was eventually to have it, but the Rani's delay in transferring it to her caused unpleasantness and the appellant's husband left and went to his own home. Negotiations took place, and eventually the Rani on 12th October 1893 wrote to the appellant a letter in which she said "Repudi was purchased for you alone. I shall retain it under me so long as I am alive and afterwards convey it to you yourself." Thenceforth the appellant and her husband lived with the Rani until her death.

* *Present*:—Lord SHAW, Lord SUMNER, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS.

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that the communications to him had been made by her directions. Relying on the Rani's word and on her representations as to Repudi, the plaintiff and her husband remained at Senivaripet as desired by her, and the plaintiff attended on her until her death on 5th December 1899.

The Rani left a will, dated 27th August 1892, whereby she appointed her Diwan Venkateswara Rao to be executor. On the day of her death she referred to the village, and told the plaintiff that it had been given to her and that it should be placed in her possession when she (the Rani) died. Subsequently the Rani saw her executor, and gave him directions to the same effect.

On the Rani's death the right of inheritance to the Nidadavole and Medur estates was the subject of litigation between Rangayya Appa Rao, Narasimha Appa Rao, and Parthasaradhi Appa Rao, who claimed to succeed as the reversionary heirs of Papamma Rao's late husband, as well as heirs of the Rani herself, and who were ultimately found to be equally entitled, each to a one-third share of the property. In the course of that litigation a Receiver *pendente lite* of the estates was appointed.

The present suit was brought on 5th December 1902 whilst the above litigation was pending against the above-named three heirs to the reversionary heirship, and the Receiver of the Estate. The plaintiff set out the facts of her case, and prayed for a declaration that she was entitled to the village of Repudi, and for a decree for possession of it, and, if necessary, for the execution by the defendants of a conveyance of the village to her, and for other reliefs.

The only defendants who took part in the suit were Narasimha Appa Rao, the second defendant, and Parthasaradhi Appa Rao, the third defendant, who both denied the plaintiff's claim, and alleged that she had no right or title whatever to the village in suit.

The issues now material were as follows:—

"6. Whether the transactions referred to in the plaint are true and whether they constitute a contract between the plaintiff and the late Papamma Rao, that the latter should buy, and whether she so bought the suit village to be held by her in trust for the plaintiff as the beneficial owner and whether the said Papamma Rao contracted further, that the possession of the suit

village should be with her during her life and pass on her death to the plaintiff?

"7. Whether the said contract is valid and supported by consideration?

"8. Whether the oral testamentary disposition referred to in the plaint is true and valid?

"9. Whether the letter of 12th October 1893 and the will mentioned in the plaint are genuine and what is their legal effect?"

The District Judge held on the 6th, 7th and 9th issues that the Rani entered into a binding contract with the plaintiff at or after their marriage to settle property on them in consideration of their living with her; that the Rani purchased the village Repudi in pursuance of that contract; and that under the circumstances disclosed in the evidence the Rani must be deemed to have held Repudi under a resulting trust in favour of the plaintiff, but that the Rani was to retain possession of it until her death With regard to the 8th issue the District Judge was of opinion that "the weight of the evidence and the probabilities of the case are sufficient to establish what would amount to an oral bequest, if the existence of a resultant trust for the plaintiff had not been established." In the result a decree was made in favour of the plaintiff.

From that decision the second defendant Narasimha Appa Rao alone appealed, the appeal being valued at, the value of and consequently relating only to, the one-third share he claimed of the village. The appeal was heard by SANKARAN NAIR and ABDUR RAHIM, JJ., who differed in opinion, the former holding that the correspondence "proved beyond all reasonable doubt that the plaintiff's husband made it a condition of their living with Papamma Rao that the village should be at least bequeathed to the plaintiff, and thus confirms the oral evidence. The plaintiff lived with Papamma Rao, and in consideration of that and of their promise to live with her afterwards, Papamma promised to leave the village to her. I am therefore of opinion that there was an agreement, and it is a contract under the Indian Contract Act." He considered that the evidence of what was said by the Rani on 5th December 1899 showed that she thought the village already belonged to the plaintiff, and there was therefore no bequest of it. ABDUR RAHIM, J., negatived the idea that

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Papamma Rao made a contract with the plaintiff to convey the village in her life-time or to bequeath it to her, or that she held it subject to any trust, though he thought that she had an intention to make a settlement of the property for herself for life, and thereafter for the plaintiff. He further held that no bequest was proved.

The result of the difference of opinion was that in accordance with section 575 of the Civil Procedure Code, 1882, a decree was passed dismissing the appeal.

From that decree a further appeal valued as before was preferred by the second defendant alone under section 15 of the Letters Patent, which was heard by SIR C. ARNOLD WHITE, C.J. and WALLIS and MILLER, JJ., who after discussing the correspondence said, "It is clear we think, that no contract arises on it, and we do not find any sufficient evidence of a subsequent contract by which the plaintiff and her husband agreed to go on living with the old lady till her death in consideration of her undertaking to leave the plaintiff the village at her death." On the other points they agreed with the Judges before whom the case first came in the High Court. In the result a decree dated 26th November 1909 was drawn up allowing the appeal and reversing the decree of the District Judge so far as it affected the one-third share of the second defendant.

Thereupon the third defendant Parthasaradhi Appa Rao who had not appealed either against the decree of the District Judge, nor from the decree of the two Judges of the High Court, applied to the Court to set aside the decree against him and his one-third share. But the Court rejected the application on the grounds "that the old section 544 of the Civil Procedure Code, 1882, does not apply to the case, as the present appeal is not against the whole decree. Before the present Code came into force the plaintiff had become entitled to hold her decree against the defendant undisturbed, and the provisions of the present Code cannot be applied retrospectively so as to deprive her of it: *Colonial Sugar Refining Co.* v. *Irving*(1)."

From the decision of the Appellate High Court of 26th November 1909 the plaintiff preferred the first of the present appeals. Parthasaradhi Appa Rao, however, made no application

(1) (1905) A.C., 369.

to the High Court for leave to appeal. But on 20th May 1914 he filed a petition to His Majesty in Council praying for an order that he should be added as a respondent to the plaintiff's appeal and, "that he shall have special leave to cross-appeal from that portion of the decree of the High Court, dated 26th November 1909, which is against him." On 15th June 1914 his petition came on for hearing before the Judicial Committee of the Privy Council, and objections were taken on behalf of the present appellant that the petitioner had not appealed from the decree of the District Judge or even appeared on the hearing of the appeal of Narasimha Appa Rao, nor appealed from the first decree of the High Court, nor applied for leave from the High Court to appeal against the decree of 26th November 1909, and had taken no step in the matter for more than four years from that date, and that for these reasons among others the petition ought to be dismissed. An order was thereupon made granting the leave sought by the petitioner, "Such leave to be subject to all objections that may be taken at the hearing of the appeals, and that the appeal and cross-appeal be consolidated and heard together."

On 22nd July 1915 Parthasaradhi, the then petitioner, filed his petition of appeal in this case.

On these appeals—

Sir H. Erle Richards, K.C. and *Kenworthy Brown* for the appellant in the appeal and respondent in the cross-appeal contended that special leave to appeal should not be granted to Parthasaradhi Appa Rao, the third defendant. He had not appealed from the decree of the District Judge, and that right of appeal became barred in 1905 under article 156, schedule II of the Limitation Act, 1877. He had not appealed, as he might have done from the first decree of the High Court, and his right to appeal to the Privy Council was barred under article 179, schedule I of the Limitation Act, 1908. When, in 1914, he did apply for special leave, he made his application without first applying for leave to the High Court—see *Mutusawmy Jagavera Yettapa Naiker* v. *Venkateswara Yettia*(1) and *Moti Chand* v. *Ganga Pershad Singh*(2). Nor did his application after such delay fulfil the requirements of rule 5 of the Consolidated Rules of the Judicial Committee. If, therefore, he ever had such

(1) (1865) 10 M I.A. 313 at p. 319.
(2) (1901) I.L.R., 24 All., 174; s.c., L.R., 29 I.A. 40.

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a right he had forfeited it by his laches and delay. Relief could not be given him under section 544 of the Civil Procedure Code, 1882, because the appeals to the High Court were not against the whole decree, as was shown by their valuation and though at the date of the Letters Patent Appeal, the new Civil Procedure Code of 1908 was in force, this plaintiff-appellant had then, as the Judges of the High Court said, "become entitled to hold her decree against him undisturbed;" and he could not therefore get the benefit of order 41, rule 33 of that Code. Reference was made to *Karsondas Dharmsey* v. *Bai Gungabai*(1) and *Colonial Sugar Refining Co.* v. *Irving*(2). The High Court, moreover, under that rule had a discretion, which it was submitted, was rightly exercised. The third defendant should not have been made a respondent in this appeal: if he had, as is contended, no right to special leave, the same reasons are applicable why he should not get the benefit of an adverse decision against the plaintiff-appellant by being made a party respondent to her appeal.

P. O. Lawrence, K.C. and *J. M. Parikh* for Parthasaradhi Appa Rao, the third defendant, contended that the Order in Council, so far as it made the third defendant a respondent to the appeal of the plaintiff-appellant, was an unconditional order. Even, therefore, if the special leave to cross-appeal is open to objection, this defendant is now rightly before the Court as a respondent, and entitled to have his case stated and dealt with by the Board. The former appeal was treated as an appeal against the whole decree, and the decree made affirmed the whole decree of the Court below, and dismissed the whole appeal. There was in this case a common ground of action against several defendants, and an appeal by one of them on a ground common to all, and it was submitted that under the Civil Procedure Code, 1882, the Court could deal with the whole matter on this appeal. Reference was made to *Ram Kamal Shaha* v. *Ahmad Ali*(3), and *Dhullaloor Subbaya* v. *Paidigantam Subbaya*(4). *Colonial Sugar Refining Co.* v. *Irving*(2) had no application to or bearing on the present case. Order 41, rule 33 of the Civil Procedure Code, 1908, was referred to as being applicable, and as governing the case, though it was not necessary to rely on it. But special leave to

(1) (1905) I L R 30 Bom, 329.
(2) (1905) A.C, 369.
(3) (1903) I.L.R, 30 Calc, 429
(4) (1907) I.L.R, 30 Mad, 470 at p 472

appeal might be granted in any case that merited that privilege; for this Board was not confined to granting leave only within the restrictions of the Limitation Act. There being an appeal before the Board, a cross-appeal is not subject to a time limit; it can be granted at any time, *nunc pro tunc*. Reference was made to *Gajadhar Pershad* v. *Widows of Emam Ali Beg*(1) and *Cassim Ahmed Jewa* v. *Narainan Chetti*(2). There was no case in which a respondent wishing to appeal had been referred to the lower Courts when he was in such a position as this defendant, and when the whole subject of the appeal, and all the parties are before the Court.

Sir H. Erle Richards, *K.C.*, in reply, submitted that to give special leave to appeal would be to act contrary to all the practice of the Board. The applicant had neglected to perform any of the requirements necessary to found a grant of special leave upon: he had done nothing for five years to get the decree against him set aside or altered.

[LORD SHAW —Their Lordships are of opinion that the third defendant being a party to the appeal should have leave to present his cross-appeal. The question whether he is entitled to relief, and the form of that relief, will be further considered, should the principal appeal fail.]

The argument on the main question in the appeal was heard on 23rd, 28th, 29th and 30th March.

Sir H. Erle Richards, *K.C.* and *Kenworthy Brown* for the plaintiff-appellant contended that on the evidence, oral and documentary, there was a promise held out by the Rani that the village of Repadi should belong to the appellant, the consideration being that she and her husband should live with her until her death, and it was submitted that those facts established a contract which the Court would specifically enforce. Reference was made to *Hammersley* v. *Biel*(3) as supporting the present case on the question of contract, and not as an authority on the old doctrine of enforcing a representation; Pollock on Contracts (8th edition), page 752; *Maunsell* v. *Hedges*(4) and *Synge* v.

(1) (1875) L.R., 2 I.A., 205.
(2) (1910) I.L.R., 37 Calc., 623, s.c., L.R., 37 I.A., 133.
(3) (1845) 12 Cl. & Fin., 45.
(4) (1854) 4 H.L.C., 1039.

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Synge(1), which was approved by this Board in *Central Trust Co.* v. *Snider*(2). The Rani made a conditional proposal within the meaning of section 8 of the Contract Act (IX of 1872), and acceptance was established by the condition being fulfilled. The Rani was bound to transfer the village to the plaintiff-appellant: *Maddison* v. *Alderson*(3) and *Mahomed Musa* v. *Aghore Kumar Ganguli*(4) were referred to. This appellant was also entitled in the alternative to rely on the oral bequest of the village to her by the Rani which it was submitted was established.

Deejruyther, K.C. and *B. Dube* for the representatives of the second respondent Narasimha Appa Rao, contended that there was no contract proved to give the village to the plaintiff-appellant: what took place amounted merely to an expression of the Rani's intention to give it. The plaintiff and her husband went to live with the Rani depending entirely on her bounty and generosity. A mere representation of her intention until acted upon was not actionable, nor did it constitute a valid declaration of trust. The Rani though with an intention to give, reserved the right not to do so: there was no binding contract. If any title passed under the Rani's letter to the plaintiff of October 1893, it was invalid because the document was unregistered: *Umrao Singh* v. *Lachman Singh*(5) and the Registration Act (III of 1877), section 17, sub-section (*b*), and section 49 were referred to. It would be inadmissible in evidence. If a contract, it would be void under the Trusts Act (II of 1882), section 5. It did not constitute the Rani a trustee for the plaintiff-appellant in respect of the village.

P. O. Lawrence, K.C. and *J. M. Parikh* for the respondent and cross-appellant Parthasaradhi Appa Rao contended that there was no agreement whereby the plaintiff-appellant undertook to live with the Rani, and the Rani never stipulated that she should do so, and for this reason the present is a weaker case than *Maddison* v. *Alderson*(3) In order to found an action there must be a representation of a fact, and not merely a declaration of an intention to do something. *Loffus* v. *Maw*(6). Here

(1) (1894) 1 Q B, 466. (2) (1916) A.C, 266 at p. 272.
(3) (1883) L.R, 8 A.C, 467 at pp. 471 and 473
(4) (1914) I.L.R., 42 Calc., 801; s.c., L R, 42 I A., 1.
(5) (1911) I.L R., 33 All, 344 at p. 355; s.c, L.R., 38 I.A, 104 at p. 109.
(6) (1862) 3 Giff., 592 at pp. 594 and 602.

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there was merely an expression of intention, and no proposal under section 8 of the Contract Act: *Hammersley* v. *Biel*(1) which was a case of contract; Pollock on Contracts pages 558 and 559; *Maunsell* v. *Hedges*(2), also a case of contract and *Jordan* v. *Money*(3), were referred to. With respect to the position of this respondent as cross-appellant, the suit, if the plaintiff's appeal failed, should be altogether dismissed.

Sir H. Erle Richards, K.C., in reply. The intention expressed in the letter of October 1893 amounted to a promise or a conditional contract. It did not need registration: section 17 (*b*) of the Registration Act, 1877, did not apply to contracts. In the case referred to—*Umrao Singh* v *Lachman Singh*(4)—the document was found to be not a contract. On the whole circumstances of the case there can be but one conclusion that there was a contract. It was purely a question of fact.

J. M. Parikh replied in the cross-appeal.

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The judgment of their Lordships was delivered by LORD SHAW:—These are consolidated appeals against a judgment and decree, dated the 26th November 1909, pronounced by the Chief Justice and two Judges of the High Court of Judicature at Madras in an appeal under the Letters Patent against a decree of the High Court, dated the 16th November 1908. The two Judges constituting the High Court differed in opinion, with the result that a decree pronounced by the District Judge of Gōdāvari, dated the 3rd November 1904, had been affirmed in the original appeal. The Letters Patent appeal was allowed and the suit was dismissed. The form which the dismissal took will be afterwards referred to.

The suit was brought with the main object described in the first prayer of the plaint,—to the effect that it be declared that the plaintiff is entitled to the village of Repudi, and that defendants do put the plaintiff in possession of the same.

Raja Narayya, who died in 1864, was the owner of an extensive zamindari of Nidadavole. He was survived by two widows, both of whom were childless. One of those widows died in 1881; the other, a lady named Papamma, became sole lifeowner and continued to enjoy the estate until December 1899 when she died.

(1) (1845) 12 Cl., & Fin., 45. (2) (1854) 4 H.L.C., 1039
(3) (1854) 5 H L.C., 185 at pp. 210, 214, 226 and 251.
(4) (1911) I.L.R., 33 All, 344 at p 355, s c, L.R., 38 I.A., 104 at p. 109.

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She resided in her palace, or fort, at Senivarpet, having a large income amounting to about 6 lakhs of rupees per annum. The appellant, who is plaintiff in the suit, was a grandniece of Papamma, and was brought up by her from an early age. In 1886, at the age of 14, she was married to the ex-zamindar of Narasaraopet. He was a man of good standing, in the enjoyment of a small pension from the Government, and himself the owner of property of considerable value.

There can be little doubt that the Rani, herself childless, was on terms of attachment and affection towards the plaintiff and valued her companionship. When the marriage was arranged, the Rani disbursed all the suitable expenses thereof, but she appears to have been extremely anxious that her grandniece, although married, should continue to live with her. This, however, would without doubt have involved a certain loss of dignity and position on the part of her husband; and it appears clear from the facts proved that the obtaining of his consent to any arrangement of the kind was obtained with difficulty. The Rani agreed to make presents of jewellery to her grandniece, and to make provision for her apparently on a fairly ample scale by the purchase of immovable property for her. Upon this footing an arrangement was made and matters were settled. The date of that settlement was 1886, namely, the year of the plaintiff's marriage.

The arrangement was indefinite; and the indefiniteness was the cause of considerable uneasiness. Following upon it, however, the plaintiff and her husband did reside with the Rani until 1893. During this interval of time two properties were purchased by the Rani. The form in which she carried out her promise towards her grandniece was that in each instance she took the property in the first place in her own name, and after a period of about two years she granted a conveyance thereof to her grandniece. These properties were small. The balance of evidence is that they would not have been held by any of the parties as sufficient consideration for the plaintiff and her husband continuing to reside as stated. The Rani herself appeared, as circumstances afterwards showed, to be anxious to make further and more substantial provision for her grandniece. This was the situation of affairs up till the spring of the year 1893.

At that time the Rani purchased the property known as udi. She made no concealment of having done so for the intiff; but she did raise objection to the title of Repudi being on directly in the plaintiff's name. The impression of her van had been that the transaction was to be direct; and on 28th February, 1893, a receipt was given to him for an ance paid in respect of the purchase which bore that "having led to sell to you for 40,000 rupees the village" . . . . order that you may give away the same to M.R.Ry. Rajah Iraju Lakshmi Venkayyamma Rao Garu for dowry," . . . e have this day received from out of your own separate perty 100 rupees as advance towards the said sale amount." is appeared to be much too direct for the Rani, and she wrote the Diwan on the 8th March: "I have told you that this age should be purchased and the document obtained, for the sent, in my name alone, as was done before." She mentioned desire that the document "should be got written" as on the vious occasion, and she added · "it is not my intention to have village conveyed to anyone's name for the present, and so I re written this." In their Lordships' opinion the Rani ired to follow her own previous practice of taking the title her own name, and as was done with the two other villages, reafter to give a conveyance from herself. She uses the pressions "for the present," and "as was done for the former lages." The title was accordingly taken in her own name.

This, however, brought matters to a head with regard to the ition of the plaintiff and her husband, and to their continuing reside with the Rani. The plaintiff's husband left; he betook iself to his own property, and he received various communicas which asked him to return, and contained assurances that arrangement upon which Repudi was bought, namely, that hould be truly for the plaintiff, should be carried out. Their rdships do not state these arrangements in detail. They are, vever, fully satisfied on the evidence that the Diwan and the intiff's uncle were authorized to communicate to the plaintiff's sband this assurance and promise, and that in pursuance of t authority they visited him and made the communication.

The negotiations were protracted, but they culminated in a er of date 12th October, 1893, written by Papamma in her n hand to the plaintiff herself, in which she stated: "Repudi

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was purchased for you alone. Some encumbrances thereo yet to be discharged. I shall discharge the debt, retain it me so long as I am alive, and afterwards convey it t yourself. From that forwards you may do with it as you p The whole world knows that I purchased it (only) to g away to you. Do not think, even in your dream, that I, brought you up from infancy, would ruin you. I wrote grandson" (she designated the plaintiff's husband thus) "in manner, thinking that there was need to tell him all matters and nothing else."

This letter appears to their Lordships to be a promise, a be quite definite (1) with regard to its subject-matter, nam the village of Repudi; (2) with regard to the ownership the namely, that that was to be in the plaintiff; and (3) with re to the date of her entry into possession thereof, namely, possession would be given immediately upon the expiry of life interest therein, which Papamma reserved to herself.

In their Lordships' opinion this promise was accepted. evidence taken as a whole and the actings of parties are in en conformity with this being so. Their Lordships believe plaintiff's testimony to the following effect: "In the said let she wrote to say that she would pay off the debts, keep village under her throughout her lifetime and then give it to I agreed to it. I informed my husband of this. He consented to it. Being unable to bear the separation, she desir me to stay with her. She promised to give me, as aforesaid, staying with her accordingly till her death. The arrangeme was that both myself and my husband should remain there. consented to it accordingly. My husband also consented to Had Papamma Rao Garu failed to enter into such an agreeme in regard to Repudi, myself and my husband would not hav stayed there."

The Board is of the opinion accordingly that there was her a completed contract. Papamma accomplished her desire, an she obtained the consideration which she had so much at heart Acceptance of her terms and compliance with her stipulatio were made The words of Lord St. LEONARDS in *Maunsell* v *Hedges*(1) might be asked here: "Was it not a proposal, with a

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(1) (1854) 4 H.L.C., 1039.

condition, which, being accepted, was equivalent to a contract?" *Their Lordships do not doubt that it was.*

From that date forward, for a period of about seven years, namely, until Papamma's death in 1899, the plaintiff and her husband continued to live with her in her palace. There is a mass of oral and documentary evidence, but it does not advance, *nor does it in their Lordships' opinion recede from*, the point of completed contract as above set forth.

This being so, the citation of that set of cases of which *Maddison* v. *Alderson*(1) and *Maunsell* v. *Hedges*(2) are the familiar examples is beside the mark. In both of these cases, as must be done in all cases of a similar character, the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention; and that true issue is: is a contract proved? Had a contract been proved in either of the examples cited, there is nothing to suggest that the law would have refused to give effect to it by way of specific performance.

Maddison v. *Alderson*(1) is a good instance of the point. The contract was alleged to be constituted by a promise followed by actings on the faith thereof. The actings were carefully scrutinized in order to see whether the contract, the sole evidence of which otherwise was in the testimony of the plaintiff herself, was established. Lord O'HAGAN put the matter thus: "Assuming that the action be considered maintainable, if at all, for the purpose of forming [enforcing] a parole contract partly performed, the course of the argument appears to me to have been further erroneous in this, that instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked from the findings of the jury and the testimony supporting them to say there was a contract, and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained." And Lord BLACKBURN put the matter broadly thus: "It seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury if it had been explained to them that to make a contract there must be a bargain between two parties."

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(1) (1883) L.R., 8 A.C., 467. (2) (1854) 4 H.L.C., 1039

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In *Maunsell* v. *Hedges*(1) a bill was filed for the purpose of compelling those claiming under a certain will to settle certain real estates in Tipperary on the appellant pursuant to an alleged obligation arising out of certain letters. The letters disclosed that the deceased had positively declined to be bound. "I shall never settle," said he, "any part of my property out of my power so long as I exist." It was held that there was no contract placing the testator under such obligation

In short, to use the language of Lord CRANWORTH in *Jordan* v. *Money*(2) (a case in which the process of disentangling the true from the erroneous issues, as above alluded to, was carefully followed), "The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a Court of justice in acting upon it that such a contract as that which is alleged really was entered into?" The Board is of opinion in the present case that this question should be affirmatively answered.

It was strongly pressed upon their Lordships that the letter did not contain sufficient evidence of anything but an intention, and that it stopped short of any actual promise upon which acceptance of it as such might follow. Their Lordships do not think so. The law of India does not require writing at all in regard to such a bargain; but their Lordships are not surprised, looking to the frequent challenges made of contracts resting upon word of mouth alone, that the desire should have been expressed to have Papamma's undertaking in writing and distinctly set down. In their Lordships' opinion they were so obtained, and a contract was concluded in October 1893.

Another view of the case would lead precisely to the same result. It is this: Suppose the proof of the acceptance of the proposal made by the Rani, that is to say, of an acceptance in terms, were considered to be defective, what is the situation of the parties in view of the actings of the plaintiff and her husband. Their Lordships are of opinion, looking to the demand for a definite proposal as a condition of the plaintiff and her husband staying on with the Rani, that their actings did take place upon the footing of the proposal so made and that they were known by Papamma to have taken and to be taking place on that

(1) (1854) 4 H.L.C, 1039. (2) (1854) 5 H.L.C, 185 at p. 217.

footing. In these circumstances the objection that the contract itself was inchoate or incomplete cannot be maintained. The law in this sense was fully explained by Lord SELBORNE in *Maddison* v. *Alderson*(1) a judgment which was cited at some length by this Board in *Mahomed Musa* v. *Aghore Kumar Ganguli*(2). After such actings *locus penitentiæ*, or the power of resiling from an incomplete engagement or an unaccepted offer is, to use language borrowed from the law of Scotland and highly approved in the case referred to, barred by "*rei interventus*, which raises a personal exception which excludes the plea of *locus penitentiæ*." As was stated in the judgment of the Board in *Mahomed Musa* v *Aghore Kumar Ganguli*(2): "Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but upon the contrary, that these laws follow the same rule."

As stated, accordingly, the same result is reached. And it would not be open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village of Repudi to the plaintiff, such possession to take effect as from the date of the Rani's death.

The question of Papamma's intention is, of course, of fundamental importance, and it was much pressed upon the Board that she never meant to be bound. Their Lordships do not agree. They do not think that Papamma meant to avoid a bargain, or ever meant to have her grandniece and husband live on with her under the impression, on their part, that they were bound, whereas all the time she, Papamma, knew she was, and intended to be, free. Their Lordships do not think that the Rani's design included duplicity of this character.

The transactions of October 1893 followed by the years of compliance, on the footing that those transactions formed a concluded contract, leave no substantial doubt that no repudiation by the Rani would have affected it. Fortunately, however, there is a body of evidence throwing light upon the Rani's own view.

Her death occurred on the 5th December, 1899. On her death-bed she declared that she had purchased Repudi village solely on account of the plaintiff. Their Lordships believe the

(1) (1883) L R., 8 A.C., 467.
(2) (1911) I.L.R., 42 Calc., 801; s c., L.R, 42 I.A, 1.

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plaintiff's statement that the Rani then said "that she had purchased the Repudi village on my account alone, that I should take it after her death." The Diwan's evidence is quite plain upon the subject. He made a statement on the 5th December before the Tahsildar as to his instructions by the Rani, in which he said: "She has given me directions saying, among other things, that the village of Repudi had been given away to her granddaughter, and that the same should be delivered into possession of her after her death."

In the opinion of the Board accordingly, instead of there being any such repudiation of the contract, there was a dying declaration by the Rani, which, in their Lordships' opinion, constituted a reaffirmation and confirmation thereof.

Their Lordships observe that much discussion and considerable difference of judicial opinion arose, in the Courts below, upon the question whether these statements made on death-bed by the Rani did not constitute a nuncupative will. Such a will is valid in India. Some of the Judges, including the trial Judge, thought that it did; others thought it did not. The argument presented at this Board is noticeable in this particular: It was to the following effect: "Granted that the words taken by themselves might have made a will, it really could not have been so because the lady used language, the true effect of which was a declaration that the property of Repudi was already the plaintiffs'. She thought that it was, and therefore did not make a will with regard to it." If this argument be sound, that there was no will for the reason given, then the reason given is very helpful evidence that the Rani had already and effectually given a right to Repudi to the plaintiff, under which, immediately she, the Rani, died, the plaintiff would enter into possession of the village.

As stated, their Lordships are of opinion that the plaintiff has such a right in terms of a contract accepted and complete, and that a will accordingly would not have been in place in the circumstances, and should not be affirmed by law. Upon the other hand, the declaration on death-bed by the Rani herself leaves no doubt that what had been done had been effectively done. Her belief and statement to that effect were entirely well-founded.

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issued to the Public Prosecutor to appear at the further hearing of the revision and also to inform the Court whether Government intended to appeal against the acquittal. He appeared and handed in the appeals by the Government to the learned Judges who perused them and ordered notice forthwith. On that date an Admission Court constituted by a single Judge was sitting:

Held, that there was a valid presentation of the appeals.

The fact that a single Judge sitting in the Admission Court is entrusted with the duty of admitting criminal appeals does not deprive the Divisional Court constituted for the disposal of criminal business, of the right to exercise its power of admitting criminal appeals. It is by reference to the rules made by the High Court that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained and not by reference to the notes to the 'Sittings List' which are merely instructions for the guidance of practitioners. Under section 13 of the Charter Act rules for the exercise of the High Court's appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court the powers of the Chief Justice being only those conferred by section 14 to determine which Judge shall sit alone and which in Divisional Courts.

Per OLDFIELD, J.—As regards presentation, no special method is enjoined in the Code of Criminal Procedure, and therefore the question is one of administrative convenience alone So long as there is an actual presentation to an officer of the Court such as a Bench Clerk or to one of the Judges, its members, the presentation is not invalid

Where, on the presentation of a single complaint against the accused containing all the allegations necessary for the establishment of two cases, those allegations being shortly that the accused had cheated the Bank of Madras in connexion with certain bills of exchange and also by a false representation contained in a document as to the amount of his assets, the Magistrate after recording the prosecution evidence continuously without discriminating between that which was relevant on each of these two charges, framed separate charges and also numbered them as different calendar cases, but when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross examined promiscuously in respect of both the charges,

Held, that the joint trial of the two cases was illegal inasmuch as it contravened the provisions of section 233, Criminal Procedure Code, and that the illegality could not be cured by section 537, Criminal Procedure Code.

Subrahmania Ayyar v. *King Emperor* (1902) I.L.R., 25 Mad., 61 (P.C.) followed

Where in an appeal preferred to the High Court against the acquittal of an accused after an illegal trial, the Court is of opinion that the acquittal is wrong on the merits, the accused cannot be convicted and sentenced by the High Court, the only course open is to order that the accused be tried a second time.

Per NAPIER, J.—The decision of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) does not compel the Court to hold that in no case can a

(1) (1902) I.L.R., 25 Mad., 61 (P.C.).

misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537, Criminal Procedure Code.

APPEAL under section 417 of the Code of Criminal Procedure, 1908, against the acquittal of Kadiri Koya Haji by V. P. Row, the Additional District Magistrate of Malabar, in Calendar Case No. 4 of 1914.

The facts of the case are clearly set out in the judgment of OLDFIELD, J.—[see paragraphs Nos. 1 and 4].

N. Grant, the *Acting Public Prosecutor*, for the Crown.

The Honourable Mr. *T. Richmond* and *A. Ramaswami Mudaliyar* for the accused.

OLDFIELD, J.

OLDFIELD, J.—The accused has been acquitted in Calendar Case No. 4 of 1915 on a charge of an offence punishable under section 420, Indian Penal Code, by the Additional District Magistrate of Malabar. A learned Judge thought it necessary to take up the case in the exercise of this Court's powers of revision. Whilst it was under the consideration of a Bench, Government instructed the Public Prosecutor to file the appeals, which are before us against the acquittals in Calendar Case No. 4 and Calendar Case No. 5, a connected case. I deal at present with the former

A preliminary objection to the hearing of both appeals has been made that they were not legally presented and that they cannot be proceeded with, because the provisions of section 421 of the Code of Criminal Procedure have not been complied with, inasmuch as the appeals were not duly presented to this Court and they were not perused and notice was not ordered by a judge empowered for those purposes. The facts are that the Bench above referred to issued notice to the Public Prosecutor to appear at the further hearing of the revision case and also to inform the Court whether Government intended to appeal. He appeared and then handed in the appeals by Government now under disposal to the learned Judges, who perused them and ordered notice forthwith.

As regards presentation no special method is enjoined in the Code of Criminal Procedure; and therefore the question is one of administrative convenience alone. So long as there is, as there was in this case, an actual presentation to an officer of the Court, such as a Bench Clerk or to one of the Judges its members, I am

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not prepared to hold that the presentation was invalid. As to compliance with section 421, accused relies on the note published at part of the weekly sittings list: "Urgent Criminal Appellate Side motions will be heard by the Bench before which the criminal work of the week is posted (and must be moved at 11 a.m.), unless an Admission Court is sitting, in which case, if the motion can be heard by a single Judge, the application must be made before the Admission Court" and argues that, as an Admission Court constituted by a single Judge was sitting on 15 March 1915, the date on which orders were passed under section 421, that Court alone, and not the Bench of two Judges, was competent to peruse the appeals. It is a sufficient answer to this objection that under section 13, Charter Act rules for the exercise of the High Court's appellate jurisdiction by one or more judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by section 14 to determine which Judges shall sit alone and which in Divisional Courts. It is by reference to the rules so made that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained, not by reference to the *notes to the sittings list, which are merely instructions for the* guidance of practitioners and parties. The rules made by this Court are contained in the Appellate Side Rules; and under rule 1 (1) (*f*), applications for the admission of appeals from the judgment of any Criminal Court are ordinarily to be made before a single Judge. This does not in terms, and is not intended to, deprive the Divisional Court, constituted for the disposal of criminal business, of the right to exercise its powers in special cases, such as those before us, in which convenience and the acquaintance with the circumstances, which the two learned Judges concerned had, rendered their intervention specially advisable. This objection must therefore fail.

I turn next to an argument relating to the conduct of the proceedings in the lower Court, on which Mr. Richmond, who appeared for the accused has relied, as a comprehensive answer to the appeal, in so far as the substitution of a conviction for the acquittal is asked for, and not merely an order for a retrial. The relevant facts are that both Calendar Case No. 4 and Calendar Case No. 5 were instituted by the same complainant by the presentation of only one complaint, containing all the allegations

necessary to the establishment of both cases, those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation, contained in Exhibit K, as to the amount of his assets. The Magistrate in spite, Mr. Richmond alleges, of his remonstrances recorded the prosecution evidence tendered on behalf of the complainant continuously without discriminating between that which was relevant on each of these two charges, examining each witness once as to all he knew regarding both and questioning accused under section 342, Criminal Procedure Code, only once. He then, as his diary shows, "split" the case into Calender Cases Nos. 4 and 5 and proceeded to the further cross-examination of the prosecution witnesses, which accused had claimed under section 256 (1). It is not clear whether he bore in mind that he had two distinct cases to try during the cross-examination of first prosecution witness, for part of it is headed Calendar Case No 5. But his attempt to do so, if he made one, was ineffective, since that part of the cross-examination is in fact relevant rather to Calendar Case No. 4. And in any case the attempt was abandoned almost immediately, no such distinction being made in the cross-examination of third prosecution witness, who deposed regarding both the bills and Exhibit K, or of other witnesses. Subsequently one written statement was filed by the accused under section 256 (2), and both cases were disposed of in one judgment. Mr. Richmond argues that this was one trial of separate charges of distinct offences, which offended against section 233; that the trial was therefore not a legal one; and that, before accused can be convicted by this or any Court, a legal trial must be held.

There is no doubt that the offences in question in the two cases were distinct, and it is not suggested that section 234, 235, 236 or 239 is applicable. It is also in my opinion the fact that, although two charges were framed, one trial only was held. For except in that respect the proceedings were, as pointed out above, in every way similar to those, which would have taken place in one trial. It has not been shown how section 233 is not in point; and accordingly the learned Public Prosecutor's efforts have been directed mainly towards establishing that there is in question only an irregularity, to which section 537 is applicable.

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This contention requires close scrutiny because the effect of the leading case on the subject—*Subrahmania Ayyar* v. *King-Emperor* (1)—is to discountenance any liberal application of the section and because it is in terms inapplicable, as the Public Prosecutor would apply it here, to sustain the validity of a trial, attacked by the accused only incidentally and not to resist directly a claim to the reversal or alteration of a decision in reference, appeal or revision. And there is in any case the direct objection, which I state in words borrowed from the decision already referred to: "When the Code positively enacts that such a trial as that which has taken place here shall not be permitted," it cannot be said "that this contravention of the Code comes within the description of error, omission or irregularity." This principle was applied to facts resembling those now in question in essential respects in *Gobind Koeri* v. *Emperor*(2) and *Raman Behari Das* v. *Emperor*(3), the latter case being authority also for a strict construction of section 233. The only conclusion I can reach is that section 537 is inapplicable, and it is therefore useless to follow the Public Prosecutor in his contentions that no failure of justice has been occasioned by what occurred or that the accused did not raise his objection to it at a sufficiently early stage in the proceedings.

As accused has undergone no legal trial, he cannot be convicted and sentenced by us, and if we are to take action, the only course open to us is to order that he be tried a second time. It is no doubt true that in two respects the case is one, in which interference with a decision of acquittal could be justified. For it is one of public importance since the establishment of the charge would mean that accused profited largely by conduct subversive of the existing system of mercantile credit; and, though it is not in my opinion legitimate in one judgment to hold that accused has not been tried legally and to reach a conclusion that he is guilty, the full argument we heard on the merits demonstrated that the Magistrate dealt most inadequately with one question of fundamental importance and never came to close quarters with the evidence. On the other hand the charge deals with events in October 1910 and was made over

(1) (1902) I.L.R., 25 Mad., 61 (P.C.). (2) (1902) I.L.R., 29 Calc., 385.
(3) (1914) I.L.R., 41 Calc., 722.

three years later on the 15th May 1914. The explanation given for this delay is that accused's accounts and other documents, on which the prosecution largely depends were not accessible to the complainant Bank, until proceedings in another case against accused had ended in this Court in September 1912. But I am not satisfied that the subsequent interval is not excessive; and it is clear that after so long accused would labour under great disabilities In the circumstances I do not think that the case is one for retrial. In my opinion therefore the appeal must be dismissed.

SESHAGIRI AYYAR, J.—I have come to the same conclusion. Mr. Richmond contended that the appeal is not properly before us. The facts he relies on for this contention are these. The Public Prosecutor presented the appeal petition to SPENCER and COUTTS TROTTER, JJ., in Court through the Bench Clerk on the 15th March 1915. On that date, Mr. Justice AYLING was sitting in the Admission Court. Consequently he argues it was not competent to the two learned Judges to receive the appeal.

Before dealing with the objection, a few further facts may be stated. Under the orders of a learned Judge of this Court, the records of the present case were called for by the High Court. It was numbered as Criminal Revision Case No. 782 of 1914. On the 4th March, the learned Judges who heard the case sent a notice to the Public Prosecutor calling upon him to inform the Court whether the Government was prepared to file an appeal against the acquittal, and whether he would make any further representation in the matter. The Revision Case was adjourned to the 15th March. On this latter date, the incident referred to by Mr. Richmond took place. It is conceded that SPENCER and COUTTS TROTTER, JJ, were constituted a Bench for hearing Criminal Cases on the day for which the appeal was presented.

Mr. Richmond's first objection is that there was no valid presentation of the appeal. I am unable to agree with him. Section 419 contemplates a presentation by the appellant or his pleader. The petition of appeal was handed over to the clerk present in Court by the Public Prosecutor. It has not been shown that the clerk had no authority to receive the appeal petition. Even if it be said that the presentation was to the Judges direct, I am unable to see why it is not a presentation to the High Court. Moreover, the learned Judges

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who heard the revision petition having issued the notice were certainly competent to receive the appeal which was presented to them in pursuance of that notice. There is no force in this contention.

The second argument rests on the fact that in the note appended to the sitting list for the week, it is stated that all applications relating to criminal matters should be made before the Judge sitting in the Admission Court. It is therefore argued that the presentation of the appeal for admission to the two learned Judges while there was an Admission Court was improper. Speaking for myself, I accept the contention of the learned Counsel that when the Public Prosecutor presented the appeal petition to the learned Judges he moved for its admission, Rule 1 of the Appellate Rules of Practice speaks of it as an application. I do not think that the admission of the appeal is a partial hearing of the appeal itself. I proceed on the assumption that when an appellant asks the Court to admit an appeal, he is making an application in a criminal matter. In this case, it was an urgent application, as the hearing of the Revision Petition which was stayed depended upon the admission of the appeal. The question then arises, whether the Criminal Bench was deprived of jurisdiction to admit the appeal because an Admission Court was sitting. The note in question only says that ordinarily all applications of this kind should be heard by the Admission Judge. Under clause 13 of the Charter Act, the High Court can make rules for the exercise, by one or more *Judges, of the Original and Appellate Jurisdiction vested in the* Court. Clause 14 empowers the Chief Justice to determine what Judge shall sit alone and what Judges shall constitute a Bench. It was under this clause the two learned Judges were constituted a Bench to hear and determine criminal cases. They had jurisdiction to dispose of all criminal matters during the week of their sitting. Their jurisdiction was not taken away, because a single Judge was entrusted with the duties of admitting appeals. Stress was laid on the foot-note to the sitting list to which I have already referred. I have no hesitation in saying that it was not intended to restrict the powers of the Benches constituted for the week. It was only an intimation to the practitioners as to the course they should adopt. It may be taken also as a suggestion to the Benches not to encourage

applications made to them otherwise than in accordance with the note. Every Judge of the High Court would certainly act on the suggestion. But there can be no warrant for arguing that this note deprives the Criminal Bench of its jurisdiction to hear applications. There is nothing in section 14 which would enable such a limitation being placed on the powers of a Bench. Clause 36 of the Letters Patent on which Mr. Richmond relies is not against this view. As pointed out in *Haladhar Maiti* v. *Choytonna Maiti*(1), the Chief Justice has power to constitute a Bench even in the absence of rules made under clause 13; and when a Bench is constituted, it has jurisdiction to hear applications and appeals in criminal cases. I agree in holding that the appeals were properly before us.

Mr. Richmond finally contended that even if we are satisfied that the judgment of the lower Court is wrong, we ought not to convict his client of the offences charged, as the trial was illegal in that it contravened the provisions of section 233 of the Code of Criminal Procedure. It is to be regretted that such an objection should be taken at this late stage.

Mr. Richmond states that he objected at the outset to evidence being let in without specifying the charges on which the accused is to be tried. Although there is authority for the position [see *In the matter of Govindu*(2)] that the letting in of evidence before framing a charge in respect of separate allegations is not obnoxious to section 233 of the Code of Criminal Procedure, I think that the procedure is not calculated to advance justice. In *Sriramulu* v. *Veerasalingam*(3) and in *Palaniandy Goundan* v. *Emperor*(4) it was laid down that a trial commences only after the charge is framed. It is no doubt true that as the accused pleads only to the charge his trial commences really after the charge. None the less, he is practically on his trial from the moment the prosecution starts the case. However that may be, in this case we are concerned only with what happened after the charge was read out. The Magistrate rightly enough framed separate charges and numbered the cases as Calendar Cases Nos. 4 and 5 of 1914. But when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two

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(1) (1905) I.L.R., 33 Calc., 588 (2) (1903) I.L.R., 26 Mad., 592.
(3) (1914) 27 M.L.J., 539. (4) (1909) I.L.R., 32 Mad., 218.

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SESHAGIRI AYYAR, J.

trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. I do not think the fact that he noted the further cross-examination of the first witness as in Calendar Case No. 5 is of any consequence, because that examination was not in reference to the charge framed in that case. Under these circumstances, there can be no doubt that the trial offends against the provisions of section 233.

It was argued by the learned Public Prosecutor that as the reading of the charge and the numbering of the cases were not improper, the further irregularity in not recording evidence separately did not vitiate the trials. The section says that each charge shall be tried separately and the failure to conform to it at any stage of the trial renders the proceeding illegal: see *Subrahmania Ayyar* v *King-Emperor*(1), *Gobind Koeri* v. *Emperor*(2) and *Raman Behari Das* v. *Emperor*(3). In *Emperor* v. *Madan Mandal*(4), the learned Judges point out that if the mode of trial was wrong, the proceedings ought to be set aside.

Mr Grant's more serious contention was that section 537 cured the defect. In the first place, the section has no application. The language of the first part of the section is against the conclusion which the Public Prosecutor asks us to adopt. In the second place clause (*a*) which speaks of error "in proceedings before or during trial" does not cover cases where the trial itself is defective. Consequently, the explanation which introduces the principle of acquiescence under certain circumstances has no application. Moreover as the Judicial Committee has held that a violation of a plain provision of law is not an irregularity, the section has no application to the present case. In *Moharuddi Mahta* v. *Jadu Nath Mandul*(5), the error related to the framing of the charge which is distinctly dealt with in clause (*a*) of section 537. Further in that case, the trial was perfectly regular. I am therefore of opinion, that the joint trial of the two calendar cases is opposed to section 233 and that consequently the accused should not be convicted of the offences charged against him.

I feel little doubt on the records before us that the accused is guilty of at least two out of the three counts mentioned in the

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(1) (1902) I L R, 25 Mad., 61 (P C). (2) (1902) I L R, 29 Calc, 385.
(3) (1914) I L R, 41 Calc., 722. (4) (1914) I.L.R., 41 Calc., 662.
(5) (1906) 11 C.W.N., 54

charge in Calendar Case No. 4. Ordinarily such a failure of justice would warrant a retrial of the accused. But the offence took place in October 1910 and the accused has been before the Criminal Courts on three occasions. Under these circumstances, I agree in holding that it is not desirable to direct a retrial.

NAPIER, J.—I concur. I do not however think that the decision of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537 of the Code of Criminal Procedure. In the manner in which this case comes before us that section however cannot be relied on, and we have only to apply section 233. The only question that remains is what course we must adopt being satisfied (1) that the accused has been tried illegally, (2) that his acquittal on the merits on two of the charges was wrong and (3) that in the circumstances we do not think that he should be retried on those charges. It seems to me that we must do what the lower Court could have done if its attention had been drawn to the illegality of the trial before judgment, that is, acquit the accused, which in our position, is done by dismissing the appeal.

C.M.N

APPELLATE CRIMINAL

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

N SUBBAYYA AND ANOTHER (COUNTER-PETITIONERS), APPELLANTS,

v.

P RAMAYYA (PETITIONER), RESPONDENT *

Criminal Procedure Code (Act V of 1898), ss. 435, 439 and 133—Revision petition to the High Court against an order under section 133—Order of a single Judge of the High Court—Appeal against order, if maintainable—Letters Patent (24 & 25 *Vict., cap.* 104), *cl* 15.

No appeal lies, under clause 15 of the Letters Patent, against an order of a single Judge of the High Court in a Criminal Revision Petition preferred ...

(1) (1902) I L.R , 25 Mad., 61 (P.C.).

* Letters Patent Appeal No 373 of 1914.

SUBBAYYA v. RAMAYYA.

an order of a Magistrate acting under section 133 of the Code of Criminal Procedure.

APPEAL under clause 15 of the Letters Patent against the order of AYLING, J., in *Subbayya* v. *Ramayya.**

The facts appear from the order of the High Court.

V. Ratna Somanathan for the appellants.

B. Somayya for *R. Narayanamurti* for the respondents.

SPENCER AND SESHAGIRI AYYAR, JJ.

The following ORDER of the Court was delivered by SPENCER, J.—We are of opinion that no appeal lies in this case against the order passed under section 439 of the Code of Criminal Procedure by a single Judge of this Court

Orders made under section 133 and connected sections are not excluded from the operation of section 435 and there is no good reason for treating orders passed under this Chapter X which deals with public nuisances and prescribes that the procedure shall be that of a summons case, as not orders passed in a criminal trial within the words of section 15 of the Letters Patent Act.

It is argued on the authority of *Hirananda Ojha* v. *The Emperor*(1) that cases where the person against whom proceedings are taken can give evidence on his own behalf are cases of a quasi-civil nature, but in proceedings under section 488 persons against whom orders of maintenance are applied for are permitted to tender themselves as witnesses and yet they are styled 'accused'. Assuming that a counter-petitioner in proceedings under Chapter X is a competent witness on his own behalf this fact will not in our opinion render the proceedings any less a criminal trial. We dismiss this appeal.

K.R.

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* Criminal Revision Case No. 427 of 1914 preferred against the order of Rao Sahib O BHAKTAVATSULUDU NAYUDU, Sub-Divisional Magistrate, Tenali division, in Miscellaneous Case No 14 of 1913.

(1) (1905) 9 C.W N , 983

APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

Re ADUR DESIKACHARI AND SEVEN OTHERS (ACCUSED), APPELLANTS.*

1915. February 9 and 10.

Letters Patent (24 & 25 Vict., cap. 104), sec. 15, appeal under—Order of a single Judge in revision against order to give security to keep the peace—No appeal—"Criminal trial."

Proceedings taken for binding over persons to keep the peace under Chapter VIII, Criminal Procedure Code, are "criminal trials" within the meaning of section 15 of the Letters Patent, and hence no appeal lies from the judgment of a single Judge disposing of a Revision Petition presented against an order of a Magistrate under section 118 of the Code of Criminal Procedure

In *In the matter of Ramasamy Chetty* (1904) I L.R., 27 Mad , 510, followed.

APPEAL under section 15 of the Letters Patent against the order of SADASIVA AYYAR, J., who rejected Criminal Revision Case No. 502 of 1914 (Criminal Revision Petition No. 426 of 1914), presented under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of M. AZIZ-UD-DIN, the District Magistrate of South Arcot, in Criminal Revision Case No. 4 of 1914, against the order of S. V. NARGUNAM, the Sub-Divisional Magistrate of Cuddalore, in Miscellaneous Case No. 32 of 1913.

The facts of the case appear from the ORDER of the High Court.

T. V. Venkatrama Ayyar, T. Narasimha Ayyangar and *K S. Krishnaswami Ayyangar* for the appellants.

Sidney Smith for *the Public Prosecutor* for the Crown.

SPENCER AND SESHAGIRI AYYAR, JJ.

The following ORDER of the Court was delivered by SPENCER, J.—A preliminary objection has been taken that no appeal lies in this case. In our opinion proceedings taken for binding over persons to keep the peace under Chapter VIII are "Criminal trials" within the meaning of section 15 of the Letters Patent, and if this is so, the section provides no appeal from the judgment of a single Judge dealing with a revision petition presented against the order of a Magistrate under section 118 of the Code of Criminal Procedure.

In *In the matter of Ramasamy Chetty*(1) this was the view taken by the officiating CHIEF JUSTICE who gave several reasons for his opinion.

* Letters Patent Appeal No. 336 of 1914.

(1) (1904) I.L.R., 27 Mad., 510.

Re DESIKACHARI.

SPENCER AND SESHAGIRI AYYAR, JJ.

The learned CHIEF JUSTICE was apparently mistaken in saying that an appeal was allowed against an order to give security for keeping the peace.

Section 406 of the Code of Criminal Procedure provides only for appeals from orders to give security for good behaviour.

But the procedure prescribed by section 117 of the Code of Criminal Procedure for conducting enquiries under Chapter VIII is that for conducting trials and persons ordered to give security may under section 123 of the Code of Criminal Procedure be committed to jail, the imprisonment for failure to give security for keeping the peace being simple and for failure to give security for good behaviour being rigorous. Imprisonment is a kind of punishment (vide section 23 of the Indian Penal Code).

An order passed under order 106 (3) by an Appellate Court that persons convicted of offences involving a breach of the peace should execute bonds to keep the peace is treated in section 423 (1) (*b*) (3) as an enhancement of sentence.

At the end of the enquiry, if it is found unnecessary to bind over the person proceeded against, he is to be "released" or "discharged" according as he happens to be in custody or not at the time. We have no doubt therefore that proceedings under this chapter are of a criminal nature.

The next question is whether they constitute a trial. It may be that if the definition in section 4 (4) of the Code of Criminal Procedure, of "enquiry" be used as a test, such proceedings might fall within the scope of an enquiry rather than of a trial But it is not to be supposed that when the Letters Patent were enacted in 1865, the definition afterwards embodied in the Criminal Procedure Code of 1882 was in the mind of the legislature. In the Code of 1861, the word "enquiry" was used only to denote proceedings preliminary to trial.

There can be no doubt that proceedings under Chapter VIII are "Criminal cases," and can be transferred from one Magistrate's file to another's: *vide Wazed Ali Khan* v. *Emperor* (1).

For these reasons, we consider that *In the matter of Ramasamy Chetty*(2) was rightly decided. Mr. Sidney Smith for the

(1) (1914) I.L.R., 41 Calc., 719. (2) (1904) I.L.R., 27 Mad., 510.

Re DESIKACHARI. — SPENCER AND SESHAGIRI AYYAR, JJ.

Public Prosecutor has also suggested another reason for holding that no appeal lies. Section 15 of the Madras Letters Patent falls within that part which begins at section 11 dealing with civil jurisdiction. It cannot be understood by implication that an appeal lies in every case in which the right of appeal is not denied by this section. We must take it that rights of appeal do not exist unless expressly conferred by the legislature. The portion of the Act which commences at section 22 and deals with Criminal Jurisdiction gives no right of appeal against the order of a single Judge acting as a Court of revision.

This was the view taken in *Srinivasa Ayyangar* v. *Queen Empress*(1), with which we agree.

We therefore dismiss this petition.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1915. March 1.

SUBRAMANIA PILLAI (SIXTH DEFENDANT, PETITIONER), APPELLANT,

v.

KUMARAVELU AMBALAM *alias* V. E. K. R. KARUPPIAH KANGANI (PLAINTIFF, RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 5—Agreement between one of the judgment-debtors and the decree-holder to enter up satisfaction of the decree—Agreement prior to decree—Application to enter up satisfaction, if maintainable—Civil Procedure Code (Act XIV of 1882), sec. 244.

An application was made to the executing Court by one of the judgment-debtors to enter up satisfaction of the decree as against him, on the ground that there was an agreement to that effect entered into between himself and the decree-holder prior to the passing of the decree. The latter objected that such an application was not sustainable. *Held*, that the application was maintainable under Order XXI, rule 5 of the Civil Procedure Code (Act V of 1908).

Rukmani Ammal v. *Krishnamachary* (1911) 9 M.L.T., 464, referred to.

Laldas v. *Kishondas* (1898) I.L.R., 22 Bom., 463, followed.

Hassan Ali v. *Ganzi Alim* (1904) I.L.R., 31 Calc., 179, dissented from.

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(1) (1891) I.L.R., 17 Mad., 105.

* Appeal against Appellate Order No. 92 of 1913.

SUBRAMANIA PILLAI v. KUMARAVELU AMBALAM.

SESHAGIRI AYYAR AND NAPIER, JJ.

APPEAL against the order of C. V. VISWANATHA SASTRIYAR, the temporary Subordinate Judge of Rāmnād, in Appeal No. 463 of 1912, preferred against the order of P. S. SITHARAMA AYYAR, District Munsif of Sivaganga, in Insolvency Application No. 492 of 1912, in Original Suit No. 194 of 1911.

T. Ranga Achariyar for the appellant.

C. V. Anantakrishna Ayyar for the respondent. The facts of the case appear from the judgment.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—The attention of the Subordinate Judge was apparently not drawn to the decision in *Rukmani Ammal* v. *Krishnamachary*(1) where SUBRAHMANYA AYYAR and BODDAM, JJ., follow the Bombay ruling in *Laldas* v. *Kishondas*(2). Mr Anantakrishna Ayyar argues that these two decisions had reference to the language employed in section 244 of the Code of Civil Procedure of 1882 which in express terms included stay of execution among questions relating to execution. We are not satisfied that the omission of these words in section 47 of the present Code is any indication that matters relating to stay of execution are not within the section. The words omitted may have been regarded as superfluous; moreover the plea that the decree should not be enforced certainly relates to execution, whether it relates to stay of execution or not It is not analagous to the plea of fraud in obtaining a decree because where fraud is set up, the decree is sought to be avoided and not to be executed; but where an agreement is pleaded, it only affects the enforceability of the decree; we think the decision in *Laldas* v. *Kishondas*(2) is correct and are not prepared to follow *Hassan Ali* v. *Ganzi Alim*(3). We must set aside the order of the Subordinate Judge and direct him to dispose of the appeal on the merits. Costs will abide the result.

K.R.

(1) (1911) 9 M L.T., 464. (2) (1898) I L R, 22 Bom., 463.
(3) (1914) I L R, 31 Calc, 179

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

T. K. P. MAMMALI (THIRD RESPONDENT), PETITIONER,

1915.
March 2.

v.

T. KUTTI AMMU (FIRST APPELLANT), RESPONDENT.*

Indian Penal Code (Act XLV of 1860), sec 188—"Promulgated," meaning of—Injunction, disobedience to—No offence under Penal Code.

The word "promulgated" in section 188 of the Penal Code refers to orders issued under the Code of Criminal Procedure and not to judgments and orders of Civil Courts.

PETITION under section 115 of Civil Procedure Code (Act V of 1908), praying the High Court to revise the order of S. G. ROBERTS, the District Judge of North Malabar, in Civil Miscellaneous Appeal No. 4 of 1914, preferred against the order of K. S. VENKATACHALA AYYAR, the District Munsif of Tellicherry, in Miscellaneous Petition No. 2378 of 1913 (Original Suit No. 779 of 1913).

The petitioner as third defendant in Original Suit No. 779 of 1913 in the Court of the District Munsif of Tellicherry was prohibited by an order of injunction of that Court from continuing the construction of a building. It was found that the third defendant violated the above order by continuing the constructions even after the receipt of the order, but the District Munsif let off the petitioner by merely warning him. On appeal the District Court of North Malabar sent the case under section 476 of the Code of Criminal Procedure to the Joint Magistrate of Tellicherry for trial of the third defendant for the offence of disobedience of the lawful order of a public servant. The petitioner preferred this Civil Revision Petition.

J. L. Rosario and *Kutti Krishna Menon* for the appellant.

A. Sundram for the respondent.

SESHAGIRI AYYAR AND NAPIER, JJ.

The following Judgment of the Court was delivered by SESHAGIRI AYYAR, J.—The District Judge is wrong in holding that disobedience to an injunction issued by a Civil Court is punishable under section 188 of the Indian Penal Code. The

* Civil Revision Petition No. 206 of 1914.

MAMMALI v. KUTTI AHMED.

SESHAGIRI AYYAR AND NAPIER, JJ.

word *promulgated* in that section refers as pointed out in *In the matter of the petition of Chandrakanta De*(1) to orders issued under the Code of Criminal Procedure, not to judgments and orders of Civil Courts. We must set aside the order of the lower Appellate Court and direct him to dispose of the appeal on the merits.

Costs to abide the result.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

1915. March 17 and 19.

MUHAMMAD HUSSAIN SAHIB AND ANOTHER (DEFENDANTS—RESPONDENTS), APPELLANTS,

v

ABDUL KARIM SAHIB (SECOND PLAINTIFF—PETITIONER), RESPONDENT.*

Mortgage-decree—Application for order absolute—Transfer of Property Act (IV of 1882), ss 88 and 89—Successive applications within three years of each preceding application—Last application within twelve years of decree, if barred—Indian Limitation Act (IX of 1908), arts 181, 182 and 183—Preliminary decree executability of—Civil Procedure Code (Act V of 1908), sec. 43

A decree for sale was passed in a mortgage suit on the 7th October 1901, and an application for order absolute was made on the 6th April 1904, subsequent applications were made in 1907, 1910 and 1912, all within three years of the immediately preceding application; notices were sent to the judgment-debtor in most of the applications, but the latter were all dismissed without the relief prayed for being granted, the last application was made on the 15th April 1912, the judgment-debtor objected that the application was barred by limitation as more than three years had elapsed from the date of the decree:

Held, that the application was not barred by limitation.

Held also, that the following propositions are deducible from the decisions of the Privy Council.—

(1) The preliminary decree passed under section 88 of the Transfer of Property Act is executable

(2) In order to obtain the order absolute under section 89 of the Transfer of Property Act, steps have to be taken in execution.

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(1) (1881) I.L.R., 6 Calc., 445.

* Appeal Against Order No 75 of 1914

HUSSAIN v. KARIM.

(3) To such application article 182 or 183 of the Limitation Act will apply as the decree happens to be of a mofussil Court or of the original side of the High Court.

(4) There is a fresh starting point given to the decree-holder after the preliminary decree ripens into a final decree.

(5) A decree-holder will have twelve years under section 48 of the Code of Civil Procedure, to perfect the preliminary decree and another twelve years under the same section, if he gets the order absolute within the first twelve years.

Abdul Majid v. *Jawahir Lal* (1914) I.L.R., 36 All., 350 (P.C.), followed.

Munna Lal v. *Sarat Chunder* (1915) 21 C.L.J., 118 (P.C.), followed.

Ashfaq Husain v. *Gauri Sahai* (1911) I.L.R., 33 All., 264 (P.C.), explained.

Mallikarjunudu v. *Lingamurti Pantulu* (1902) I.L.R., 25 Mad., 244 (F.B.), and *Rangiah Goundan & Co.* v. *Nanjappa Row* (1903) I.L.R., 26 Mad., 780, referred to.

APPEAL against the order of J. T. GILLESPIE, the District Judge of Salem, in Appeal No. 118 of 1912, preferred against the order of G. R. SUBBAROYA AYYAR, the District Munsif of Dharmapuri, in Original Petition No. 435 of 1912, in Original Suit No. 452 of 1910 on the file of the District Munsif of Krishnagiri.

The material facts appear from the judgment.

S. Doraswami Ayyar for the appellants.

M. O. Parthasarathi Ayyangar for the respondents.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

JUDGMENT.—This appeal raises an important question of limitation. A preliminary decree in a mortgage suit was passed on the 7th of October 1901. On the 6th of April 1904, the first application was presented to obtain the order absolute. This apparently was filed as an application for the execution of the preliminary decree. Subsequent applications were made in 1907, 1910 and 1912 all within three years of the immediately preceding application. Notices were sent in most of the applications. They were all dismissed without granting the relief prayed for. The present application is dated the 15th of April 1912. It was objected to in the Court of First Instance that as more than three years had elapsed from the date of the preliminary decree, the application was barred. The District Munsif held that there was no bar of limitation for such applications. On appeal the District Judge held that the present application must be treated as one in execution of the decree and that article 181 of the Limitation Act applied to it

Mr. S Doraswami Ayyar has cited before us a large number of authorities to show that the preliminary decree is not executable and that article 180 applies to the application. There have been conflicting decisions regarding the executability of the preliminary decree. Different High Courts have taken different views. We wish to confine ourselves to a consideration of the decisions of this Court and of the Judicial Committee of the Privy Council.

In *Mallikarjunudu* v *Lingamurti Pantulu*(1), the majority of the Full Bench came to the conclusion that the preliminary decree in a mortgage suit was executable and that the process for obtaining the order absolute was by way of execution. In arriving at this result, the learned Judges were largely influenced by the language of sections 88 and 89 of the Transfer of Property Act. The first section speaks of the preliminary decree and the second section of applying for an order absolute. Even after the pronouncement in the Full Bench case, doubts arose regarding the applicability of article 179 of the Limitation Act (Act XV of 77). As was pointed out by Mr. M. O. Parthasarathi Ayyangar, the learned counsel for the respondent, the import of the Full Bench ruling was explained in *Rangiah Goundan & Co.* v. *Nanjappa Row*(2). It was suggested in that case that ordinarily an application for an order absolute will be one to which article 179 would apply. In certain cases article 178 may also apply. This view was acted on in this Presidency for a long time, until the decision of the Judicial Committee was reported in *Ashfaq Husain* v. *Gauri Sahai*(3) That decision as we shall show presently does not affect the conclusion stated in *Rangiah Goundan & Co.* v. *Nanjappa Row*(2). All that was laid down in *Ashfaq Husain* v *Gauri Sahai*(3), was that time began to run against the decree-holder after the passing of the final decree, that is "from the date when it was made absolute." It did not say that the preliminary decree was not executable. But it was so understood in some of the cases decided in Madras. It is not necessary to refer to all the decisions They are all mentioned in *Ramasami Reddi* v. *Rangamannar Aiyangar*(4). In that case,

(1) (1902) I.L.R., 25 Mad., 244 (F.B) (2) (1903) I.L.R., 26 Mad., 780.
(3) (1911) I.L.R., 33 All., 264. (4) (1915) 28 M.L.J., 255.

SANKARAN NAIR and AYLING, JJ., without expressing their opinion regarding the correctness of the decisions they quoted, held that the judgment-debtor was barred by res judicata from raising the plea that the preliminary decree was not executable. All these decisions were passed before the Judical Commitee's decision in *Abdul Majid* v. *Jawahir Lal*(1) was published. That case lays down distinctly that the article applicable to an application for obtaining an order absolute is 179 of the Limitation Act.

This pronouncement must be taken to overrule the decisions of this High Court which held that the preliminary decree was not executable. Another decision of the Judicial Committee strengthens this view. In *Munna Lal* v. *Sarat Chunder*(2) their Lordships held that an application for an order absolute regarding a preliminary decree passed on the Original Side of the High Court was governed by article 183 of the Limitation Act. Although the third column of that article speaks of the "enforcement" of a judgment, decree or order, there can be no doubt that it is a provision for the execution of decrees passed on the original side corresponding to article 182 which deals with the mofussil decrees. This view makes it clear that the process by which a preliminary decree is to be made the final decree is by way of execution.

The result of these decisions of the Judicial Committee may be thus summed up :—(1) The preliminary decree passed under section 88 of the Transfer of Property Act is executable. (2) In order to obtain the order absolute under section 89 steps have to be taken in execution. (3) To such application article 182 or 183 will apply as the decree happens to be of a mofussil Court or of the Original Side of the High Court. (4) *There is a fresh starting* point given to the decree-holder after the preliminary decree ripens into a final decree. (5) It would follow from the above that a decree-holder will have twelve years under section 48 of the Code of Civil Procedure to perfect the preliminary decree and another twelve years under the same section if he gets the order absolute within the first twelve years This view is in consonance with the earlier Madras view in *Mallikarjunudu* v. *Lingamurti Pantulu*(3), and in *Rangiah Goundan & Co.* v. *Nanjappa Row*(4).

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(1) (1914) I.L.R., 36 All., 350 (2) (1915) 21 C L.J , 118 (P.C)
(3) (1902) I.L.R., 25 Mad., 244. (F.B.) (4) (1903) I.L.R., 26 Mad , 780.

HUSSAIN v. KARIM.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

All these difficulties are now avoided by the enactment of Order XXXIV in the Code of Civil Procedure.

For these reasons we hold that as the application for an order absolute was made within twelve years of the passing of the preliminary decree and as the decree has been kept alive by the steps taken under article 179, this application is not barred by limitation.

We dismiss the appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915. March 17, 18 and 23.

MOOL CHAND AND ANOTHER (DEFENDANTS Nos 3 AND 4), APPELLANTS,

v.

P. ALWAR CHETTY (PLAINTIFF), RESPONDENT.*

Joint judgment-debtors—Release of some—Liability of others—English law—Indian Contract Act (IX of 1872), sec 44—Justice, equity and good conscience, rule of—Rule of English law, applicability of.

A release by a decree-holder of some of the joint judgment-debtors from liability under the decree, does not operate as a release of the other judgment-debtors from their liability.

The rule of English law should not be applied in India, as it is based on the substantive rule applicable to contractual joint-debtors, which is different under section 44 of the Indian Contract Act, and is not in consonance with justice, equity and good conscience.

Quære whether the English law should be applied in cases arising within the original jurisdiction of the High Courts though contrary to the rule of justice, equity and good conscience.

Chinnamannar and Gurusami v. Sadasiva (1882) I.L.R., 5 Mad., 387, referred to.

APPEAL from the judgment of KUMARASWAMI SASTRIYAR, J., in Execution Application in Civil Suit No. 176 of 1909.

The material facts appear from the judgment of NAPIER, J.

G. Annaji Rao, for the appellants.

C. P. Ramasuami Ayyar, for the respondent.

* Original Side Appeal No. 65 of 1914.

NAPIER, J.—This appeal is from an order passed in execution by Mr. Justice KUMARASWAMI SASTRIYAR. It was on the application by the plaintiff in execution of the decree in Original Suit No. 176 of 1909. The decree is as follows "That Kasturchand, Nattoji Mulchand and Amed Mull, the defendants herein, do pay to the plaintiff the said sum of rupees twenty-three thousand," etc.; subsequently to the decree a petition was put in under Order XXI, rule 2 of the Civil Procedure Code, by the first and second defendants and not opposed by the decree-holder for a certificate by the Court of the adjustment of the decree as against them, and an order was passed "that the plaintiff herein do enter up satisfaction of the decree herein in full as against the first and second defendants herein as agreed to by him by the said agreement." Later when the execution application above referred to as against the other defendants was put in, objection was taken that the decree had been fully satisfied by the adjustment referred to on the ground that the discharge of one of several joint promisors discharges the others as well. Mr. Justice KUMARASWAMI SASTRIYAR overruled the objection and ordered execution to issue.

It is contended before us that the learned Judge was wrong on two grounds, (1) that satisfaction having been entered up nothing remains and (2) that the release of one judgment-debtor operates in favour of all.

On the first point it is only necessary to observe that the term "satisfaction" although used in the order is not one contemplated by the Civil Procedure Code. The words of Order XXI, rule 2, are "The decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly." Admittedly the decree has been adjusted by payment so far as the first and second defendants are concerned, but there has been no satisfaction, although that word appears in the order.

The second point is one of more substance. It is argued that although section 44 of the Indian Contract Act provides that a release of one or more joint promisors does not discharge the other joint promisor or joint promisors, that has reference only to obligations arising out of contract and does not apply to judgment debts, that under the English law a release of one promisor of a contractual joint debt, or of one judgment-debtor in respect

MOOL CHAND v. ALWAR CHETTY.

NAPIER, J.

of a judgment joint debt does discharge the co-obligor, that in the original civil jurisdiction of the High Court the law as administered in England prevails and that therefore there being no statutory provision as to a judgment-debt the English law of discharge still obtains. In my opinion this argument is fallacious. Admitting that according to the English law, the fact that a debt is a judgment-debt makes no difference and that a release in favour of one joint judgment-debtor operates in favour of the others it is only necessary to see the basis on which this doctrine is founded to establish the fallacy in the argument. In *In re E.W.A; A debtor*(1) (in the Court of appeal) it was contended that where the foundation of the obligation was a judgment the doctrine of release did not apply. Lord Justice COLLINS overrules this contention in the following words: "I cannot see any foundation in principle for the distinction; for under any judgment or other obligation creating a joint liability, there is only one debt, and that being so, the rule that the release of one of the joint debtors gets rid of the debt applies equally whether the obligation arises on a judgment or on any other security. It is too late now to question the law that where the obligation is joint and several the release of one of two joint debtors has the effect of releasing the others." The view of the Court is clear, namely, that where a right to a release arises on the original contractual liability, the fact that a liability under a judgment has been substituted for that original liability cannot increase the burden or deprive the debtor of the right given to him by the substantive law. It necessarily follows that where the substantive law has been altered, as has been done by the Indian Contract Act, and the benefit of the doctrine of release has been taken away from a joint debtor, the basis of the rule disappears. I do not think it necessary to discuss the soundness of the decision of this Court in *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2) that in an appeal from the original side the English law has to be administered but I must not be taken to accept the correctness of that conclusion. On principle I am clear that just as the debtor cannot in England be deprived of this right which attaches to his contract by reason of the fact that the contract debt has merged in a judgment debt, so in India the creditor cannot be

(1) (1901) 2 K.B., 642. (2) (1882) I.L.R., 5 Mad., 37.

deprived of his statutory right to proceed against a joint debtor in spite of a release by reason of the fact that the contractual debt has merged in a judgment debt. It is noticeable that the English Law was not accepted by the Courts in India in dealing with cases from the mufassal even prior to the Contract Act. For in two cases *Sheo Churn Lall* v. *Ram Surun Sahoo*(1) and *Nunkoo Lall* v. *Musst Dhunesh Kooer*(2), respectively, it was held that a judgment-creditor is entitled to realize his debt from any one of the debtors and that by proceeding against one he does not relieve the other debtors from their joint liability to him. In *Ramratan Kapali* v. *Asurni Kumar Dutt*(3) and *Bhavani Koer* v. *Darsan Singh*(4), the point was considered at great length by MOOKERJEE, J. He relies on the two Calcutta cases above referred to as establishing the law outside the provisions of the Contract Act and bases the variance from the English Law on the obvious grounds of justice, equity and good conscience; and he points out that in England there has been a tendency to restrict the operation of the Common Law by a refined distinction between a release and a covenant not to sue. That this distinction exists is clear from the language of ROMER, L.J., in *In re E. W. A; A debtor*(5), the case above referred to. For in that case the learned Lord Justice expresses a doubt whether, "having regard to the form of the document and the surrounding circumstances there was not a discharge of the debt but only a discharge of the particular debtor from the liability as against himself personally, in other words an *agreement by the Bank not to sue him.*" It is clear, therefore, that even in England the Courts will favour the construction of a document in a manner beneficial to the creditor. Sir Frederick Pollock in dealing with the result of section 43 of the Indian Contract Act says: "We think it the better opinion that the enactment should be carried out to its natural consequences, and that notwithstanding the English authorities founded on a different substantive rule a judgment against one of several joint promisors remaining unsatisfied cannot in British India be held to be a bar to a subsequent action against the other promisor or promisors." This view was adopted by this Court in *Ramanjulu Naidu* v.

(1) (1871) 16 W.R., 13 (2) (1872) 17 W.R., 406
(3) (1910) I.L.R., 37 Calc., 559. (4) (1911) 14 C.L.J., 354.
(5) (1901) 2 K.B., 642.

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Aravamudu Aiyangar(1), where it was argued that the omission in a previous suit against one of several joint promisors of a part of the cause of action was a bar under section 43 (of the Civil Procedure Code) to a subsequent suit against a joint promisor for the balance so omitted. KRISHNASWAMI AYYAR, J., in an elaborate judgment after considering all the authorities declined to limit the logical result of the operation of section 43 of the Contract Act by the language of section 43 of the Civil Procedure Code. I adopt the reasoning of the very eminent jurist referred to and of the learned Judge in that case, which in my opinion applies with equal force to section 44, namely that you must look to the substantive law and must give full effect to it, and in *that view it seems to me clear that a release of a* judgment-debtor can give his co-judgment-debtor no higher rights than he would have had prior to the judgment, and that full effect must be given to the substantive law laid down in section 44.

That being so there is no force in the last contention for the appellant, that the release enures for the proportionate amount of the debt. Reliance is placed on the language to be found in the judgment of MOOKERJEE, J., in *Bhavani Koer* v. *Darsan Singh*(2), and I agree that where the consideration for the release is not the payment of a definite portion of the debt but an adjustment otherwise than by payment within the meaning of order XXI, rule 2, difficulties may arise in ascertaining the amount of the balance remaining due, and that therefore it may be necessary to hold that the adjustment operated to the extent of the proportionate liability of the released judgment-debtor as between him and his co-judgment-debtors. But whereas in this case the amount received by the judgment-creditor was a specific sum, I am clear that as the liability of the other judgment-debtors is for the whole amount of the debt, they can only claim the benefit of the amount actually paid by the judgment-debtor who has been released. In my view, therefore, this appeal fails and must be dismissed.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree. I only wish to add the following remarks:—

If the passage (at page 46) in the judgment of MUTHUSWAMI AYYAR, J., in *Gurusami* v. *Chinna Mannar* and *Gurusami* v.

(1) (1910) I.L.R., 33 Mad., 317. (2) (1911) 14 C.L.J., 354.

Sadasiva(1), was intended to lay down that the High Court on its original side is bound to decide questions like the one in controversy on the basis of English precedents and English Common Law procedure even though the following of such precedents and procedure may be against the "justice and right" or the "justice, equity and good conscience" which are the true guides to be followed according to the Charter Acts, I respectfully differ from the observation in that passage. The doctrine that the release of one joint-debtor releases the others is an artificial doctrine not consonant with "justice and right."

It was decided in *Bhawani Koer* v. *Darsan Singh*(2), that the decree-holder in that case ought to give credit to the proportionate sum due by the released judgment-debtors on the basis that all the judgment-debtors were liable equally as among themselves to pay the decree-amount. That decision is (if I may say so) no doubt justifiable on the facts of that case. But it could not, in my opinion, be extended as a support to the very broad proposition that even if the creditor realized only a definite and lesser proportionate amount from the released joint-debtor or debtors he has not got the right to go against the other debtors for the whole of the remaining balance, but only for what would be found to be the latter's proportionate share if the decree-amount was equally divided between all the debtors including the released debtor or debtors.

K.R.

(1) (1882) I.L.R., 5 Mad., 37. (2) (1911) 14 C.L.J., 354.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Tyabji.

1915. March, 8, 9 and 24

SRI. K L JAGANNADA RAJU GARU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SRI RAJAH K.V. S V L N V.J.B. PRASADA RAO GARU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Expectancies—Contracts for sale of, validity of—Transfer of Property Act (IV of 1882), sec 6—Indian Contract Act (IX of 1872), sec. 23—Estate falling into possession—Specific performance, suit for—Maintainability of suit—Rule of English Law—Rule in India before Transfer of Property Act—Doctrine of feeding the estoppel, meaning of.

Contracts for sale of expectancies are void in India under the provisions of section 6 of the Transfer of Property Act and section 23 of the Indian Contract Act, and a suit for the specific performance of such a contract, instituted after the expectancy fell into possession is not maintainable.

The statute law of India forbids *transfers* of expectancies, and it would be futile to forbid such transfers, if contracts to transfer them are to be enforced as soon as the estate falls into possession.

In England and in India before the Transfer of Property Act, a mere chance of succeeding to an estate was a bare possibility incapable of assignment, but in England it is settled law that in the case of such expectancies, equity will enforce a contract to convey the estate when it fell in, and a similar rule has been applied in India in cases which were not governed by the Transfer of Property Act.

Courts are bound to give effect to the plain provisions of the statute law, instead of following a course of English decisions which are based on a course of long established practice rather than on principle

"Equitable doctrine of feeding the estoppel," explained.

Raja Sahib Prahlad Sen v Baboo Sudhur Sing (1869) 2 B L.R, 111 at p. 117, *Mussumat Oodey Koouur v. Mussumat* (1870) 13 M I.A, 585, *Ram Nirunjan Singh v. Prayag Singh* (1882) I L R, 8 Calc, 138, *Gitabai v. Balaji Keshav* (1893) I L R., 17 Bom., 232, *Sumsuddin v Abdul Husein* (1907) I L R, 31 Bom., 165, *Dhoorjeti Subbayya v. Dhoorjeti Venkayya* (1907) I.L R., 30 Mad, 201 and *Sham Sunder Lal v Achhan, Kunuar* (1899) I.L R, 21 All, 71 (P C.), referred to.

APPEAL against the decree of C. V. KUMARASWAMI SASTRIYAR, the District Judge of Ganjām and Berhampur, in Original Suit No. 19 of 1912.

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* Appeal No. 184 of 1913

The plaintiffs sued for specific performance of a contract for sale of one-half of the estate of Urlam which was originally the property of one V who died without issue leaving a widow M. The contract was entered into by the defendants and their late father Sanyasi Raju who was the nearest presumptive reversioner to the Estate at the date of the execution of the contract, viz., 11th May 1904. The first and second defendants were also reversioners at the time but one degree more remote than their father. The contract provided that the conveyance should be executed and possession delivered after the estate fell into possession. M died in 1908. The plaintiffs instituted the suit in 1911 for specific performance of the contract after the estate had become vested in the defendants on the death of the widow. The defendants pleaded that the contract was void in law and that a suit for specific performance or for damages was not in law maintainable. The District Judge who tried the case upheld this contention and dismissed the suit The plaintiffs preferred an appeal to the High Court.

P. Somasundaram for the appellants.

S Srinivasa Ayyangar for *P. Narayanamurti, B. Narasimha Rao* and *B. Somayya* for the respondents.

N. Subba Rao and *S. Gopalaswami Ayyangar* for the second respondent.

WALLIS, C.J.—This is an appeal from a decree of the District Judge of Ganjām dismissing a suit brought by the plaintiff for specific performance of a contract entered into on the 11th May 1894 by the defendants and their father who were at that time reversioners of the Urlam estate to the plaintiff to execute a proper sale-deed in his favour when the time came for putting him in possession. The learned District Judge, now Mr. Justice KUMARASWAMI, has dismissed the suit on the ground that such a contract by reversioners is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Indian Contract Act as tending to defeat the provisions of law contained in the aforesaid section of the Transfer of Property Act. The question is undoubtedly one of great importance and Mr S Srinivasa Ayyangar has contended forcibly before us that contracts of this kind were enforceable both in England and in India before the Transfer of

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Property Act and that section 6 was not intended to affect them. There can be no doubt that before the Acts in England and in India, a mere chance of succeeding to an estate was a bare possibility incapable of assignment: *Jones* v *Roe*(1). In *In re Parsons*(2) and *Ramchandra Tantra Das* v. *Dharmo Narayan Chuckerbutty*(3) where it was held that the interest of an heir under the Hindu Law expectant on the death of a widow in possession was not property liable to attachment and sale in execution. It was nevertheless held in England that in the case of such expectancies equity would enforce a contract to convey the estate when it fell in. This was decided in the time of Charles I in *Wiseman Con Roper*(4) and notwithstanding certain observations of Lord ELDEN in *Carleton* v *Leighton*(5) and *Harwood* v *Tooke*(6) was affirmed in *Wethered* v. *Wethered*(7) and *Lyde* v. *Mynn*(8) and has since been treated as settled law. Mr. Srinivasa Ayyangar contends that the law in India was the same, and that the Transfer of Property Act has not made any difference and he refers to *Raja Sahib Prahlad Sen* v. *Baboo Sudhur Sing*(9) where their Lordships with reference to such an expectancy speak of "a contract to be performed in future and upon the happening of a certain contingency of which the purchaser may claim a specific performance if he comes into Court showing he has done all he was bound to do." The other side refer to a passage in *Mussumat Oodey Koowur* v. *Mussumat*(10) where their Lordships observed that a certain petition by which the petitioner renounced her claim to succeed on the death of a kinsman did not operate as a conveyance or a contract first because the petitioner had at the time no interest in the property and secondly because the petitioner did not show that she was contemplating any conveyance, but those observations do not amount to a direct ruling as to a contract to convey when the estate came into possession It was apparently with reference to this case that their Lordships observed in a passage of an unreported judgment cited in *Ram Nirunjun Singh* v. *Prayag*

(1) (1789) 3 T R, 88 at p. 93
(2) (1890) 45 Ch D., 51.
(3) (1872) 7 B L R, 341.
(4) (1645) Ch Ref., 158
(5) (1805) 3 Mer., 667.
(6) (1829) 2 Sim., 192
(7) (1828) 2 Sim., 183
(8) (1833) 1 My. & K., 683
(9) (1863) 2 B.L.R., 111 at p 117
(10) (1870) 13 M.I.A., 585 at p. 598.

Singh(1) that it went far to show that the principle of English law which allows a subsequently acquired interest to feed, as it is said, the estoppel does not apply to Hindu conveyances." It was held by the Calcutta High Court in that case following the English authorities that a contract between expectant heirs to divide the estate when it fell in, in a particular way, was enforceable and this was treated as well established by Sir CHARLES SARGENT in *Gitabai* v. *Balaji Keshav*(2) at a time when the Transfer of Property Act had not been extended to Bombay. Lastly in *Nasir-ul-Haq* v. *Baiyaz-ul-Rahman*(3) the learned Judges were of opinion that such contracts were not affected by the provisions of section 6 citing the decision in *Ram Nirunjan Singh* v. *Prayag Singh*(1) which was before the passing of that Act, but the point was unnecessary for the decision.

It cannot be said that there is direct authority in India the other way, but the respondents rely on *Samsuddin* v. *Abdul Husein*(4) and *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*(5) as to the scope of section 6 of the Transfer of Property Act. That section provides that property of any kind may be transferred except as provided by the Act itself or any other law for the time being in force and that (a) the chances of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature, cannot be transferred. In the former case JENKINS, C.J., and BEAMAN, J., held a release by a Muhammadan woman of her expectancy of succeeding to a share of her father's estate was void as opposed to the provision of the section and could not, as in England, be enforced in equity when the reversion fell into possession In the later decision to which I was a party, it was held that a mortgage by an expectant heir of his chance of succession was void under section 6 and could not be enforced by virtue of section 43. This is in accordance with the observations of Lord DAVEY delivering the judgment of their Lordships *Sham Sunder Lal* v. *Achhan Kunwar*(6) and with the observations of their Lordships in the judgment cited in *Ram Nirunjan Singh*

(1) (1882) I L R, 8 Calc, 138
(2) (1893) I L R, 17 Bom., 232.
(3) (1911) I.L.R. 33 All, 457.
(4) (1907) I L R., 31 Bom, 165.
(5) (1907) I.L.R, 30 Mad, 201.
(6) (1899) I L R, 21 All, 71 at p. 80 (P.C.).

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Property Act and that section 6 was not intended to affect them. There can be no doubt that before the Acts in England and in India, a mere chance of succeeding to an estate was a bare possibility incapable of assignment: *Jones* v *Roe*(1). In *In re Parsons*(2) and *Ramchandra Tantra Das* v. *Dharmo Narayan Chuckerbutty*(3) where it was held that the interest of an heir under the Hindu Law expectant on the death of a widow in possession was not property liable to attachment and sale in execution It was nevertheless held in England that in the case of such expectancies equity would enforce a contract to convey the estate when it fell in. This was decided in the time of Charles I in *Wiseman Con Roper*(4) and notwithstanding certain observations of Lord ELDEN in *Carleton* v. *Leighton*(5) and *Harwood* v *Tooke*(6) was affirmed in *Wethered* v. *Wethered*(7) and *Lyde* v. *Mynn*(8) and has since been treated as settled law. Mr. Srinivasa Ayyangar contends that the law in India was the same, and that the Transfer of Property Act has not made any difference and he refers to *Raja Sahib Prahlad Sen* v. *Baboo Sudhur Sing*(9) where their Lordships with reference to such an expectancy speak of "a contract to be performed in future and upon the happening of a certain contingency of which the purchaser may claim a specific performance if he comes into Court showing he has done all he was bound to do." The other side refer to a passage in *Mussumat Oodey Koowur* v. *Mussumat*(10) where their Lordships observed that a certain petition by which the petitioner renounced her claim to succeed on the death of a kinsman did not operate as a conveyance or a contract first because the petitioner had at the time no interest in the property and secondly because the petitioner did not show that she was contemplating any conveyance, but those observations do not amount to a direct ruling as to a contract to convey when the estate came into possession. It was apparently with reference to this case that their Lordships observed in a passage of an unreported judgment cited in *Ram Nirunjun Singh* v. *Prayag*

(1) (1789) 3 T R., 88 at p. 93
(2) (1890) 45 Ch D., 51.
(3) (1872) 7 B L R, 341.
(4) (1645) Ch Ref., 158
(5) (1805) 3 Mer, 667.
(6) (1829) 2 Sim., 192.
(7) (1828) 2 Sim. 183.
(8) (1833) 1 My. & K, 683
(9) (1869) 2 B.L.R. 111 at p. 117
(10) (1870) 13 M I.A., 585 at p. 598.

Property Act came into force, and therefore proceeded on the rule of English equity which enforced specific performance of such agreements; they do not enunciate any specific rule of Hindu Law which is to prevail unaffected by the Transfer of Property Act (section 2 (*d*) of the Act). On the other hand in *Sham Sunder Lal* v. *Achhan Kunwar*(1) there is a dictum of the Privy Council to the contrary effect, which seems to have been given effect to in *Nund Kishmore Lal* v. *Kaun Ram Tewary*(2), *Manikkam Pillai* v. *Ramalingam Pillai*(3) and *Sumsuddin* v. *Abdul Husein*(4).

It seems to me therefore that the appeal must be decided with reference to the Transfer of Property Act. The effect of section 5 and clause (*a*) of section 6 so far as material is that an act by which a person purports to convey in present or in future the chance of an heir-apparent succeeding to an estate does not operate to transfer the chance. The argument of the appellant was two-fold · (1) that there is no attempt in the present case to convey any such chance, that what was done was an agreement to convey something in future and (2) that the subject of the agreement was the property and the rights after they were to become vested, not merely a chance of succeeding as an heir-apparent

This argument does not seem to me to be sound. When property is conveyed in future there is said to be a transfer of property no less than when it is conveyed in present (section 5 of the Transfer of Property Act); and the legislature has provided that the chance of an heir-apparent cannot be the subject of conveyance in present or in future. An agreement therefore to convey in future such a chance cannot be considered a valid contract because it is an agreement to transfer that which the law says is incapable of transfer. The "object" of such an agreement is of such a nature that if permitted, it would defeat the provisions of section 6 (*a*) of the Transfer of Property Act and section 23 of the Indian Contract Act.

Can it then be said that what was agreed to be transferred here was not such a chance, but something else?

The Transfer of Property Act does not permit a person having expectations of succeeding to an estate as an heir, to transfer the expectant benefits; when such a transfer is purported to

(1) (1898) I.L.R., 21 All., 71 at p. 80 (P.C.) (2) (1902) I.L.R., 29 Calc., 355.
(3) (1906) I.L.R., 29 Mad., 120. (4) (1904) I.L.R., 31 Bom., 165 at p. 174.

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TYABJI, J.

be made an attempt is in effect made by the two persons to change with each other their legal positions, an attempt by the one to clothe the other with what the legislature refuses to recognise as rights, but styles as a mere chance incapable of being transferred. It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the expectations but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which the legislature has chosen to apply to it for the purpose of condemning it.

When the legislature refuses to the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed. The alleged transferor never purports to transfer a chance *co-nomine*, but the legislature by the terminology it has adopted has in effect laid down that until the expectant heir actually succeeds to the inheritance he has no right but a mere chance of succeeding and that when he purports to deal with the subject of his expected inheritance he in fact deals only with that chance whatever be the name by which he chooses to designate it.

It seems to me to be unnecessary to deal with the English cases which have been cited to us, as we must guide ourselves by the provisions of the Acts of the legislature. It was pointed out to us that *Sumsuddin* v. *Abdul Husein*(1) has been dissented from [see *Nasir-ul Haq* v. *Faiyaz-ul-Rahman*(2) and *Mohammad Hashmat Ali* v. *Kaniz Fatima*(3)] and inasmuch as *Sumsuddin* v. *Abdul Husein*(1) purports to proceed on rules which must be applicable to Hindus as well as to Mussalmans it is argued that the decision is inconsistent with the well recognised principle that a Hindu reversioner may empower a widow to alienate property in which she has only a life-estate. That principle has however been supported on the ground that the reversioner's consent furnishes evidence of necessity or that the reversioners in effect release their claim, and the Allahabad Court seems to proceed on the basis that releases or relinquishments ought (contrary to the decision in

(1) (1907) I.L.R., 31 Bom., 165. (2) (1911) I.L.R., 33 All., 457.
(3) (1915) 13 A.L.J., 110.

Sumsuddin's case) to be governed by a different rule from that applicable to transfers. On these points it is not necessary for me to express any opinion as we have not to deal with a relinquishment.

I agree therefore that the agreement cannot be enforced and that the appeal should be dismissed with costs. The memorandum of objections is also dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastriyar.

Re S. KUPPUSWAMI AIYAR (ACCUSED), PETITIONER.*

1915. March 12 and 26.

Criminal Procedure Code (Act V of 1898), ss. 435 and 439—Charter Act (24 & 25 Vict., cap. 104), sec. 15—High Court, powers of, to revise—Complaint of offences under Indian Penal Code (Act XLV of 1860), ss. 189 and 504—Charges framed—Prosecution evidence unreliable—Offences not made out—Prosecution not bona fide—Interlocutory order—Indian Penal Code (Act XLV of 1860), ss. 189 and 504—Process-server's right to enter any house, to effect service

A complaint was preferred against the accused in respect of offences under sections 189 and 504, Indian Penal Code, and charges were framed under the said sections by a second class magistrate. A criminal revision petition was filed by the accused in the High Court to quash the proceedings on the ground that the evidence on record was insufficient to substantiate either of the charges and that the proceedings were instituted out of pure malice and with the object of harassing the petitioner. A preliminary objection was taken as to the maintainability of the petition and the powers of the High Court to interfere in revision.

Held, that though the power of revision has to be exercised with great care the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that in the interest of justice, it should do so.

Held (on the facts of the case), that the case was a fit one for interference in revision, as a careful consideration of the evidence for the prosecution led to the conclusion (1) that the ingredients necessary to constitute an offence under sections 189 and 504, Indian Penal Code, had not been made out and (2) that the case as presented to the Court bore considerable evidence of fabrication and that the development of the case in the later stages showed that it was not a case of bona fide prosecution but that the complainant was a tool in the hands of others

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* Criminal Revision Case No. 607 of 1914.

Re KUPPUSWAMI AIYAR.

For an offence under section 504 of the Indian Penal Code, mere abuse will not do without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely.

The fact of a process-server being entrusted with a *sub pœna* to serve a witness described as residing in a particular house, does not give him a general right of entry into any house without the permission of the owner or person in charge.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order (charge) of T. Y. DURAISWAMI NADAR, Second-class Magistrate of Tranquebar, in Calendar Case No. 229 of 1914.

The facts of the case appear from the order.

T. R. Ramachandra Ayyar for *R. Sadagopa Achariyar* and *C. Rajagopala Ayyangar* for the petitioner.

N. Grant, the *Acting Public Prosecutor*, for the Crown.

KUMARASWAMI SASTRIYAR, J.

ORDER.—This is an application under sections 435 of the Code of Criminal Procedure and 15 of the Charter Act praying that the charges framed against the petitioner by the Second-class Magistrate of Tranquebar may be quashed.

The case for the accused is that he was charged under sections 189 and 504 of the Indian Penal Code, that the evidence on record is insufficient to substantiate either of the charges and that the proceedings were instituted out of pure malice and with the object of harassing the petitioner.

A preliminary objection has been taken by the Public Prosecutor as to the maintainability of the petition and the power of the High Court to interfere. So far as the power of the High Court is concerned the point seems to be concluded by authority.

In *Chandi Pershad* v. *Abdur Rahman*(1), it was held that the High Court had power to interfere at any stage of a case if it considers that grounds have been made out for interference. Their Lordships, at page 138, observe as follows: "We feel bound to say that Mr. Pugh did not attempt to contend that the charges framed against Chandi Pershad could be sustained. He rather confined himself to urging the impropriety of our interference at a time when the case is still pending before the Magistrate. There can be no doubt, however, that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected for over

(1) (1895) I.L.R., 22 Calc., 131.

two months to the harassment of an illegal prosecution, we think it is our bounden duty to interfere." In *Choa Lal Das* v. *Avant Pershad Misser*(1), it was held that the Court had power to interfere in any case and at any stage and the above passage from *Chandi Pershad* v. *Abdur Rahman*(2), was approved. While admitting the general power of the High Court, their Lordships state that the interference should be rare and only in exceptional cases and that one safe practical test would be to see whether a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the Court that it is a fit case for interference at an intermediate stage. In *Jagat Chandra Muzumdar* v. *Queen-Empress*(3) the power of the High Court to *interfere in any case and at any stage* was referred to and their Lordships found that in cases where there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress the High Court has power to interfere. Their Lordships quashed the proceedings in the particular case as they were of opinion that "it is clearly most unfair to the accused that he should now be called upon to rebut a charge which upon the evidence is baseless in so far as it affects him. In *Queen-Empress* v. *Nageshappa*(4), it was held that the High Court could interfere with an interlocutory order passed by a Magistrate and Mr. Justice RANADE observed as follows. "A preliminary objection was raised by the Government Pleader that, as the proceedings before the Magistrate were still pending, this Court could not interfere with an order passed by the Magistrate in an interlocutory stage. The words used in section 435 of the Code of Criminal Procedure are, however, very general and empower the High Court to send for the record of a case not only when it wishes to satisfy itself about the correctness of any finding, sentence or order but also as to the regularity of any proceedings in subordinate Courts In *Abdul Kadir Khan* v. *The Magistrate of Purneah*(5) the High Court of Calcutta expressly ruled that it had jurisdiction to revise interlocutory orders. This power was again exercised by the same Court in respect of an illegal Municipal prosecution : *Chandi Pershad* v. *Abdur Rahman*(2). We follow these decisions and

(1) (1898) I.L.R., 25 Calc., 223 (2) (1895) I.L.R., 22 Calc., 131.
(3) (1899) I.L.R., 26 Calc., 786 (4) (1896) I.L.R., 20 Bom., 543.
(5) (1873) 20 W.R., 23 (Cr. R)

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overrule this preliminary objection urged by the Government Pleader."

There can thus be little doubt that though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that, in the interests of justice, it should do so. No hard-and-fast rule can be laid down as regards the class of cases in which the High Court will interfere.

In the present case the accused is charged with offences under sections 189 and 504 of the Indian Penal Code.

A careful consideration of the evidence adduced by the prosecution and the exhibits filed in the case leads me to the conclusion (1) that the ingredients necessary to constitute an offence under sections 189 and 504 have not been made out, and (2) that the case as presented to the Court bears considerable evidence of fabrication and that the development that the case has undergone from the date of the first report of the process-server, dated 21st April 1914, shows that this is not a bona fide prosecution but that the complainant is a tool in the hands of others.

As regards the charge under section 504 mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely There is nothing to show that the accused had any such intention or knowledge. The endorsement on the summons does not warrant any such inference.

It appears from the *sub pœna* that it was to be served on the witness who is described as residing at No. 6, Pattamangalam Agraharam, *kaspa* Mayavaram. The process-server had power to enter that house in order to effect service. He however went inside the house of the accused in Vellalarkoil Pettai Street without permission and the accused is said to have abused him and asked him to get out.

I do not think that the fact of a *sub pœna* being entrusted to a process-server gives him a general right of entry into any house without obtaining the permission of the owner or person in charge. Such a general power to enter any house at any time is not given by any of the provisions of the Code and would in my opinion be a serious violation of private rights. The mere fact that the owner asked the process-server to go out

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of his house would not be an offence. Assuming that the request to go out of the house was accompanied by the words "Badva, Rascal," it cannot be said that the object or intention was to provoke a breach of the peace however improper the language may be.

The case was fully argued on both sides and giving it my best consideration I am of opinion that this is a case where I ought to interfere. It is easy to see what injury is likely to be inflicted on a respectable pleader by a vexatious and protracted criminal trial. It may be that after a protracted trial the accused will be acquitted but that does not appear to be a sufficient ground for not saving him from what I consider to be a groundless and vexatious prosecution.

I quash the proceedings in the lower Court.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1914. July 16 and 1915. March 30.

S. CHIDAMBARAMMA (PLAINTIFF), APPELLANT,

v.

S. HUSSAINAMMA AND TWO OTHERS (DEFENDANTS Nos. 1, 2 AND 4), RESPONDENTS.*

Hindu Law—Decree against widow for husband's debt—Attachment of property—Previous alienation by widow for no justifiable cause—Attachment and sale thereupon effective to convey reversionary interest.

A plaintiff who had obtained a decree against a Hindu widow in respect of a debt due by her late husband attached a certain property as belonging to her husband which she had sold to a stranger several years before the attachment, for no purpose binding on the reversioner,

Held, that the decree-holder was entitled to attach and bring to sale the reversionary interest in the property, subject to the enjoyment thereof by the alienee during the widow's life-time.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Kurnool, in Appeal No. 27 of 1911, preferred against the decree of B. SUBBA RAO, the District Munsif of Nandyal, in Original Suit No. 173 of 1910.

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* Second Appeal No. 1495 of 1912.

CHIDAMBARAMMA v. HUSSAINAMMA. —— SADASIVA AYYAR, J.

life-time, that is, it conveys to the purchaser only a right to enjoy during the widow's life-time. [See the very recent case *Sinjaram Chettiar* v. *Kalyanasundaram Pillai*(1).] When the full estate is vested in her and yet owing to the restrictions which from being moral restrictions have become legal restrictions, she can convey only an interest to last during her life-time by a conveyance not for legal necessity, it seems to me to follow that the absolute estate vested in her becomes by her alienation for her own purposes (valid during her life-time) divided into two estates (1) a life estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her life-time, both of which estates or rather the total of which belonged to her husband at his death. So far as her life interest is concerned, it became by her alienation not available to the creditors of her husband; but the ownership of the remaining reversionary estate continues in her as part of the estate which she inherited from her husband. That seems to me to be available to her husband's creditors. Mr. T. M. Krishnaswami Ayyar relied upon the cases which have held that a presumptive reversioner has no interest in the property during the widow's life-time which can be attached by his creditor [See the latest case of this Court in *Sri Jagannadharaju* v. *Sri Rajah Prasada Rao*(2).] In my opinion, these decisions are irrelevant in the consideration of the question whether the widow as heir of her husband has still left in her some property belonging to her husband's estate which could be attached by her husband's creditor after she had made an alienation binding on her during her life-time. No person can claim during the widow's life-time, after the alienation of the widow's life estate, to be the owner of that reversionary interest, but it does not follow therefrom that no reversionary interest in property forming part of the husband's estate is left after her alienation of her life estate. If an interest belonging to the husband's estate is left some legal person must be its owner. If a presumptive and contingent reversioner is not the legal person in whom the reversionary right exists, it must be the widow in whom the whole legal estate vested at her husband's death. If so the decree-holder who obtained a decree against her as fully

(1) (1914) M.W.N., 735. (2) (1916) I.L.R., 39 Mad. 554.

representing her husband must be entitled to attach that reversionary interest remaining in her as part of her husband's estate.

Section 60, clause (*m*) of the Civil Procedure Code and section 6, clause (*a*) of the Transfer of Property Act, are also relied on by Mr. T. M. Krishnaswami Ayyar. Section 60 (*m*) of the Civil Procedure Code prohibits the attachment of a judgment-debtor's expectancy of succession. Section 6 (*a*) of the Transfer of Property Act prohibits the transfer of the chance of an heir-apparent's succession by such heir-apparent. These statutory provisions again are, in my opinion, irrelevant to the consideration of the question before us because the judgment-debtor here is not the presumptive or contingent reversioner but the widow representing her husband's estate fully, and the transfer which would be made by the attachment and court-sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him but by the Court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow).

I would therefore answer the question which I put to myself in the beginning of the Judgment in the affirmative, and setting aside the Judgments of the lower Courts give a declaration to the plaintiff that the attachment made by him in execution of the decree in Original Suit No. 311 of 1901 is valid in respect of the reversionary interest in the properties subject to the life interest of the widow. The parties will bear their respective costs throughout.

TYABJI, J.

TYABJI, J.—I agree. *It seems to me that the widow was a* party to the proceedings in two capacities: (1) as to a life interest in her own absolute right and (2) as to the reversion as the representative of her deceased husband's estate which is to devolve on his reversioner. She had no doubt purported to convey the property in both capacities but it has been found that in so far as she purported to alienate the property in her latter capacity she had stepped beyond her legal powers and was not competent to bind the reversioner. She was on that account brought on the record so that the reversionary interest of her husband's estate may also be bound. The authorities to the effect that the presumptive reversioner's interest is such a

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and the other properties of the judgment-debtor: certain properties not included in the mortgage to the respondents were attached in execution of two other decrees against the same judgment-debtor; the realised assets were paid into Court. The present respondents applied for rateable distribution. Notwithstanding the objection of the judgment-debtor, the applications were granted. The judgment-debtor has appealed. A preliminary objection is taken that as the order was passed under section 73 of the Code of Civil Procedure against which no appeal is provided by section 104 of the Code, no appeal should be entertained. It is conceded that the question agitated in the applications relates to the execution of the decrees between the parties to the suits in which the decrees were passed. *Primâ facie*, therefore, the orders are appealable as falling under section 47 of the Code of Civil Procedure. Has that right of appeal been taken away in the present case by section 73? That section does not say that no appeal shall lie against orders passed under it. It is by the omission to provide for an appeal in section 104 that it is argued that an appeal is not given against the order. It has been held with reference to orders passed under Order XXI, rule 63 that if the adjudication was between the parties to the suit, although the matter may arise in a claim petition, an appeal will lie under section 47 of the Code of Civil Procedure. This principle was recognized both under the old and the new codes. See *Sundar Singh* v *Ghasi*(1), *Krishnobhupati Devu* v. *Vikrama Devu*(2), *Vengapayyan* v. *Karimpavakal Parvati*(3) and *Kali Prasanna Ghosh* v. *Shaikh Golam Rahman*(4). On the analogy of these decisions, we are of opinion that orders passed under section 73 of the Code of Civil Procedure are appealable, if they affect parties to the suits. In *Jagadish Chandra Shaha* v. *Kripa Nath Shaha*(5) and *Kashi Ram* v *Mani Ram*(6), the contest was between rival decree-holders. They are not governed by section 47 of the Code of Civil Procedure. This distinction was pointedly referred to in *Balmer Lawrie & Co.* v. *Jadunath Banerjee*(7).

But our attention was drawn to the judgment of SANKARAN NAIR AND AYLING, JJ., in *Chennamma* v *Rajah of Karvetnagar*(8),

(1) (1896) I.L.R., 19 All., 410.
(2) (1895) I.L.R., 18 Mad., 13 at p. 17.
(3) (1903) I.L.R., 26 Mad., 501.
(4) (1913) 18 C.W.N., 910.
(5) (1908) I.L.R., 36 Calc., 130.
(6) (1892) I.L.R., 14 All., 210.
(7) (1915) I.L.R., 42 Calc., 1.
(8) (1914) 1 L.W., 234.

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which at first sight appeared to be a direct authority in favour of the respondents. In that case, the appellant was one of the decree-holders. To him the provision of clause (2) of section 73 of the Code of Civil Procedure would have applied, and he could have had his remedy by way of suit if the order went against him. The judgment-debtor cannot avail himself of the rights of suit which that sub-clause provides. The present case may be distinguished from *Chennamma* v. *Rajah of Karvetnagar*(1) on that ground. We think that a party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure should not be deprived of it, unless the Civil Procedure Code expressly denies it to him. As we find no such denial in section 73 of the Civil Procedure Code, we must hold that an appeal lies. We overrule the preliminary objection.

The appeals then coming on for hearing on merits on the same day and having stood over for consideration the Court delivered the following judgments.—

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I entirely agree with his conclusions. The respondents are entitled to rateable distribution, even though their decrees are on mortgages. The order for payment of the amount from the person and the other properties of the judgment-debtor was also obtained in these cases. See *Abdulla Sahib* v. *Doctor Oosman Sahib*(2) and *Gatti Lal* v. *Bir Bahadur Singh*(3). It is not disputed that no formal order was passed disposing of their execution applications. Under the old Code of Civil Procedure, it was held that even when an application was "struck off," it must be taken to be still pending, as the law provided no procedure for taking such a step; *Sasivarna Tevar* v. *Arulanandam Pillai*(4). In the present Code, there is an express provision for dismissing an execution application when no further step is taken by the decree-holder. It is clear, therefore, that until that step is taken under the new Code, the application is on the file of the Court. The fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which

(1) (1914) 1 L.W., 234.
(2) (1905) I L R., 28 Mad., 224.
(3) (1905) I.L.R., 27 All., 158.
(4) (1898) I.L R., 21 Mad., 261.

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the law enables him to adopt. The District Judge is right in treating the applications of the respondents as pending at the time that the claim for rateable distribution arose. These appeals must be dismissed with costs. There will be no costs in Civil Miscellaneous Appeal No. 289.

KUMARASWAMI SASTRIYAR, J.—These are appeals against the orders of the District Judge of North Arcot declaring that the respondents are entitled to rateable distribution out of the sale-proceeds realized in Execution Petitions Nos. 78 of 1905 and 108 of 1906. The respondents obtained mortgage decrees against the appellant which directed that the judgment-debtors should be personally liable for any deficiency that may arise after the sale of the mortgaged properties and the application of the sale-proceeds towards the amounts due on the decrees. Though the decrees were not in accordance with the provisions of the Transfer of Property Act, the irregularity cannot be questioned in execution proceedings; *Raja of Kalahasti* v *Venkataperumal Raja*(1). The respondents had, therefore, decrees for money and would be entitled to rateable distribution if they had applied for execution and their applications were still undisposed of and on the file at the date when assets were realized in execution of the decrees in Execution Petitions Nos. 78 of 1905 and 108 of 1906: *Tiruchittambala Chetti* v. *Seshayyangar*(2).

The respondents in 1905 filed execution applications on the decrees obtained by them which prayed for (1) issue of notices to the judgment-debtors under section 248 of the old Civil Procedure Code, and (2) sale of the mortgaged properties, leave being given to the decree-holders to bid. Orders were passed granting the reliefs and it is admitted that the decree-holders obtained all the reliefs they had prayed for. For some reason or other (not explained) no formal orders were passed taking the petitions off the file of pending execution applications and the District Judge, treating the applications as pending, ordered rateable distribution on the applications of the decree holders. The question for decision is whether execution applications, praying for specific reliefs which were all granted several years before assets were realized, and on which no further reliefs could be asked or granted, can be said to be still on the file and

(1) (1911) 21 M.L.J., 1036. (2) (1882) I.L.R., 4 Mad., 383.

undisposed of, because no final orders have been passed taking them off the file of pending applications.

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The point is not free from difficulty. When an execution petition is filed, and the Court either rejects all or some of the prayers, it has to pass final orders to that effect. If all or any of the prayers are granted, the decree-holder has to obtain the appropriate reliefs by taking further steps either on the execution petition or in interlocutory application on the execution petition. When he has obtained all the reliefs he asks for, all that remains to be done on the execution petition is to record the fact that the petition has been disposed of. The Court cannot do anything further. It is argued by Mr. Govindaraghava Ayyar that anything that the Court might do after all the prayers have been granted and reliefs sought obtained by the decree-holder will only be purely ministerial and for statistical and not judicial purposes.

There can be little doubt that only a formal order can be passed on the petition after all the reliefs prayed for have been granted and obtained by the decree-holder; but it does not follow that the order is not a judicial order simply because it records that the execution petition has been disposed of. Many purely formal orders are still judicial and not ministerial. The Madras Civil Rules of Practice contemplates final orders being passed on execution petitions. Rule 167 of the Civil Rules of Practice requires that when orders for sale are passed, the execution petition shall be adjourned to a fixed date and clearly contemplates final orders being passed by the Court on the petition after the sale has been confirmed.

It was the duty of the Court to have fixed a date for the final disposal of the execution petitions and the fact that it did not do so has the effect of keeping the applications pending till final orders are passed.

I am of opinion that the District Judge was right in treating the execution petitions as pending and dismissing the appeals (except Civil Miscellaneous Appeal No. 289) with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Napier.

1915. March 29 and 30 and April 9.

KRISHNAMACHARI, ACCUSED,

v.

MESSRS. SHAW, WALLACE AND COMPANY, COMPLAINANTS.*

Criminal Procedure Code (Act V of 1898), ss 179 and 181—Complainant in Madras town doing business in mofussil by agent—Agent's duty to remit principal's money to Madras—Misappropriation by agent in mofussil—Jurisdiction to try offences under Indian Penal Code (Act XLV of 1860), sec 406 or 409.

A firm in the town of Madras dealing in kerosine oil, authorized an agent in a mofussil station to sell their oil and remit to them at Madras the sale-proceeds less his commission. The agent sold the oil in the mofussil and without sending the proceeds misappropriated the same:

Held. (a) that the proceeds were the property of the Madras firm, (b) that the case was governed by section 181 and not section 179 of the Criminal Procedure Code, and (c) that as the misappropriation and consequent loss occurred to the Madras firm primarily only in the mofussil station, the Magistrate at that station and not the one in Madras had jurisdiction to try the offences under section 406 or 409, Indian Penal Code.

Cases on the subject reviewed.

CASE referred for orders of the High Court under section 438 of the Criminal Procedure Code by P. NARAYANA MENON, the Third Presidency Magistrate, Georgetown, Madras.

The facts of the case appear from the judgment of OLDFIELD, J.

J. C. Adam, the *Crown Prosecutor* for the Crown.

The Honourable Mr. *T. Richmond* for the complainant.

R. N Aingar for the accused.

OLDFIELD, J.

OLDFIELD, J.—The question on this reference is whether the Third Presidency Magistrate has jurisdiction to try the accused for an offence punishable under section 406 or 409 of the Indian Penal Code or whether he should return the complaint for presentation to a competent Court at Nandyal, Kurnool district.

The circumstances are set out in the complaint only generally. But the material allegations appear from the evidence already taken and the statements of complainant's counsel, to be that the accused was appointed agent for the sale of complainant's oil at Nandyal, that his periodical reports showed a certain quantity of oil sold and a certain sum of money received and (after deduction

* Criminal Revision Case No. 169 of 1915 (Case referred No. 15 of 1915).

of commission, etc.) to be accounted for and that, when called on to account, the accused failed to do so, leaving Nandyal after locking up his place of business and secreting his books, the in ference being that he had made away with the funds in his charge. No suggestion is made that any oil entrusted to him has been converted to his use or dealt with otherwise than in accordance with complainant's instructions; that is, by sale to customers. The misappropriation relied on is accordingly not of the oil, but only of the money received for it; and we can therefore dismiss from consideration what seems to have been thought material before the Magistrate, the allegations as to the origin of the oil, whether it came from Madras or Cocanada. The fact that the accused was appointed agent by an order sent from Madras is also without significance in a criminal case. The only ground, which we have to consider as justifying the jurisdiction of the Madras Court, is that loss ensued there to the complainant's firm as a consequence of the accused's conduct at Nandyal and that the case is therefore covered by section 179, Criminal Procedure Code, not by section 181 only, in which offences under sections 406 and 409 are specially dealt with. In accordance with the ordinary canons of construction the special provision should ordinarily receive effect unqualified by the general. Clear reason must therefore be shown in the wording of section 179 or otherwise, before complainants' contention can be accepted.

That contention has been endorsed and negatived in different decisions; but, though in some of them attempts have been made to state the principle applicable in more or less general terms, the weight of such statements is impaired by the facts that either the allegations before the Court and the exact relations between the parties are not stated fully in the reports or the conclusion may have been influenced by uncertainty regarding the place, in which the money or property concerned was received or converted by the accused *Rajani Binod Chakravarti* v. *All India Banking and Insurance Co., Ld.*(1) is an instance of the former class of cases, and *Langridge* v *Atkins*(2) of the latter.

In this Presidency *Ramasami Asari's* case(3) no doubt supports both the propositions, which the prosecution has to

(1) (1914) 22 I.C, 192. (2) (1913) I.L.R, 35 All., 29.
(3) (1914) M.W.N., 324, S.C., 26 M L.J., 235.

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establish, that (1) the offence is constituted by the accused's dishonest conversion and the loss, which ensued as its consequence and (2) such loss ensues, not only where and when the conversion takes place, but also where the complainant ordinarily receives the accused's accounts and remittances. In *Rambilas* v. *Emperor*(1), however, two other learned Judges did not feel compelled to treat this as a considered ruling on the point; and with all due deference we follow them so far. Their decision however negatived the first of the propositions above stated on the ground that the existence of dishonest intention, not the ensuing of loss, was the essential element in the offence of criminal breach of trust and that there was therefore no question of any consequence or of the application of section 179; and we respectfully dissent from this view. For, we are unable to conceive and the learned counsel has been unable to suggest any case, in which more than mere preparation or attempt could be held established, but no loss whatever, it may be only a temporary or highly insignificant one, could be found to have been caused. Our conclusion is in fact that the loss ensues immediately on the conversion, because by it the property of the principal entrusted to the agent, is diminished in the latter's hands. It is the complainant firm's case that accused's collection (less commission) belonged to it from the date of receipt, and it is not alleged that any appropriation was necessary to change their ownership. The date of conversion may be uncertain and susceptible of no more definite statement than as prior to the proper date for remittance. That however cannot alter the fact that the firm's funds in Nandyal were diminished. It follows that primarily at least it suffered wrongful loss there.

Complainant's second proposition stated above is clearly essential to his contention. For section 179 can be applied only to cases, in which the consequence, necessary to constitute the offence, ensues in some place other than that, in which the accused's act is done. It has been supported with reference to the present case on the ground that, although the firm's loss at Nandyal may have been a primary consequence, the loss at Madras, the firm's headquarters, where its funds are kept, was a secondary one and was sufficient to attract the

(1) (1914) M.W.N., 594.

operation of the section. This distinction is not recognized explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *Langridge* v. *Atkins*(1) as the foundation of the decision in *Ganeshi Lal* v. *Nand Kishore*(2) on which the accused relies; and it was not drawn in the former case, because the averments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Meru* v. *Jetnabhai*(3) where the act in question was a complete causing of grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not affect the venue. We follow these authorities and hold that the complainant's firm's secondary loss at Madras will not give the Third Presidency Magistrate jurisdiction. He must return the complaint for presentation to competent Magistrate having jurisdiction over Nandyal.

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OLDFIELD J.

NAPIER, J.—I concur.

NAPIER, J

N.R.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Kumarasuami Sastriyar.

AYYAKUTTI MARKONDAN (PLAINTIFF), APPELLANTS,

v.

PERIYASAMI KAVUNDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1915. April 14

Transfer of Property Act (IV of 1882), sec. 83—Usufructuary mortgage—Hypothecation—Deposit of usufructuary mortgage amount only—Refusal by mortgagee—Subsequent deposit of hypothecation amount—Compound interest at enhanced rate—Penalty—Deposit of compound interest at the original rate only, sufficiency of—Acceptance by Court, as reasonable compensation, effect of—Mesne profits, claim for, by plaintiff from date of deposit, if sustainable.

The plaintiff, as the vendee of certain lands which were subject to a usufructuary mortgage as well as a hypothecation in favour of the defendant, sought

(1) (1913) I.L.R., 35 All., 29. (2) (1912) I.L.R., 34 All., 487.
(3) (1903) 8 Bom. L.R., 513.

* Second Appeal No. 1234 of 1912.

AYYAKUTTI MARKONDAN v. PERIANANI KAVUNDAN.

to recover the property on payment into Court of the amount due under the usufructuary mortgage under section 83 of the Transfer of Property Act. The defendant claimed that the plaintiff should deposit the sum due under the hypothecation bond also. The plaintiff paid subsequently into Court an amount as due for principal and interest on the latter bond, but calculated compound interest at the original rate and not at the enhanced rate after default as mentioned in the bond, disputing the provision as penal. The Court held the provision to be penal and accepted the amount paid for interest as reasonable compensation. The plaintiff claimed mesne profits from the date of his first deposit, but the defendant disputed his right to any mesne profits as the plaintiff did not deposit the full amount specified in the bond;

Held, (1) that the plaintiff was bound to deposit the amounts due under both the bonds and (2) that the plaintiff was not bound to deposit the penal rate of interest but that the payment of an amount as reasonable compensation which was accepted by the Court as proper was legally sufficient to entitle the plaintiff to mesne profits from the date of the second deposit.

SECOND APPEAL against the decree of J. G. BURN, the acting District Judge of Madura, in Appeal No. 375 of 1910, preferred against the decree of F. J. DE'ROZARIO, the District Munsif of Dindigul, in Original Suit No. 104 of 1909.

The facts of the case appear from the judgment of COUTTS TROTTER, J.

T. R. Venkatarama Sastriyar for the appellant.

T. V. Muthukrishna Ayyar for the respondent.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—In this case the plaintiff had created two incumbrances on his land—one a usufructuary mortgage and the other a hypothecation. The plaintiff being desirous of paying off his mortgage and recovering his property availed himself of the procedure under section 83 of the Transfer of Property Act, and paid the amount due under the mortgage namely Rs. 800 into Court on the 6th October 1908. The first defendant declined to receive that amount and claimed that the plaintiff was bound to deposit also the amount due under the hypothecation bond. Accordingly the plaintiff deposited the sum of Rs. 676-7-6 in respect of the hypothecation bond and tendered the two sums to the first defendant. A notice was sent to the first defendant who put in no appearance in Court and did not receive the money. The question which arises is this: the hypothecation bond was in respect of principal sum of Rs. 300 with interest at Rs. 1-6-0 per cent a month and also provided that if it was not paid off within the prescribed period, a year, then simple and compound interest at Rs. 2 per cent should run from the date of default

Now the plaintiff when he paid the money into Court under section 83 of the Transfer of Property Act did not pay at the penal rate of interest, but he paid only compound interest at the rate of Rs. 1-6-0 as from the date of default and when the Court came to determine what was due the Court held that the amount was enough and that he had duly discharged the claim of the first defendant.

It has been contended before us that notwithstanding the fact that the amount paid in was the amount that was found due the payment and tender were bad on the ground that it was not for debtor to speculate as to what reduction the creditor would accept or the Court would make from the full letter of the bond, but that he must pay what is expressed to be due on the face of the instrument and get back any portion if he can. It is not apparent and the respondent has not been able to suggest that there is any legal means by which he would be able to get it back. In support of the proposition some English cases about tender were cited and among them was *Searles* v. *Sadgrave*(1). There in respect of an entire debt of £82 a tender was made of £55-6-0 which was arrived at by deducting a sum of money due in respect of a cross claim between the parties. The Court held that the tender to be good must be of the whole debt in respect of which it was tendered and that the debtor was not entitled to deduct the set off from the amount of the debt. Reliance was further placed upon *Venkatarama Aiyar* v. *Rangasami Aiyangar*(2). There it was held that where a tender was made of four-fifths of the mortgage amount where a partition was sought the tender was bad because the parties were not agreed as to what the proper proportions of division would be if a partition were made. These cases seem to be quite different in principle to the present and not in any way to cover it. The words of section 83 of the Transfer of Property Act are quite clear and they enact that "the mortgagor or any other person entitled to institute such suit may deposit in any Court in which he might have instituted such suit to the account of the mortgagee the amount remaining due on the mortgage." Here the amount legally due was what the Court found it to be and that was the amount which the plaintiff paid into Court. No question arises of any attempt to set off or

(1) (1855) 5 El. & Bl., 639 (2) (1912) 23 M.L.J., 558.

AYYAKUTTI MARKONDAN v. PERIYASWAMI KAVUNDAN.

COUTTS TROTTER, J.

retain any balance. That which the plaintiff tendered was the debt and the whole debt as it was ultimately found to be and the fact that the instrument sought to provide for, and the defendant sought to exact in accordance with it a larger sum does not in my opinion affect the result that what the plaintiff tendered was the whole amount which was due and owing by him. I am therefore of opinion that the interest ceased to run at any rate as from the date when both the bonds were redeemed and paid off, namely, the 29th January 1909, and that as from that date the plaintiff should have mesne profits in respect of the property. He sought to go further and claimed mesne profits as from the 9th October 1908, the date when he paid off the original mortgage for Rs. 800. What he argued was that as he discharged the usufructuary mortgage-debt his right to mesne profits would accrue from that date as the hypothecation bond would not entitle the mortgagee to possession. This seems really an ingenious attempt to get round the decision of the Full Bench given the other day (1st April 1915) in *Subramania* v. *Balasubramanya*(1) which decides that a mortgagee is not bound to be redeemed piecemeal. We are bound by that decision and its principle is fatal to the appellants' contention

Therefore the appeal is allowed and mesne profits will be decreed to the appellant as from the 29th January 1909 until delivery of possession. The amount of mesne profits will be determined by the Court of first instance. Each party will give and take proportionate costs.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

K.R.

(1) (1915) I.L.R., 38 Mad., 927.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

S. PERUMAL NADAN AND FOUR OTHERS (DEFENDANTS—PETITIONERS), APPELLANTS,

1915.
April 15.

v.

SIVANAMJI NADACHI (PLAINTIFF—COUNTER-PETITIONER), RESPONDENTS.*

Ex-parte decree—Setting aside, application for—Deposit of money into Court—Time for depositing, granted—Extension of time till a certain date—Deposit not made on that date—Dismissal of application on that date, legality of—Jurisdiction of Court—Time granted by Court for performance of any act till a certain date, meaning of.

When time is granted by a Court for the performance of any act till a certain date, it includes that date

Where, on an application by a defendant to set aside an ex-parte decree in a Small Cause Suit, the Court granted time to the applicant till a certain date to deposit the decree amount, but dismissed the same as no deposit was made before the application was taken up for orders on that date,

Held, that the Court had no jurisdiction to pass the order dismissing the application,

Dawkins v. *Wagner* (1832) 3 Dowl., 535, *Knox* v. *Simmonds* (1791) 3 Bro.C.C., 358 and *Isaacs* v *Royal Insurance Co.* (1870) L.R., 5 Ex., 296, followed.

APPEAL preferred under section 15 of the Letters Patent against the order of AYLING, J., in *Perumal Nadan* v. *Sivanamji Naduchi*(1), preferred against the order of T. SRINIVASA AYYANGAR, the Subordinate Judge of Tuticorin, in Miscellaneous Petition No. 1514 of 1912 in Small Cause Suit No. 1505 of 1912.

The facts of the case appear from the judgment.

A. Swaminatha Ayyar for the appellant.

M. D. Devadoss for the respondent

The following judgment of the Court was delivered by OLDFIELD, J. :—The learned Subordinate Judge dismissed the appellant's petition to set aside the decree of the Small Cause Suit,

OLDFIELD AND SESHAGIRI AYYAR, JJ.

* Letters Patent Appeal No 32 of 1914.

(1) Civil Revision Petition No 302 of 1913. This petition was dismissed by AYLING, J.

PERUMAL NADAN v. SIVANAMJI NACHI.

OLDFIELD AND SESHAGIRI AYYAR, JJ.

because appellants having been called on to deposit money and the time granted for doing so having been extended until 3rd December 1912, no deposit was made before the petition was taken up for orders on that date. *Dawkins* v. *Wagner*(1), *Knox* v. *Simmonds* (2) and *Isaacs* v. *Royal Insurance Co* (3) are authorities for holding that when time is given for the performance of any act till a certain date, it includes that date. The learned Subordinate Judge therefore had no jurisdiction to pass his order of dismissal before 4th December 1912. We must allow the Letters Patent Appeal and set aside the Subordinate Judge's order dismissing the petition before him; costs to abide the result of the Small Cause Suit.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1915 April 15 and 19.

T. RAMAN NAIR (MULLAPALLI TARWAD MANAGER) (FIRST DEFENDANT), APPELLANT—PETITIONER,

v.

GOPALA MENON AND FOUR OTHERS (COUNTER-PETITIONERS Nos. 22 TO 26), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XL, r. 4—Receiver, misappropriation of income by—Property, meaning of—Wilful default, meaning of—Death of receiver—Application against legal representatives, if maintainable.

Under Order XL, rule 4 of the Code of Civil Procedure (Act V of 1908), an application can be made for execution being levied against the properties of a receiver in the hands of his legal representatives, in respect of his misappropriation of the *income* of the properties entrusted to his charge

APPEAL and Civil Revision Petition against the order of V. K. DESIKA ACHARIYAR, the Subordinate Judge of Palghat, in Execution Application No. 1319 of 1913 in Original Suit No. 28 of 1907 in Appeal Suit No. 20 of 1910 (Civil Miscellaneous Petition No. 293 of 1910), respectively.

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(1) (1832) 3 Dowl., 535 (2) (1791) 3 Bro.C.C., 358.
(3) (1870) L.R., 5 Ex., 296.

* Appeal Against Order No. 123 of 1914 (and Civil Revision Petition No. 209 of 1914).

The material facts appear from the judgment.

P. R. Srinivasa Ayyangar and *G. S. Ramachandra Ayyar* for the appellant.

J. L. Rosario for the respondents.

OLDFIELD AND SESHAGIRI AYYAR, JJ.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J. :—One Raman Nair brought a suit against the present appellant to remove him from the karnavanship. The first Court directed his removal. Pending the disposal of the appeal against the decree, the said Raman Nair was appointed receiver of the tarwad properties, and he gave security for his proper management. The appeal was decided in favour of the karnavan in February 1913. Raman Nair, the receiver, died in April 1913. The present application is by the successful karnavan for an order that the properties of the deceased receiver, in the hands of the respondents, should be held liable for moneys misappropriated by him. The Subordinate Judge held that although an application of this kind might be entertained against the receiver, if he were alive, it is incompetent against his legal representatives and that the proper procedure is to sue the latter in a regular suit. We think this order is wrong.

Order XL, rule 4, provides that where a receiver had occasioned loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold. Mr. Rosario raises two objections to the applicability of this clause. He contends that the word *property* refers to what was actually entrusted to the receiver and not to the income derived therefrom. We are unable to agree with him. Property in this and in the other clauses of the section is synonymous with *estate*. In most cases, it is for the collection of the income, that a receiver is appointed. We are of opinion that the income from a property entrusted to the charge of a receiver is covered by the word property.

The learned vakil also urges that by misappropriating the income, it cannot be said that the receiver committed wilful default or negligence. The clause is not very happily phrased. It is a residuary provision and is intended to deal with all cases of loss to the estate not specially provided for. One cannot say that a man who uses for his own benefit the money entrusted to him does not occasion loss by his wilful default. We must overrule this objection also.

RAMAN NAIR v. GOPALA MENON.

OLDFIELD AND SESHAGIRI AYYAR, JJ.

The *far more serious objection raised was that in a summary* proceeding, the legal representatives should not be proceeded against. There is no question of respondents being executors under the will of the deceased. They are the ordinary legal representatives of the deceased. The provision in rule 4 is that *the property of the receiver should be attached and sold. It* does not necessarily involve the conclusion that the receiver is alive. In section 50, clause (2) of the Code, where a provision is made for executing the decree against the legal representatives the language employed is "that the property of the deceased in his hands" should be liable. We think the legislature has advisedly rendered the property liable in Order XL in order that execution may be levied against it in the hands of the legal representatives. If a suit has to be instituted, the same representatives would have to be impleaded as being in possession of the assets of the deceased; and we see no reason why the question which can be decided in a suit should not be disposed of in the execution application. Mr. Rosario drew our attention to *Jenkins* v. *Briant*(1) and to *Ludgater* v. *Channel*(2) in which it was held that the legal representatives of the defaulting receiver should not be held liable in summary proceedings. In Order L, rules 15 (*a*) to 24 of the Rules of the Supreme Court, there is no provision directing the recovery of the money against the estate of the receiver, as we have in Order XL of our Code. We do not think that the cases cited affect the specific provisions of the Code of Civil Procedure. We agree with the learned vakil that section 145 has no application. It contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit. The receiver is not in that position. We think the provisions of rule 4, Order XL, are comprehensive enough to enable execution being had against the legal representatives of the deceased receiver. We cannot accede to the contention that as the receiver is an officer of the Court, the respondents cannot be his legal representatives. In giving an undertaking to properly manage and in furnishing security in that behalf, he is rendering himself

(1) (1834) 7 Sim., 171. (2) (1847) 15 Sim., 479.

personally liable and in that capacity the respondents are his legal representatives.

For these reasons, we must reverse the order of the Subordinate Judge and direct him to dispose of the petition. Costs will abide the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield

1915. March 12, 15, 17, 18, 19 and 31 and April 29

NARAYANA ANNAVI AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v

K. RAMALINGA ANNAVI (MINOR BY HIS GUARDIAN DHARMI AMMAL) AND FIVE OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Partition—Marriage of co-parcener—Provision for expenses of marriage at partition—Expenses, incurred subsequent to suit but before decree—Anticipatory provision for future marriage, right for—Decree in partition suit—Gift by co-parcener of lands, less than his share, validity of—Estoppel

An unmarried co-parcener is not entitled to have an anticipatory provision made for the expenses of his future marriage at partition

Srinivasa v. Thiruvengadathiengar (1915) I.L R 38 Mad., 556, dissented from.

Where the expenses of marriage of a co-parcener were incurred subsequent to the institution of a suit for partition but prior to the decree of the Court of first instance,

Held, that the severance of the joint family was effected only by the decree, and that the expenses, should be credited to him in the account to be taken in the suit.

Where a member of a joint Hindu family made a gift of some immoveable property, which was not unreasonable regard being had to the extent of his share in all the joint family properties, and his undivided son did not impeach the gift during his father's lifetime,

Held, that neither the son nor the grandson could question the validity of the same after the donor's death.

APPEAL against the decree of A. N. ANANTHARAMA AYYAR, the Subordinate Judge of Tinnevelly, in Original Suit No. 10 of 1910.

This appeal arises out of a suit for partition instituted by the first plaintiff and his two minor sons, who were the second and third plaintiffs in the suit, against the other members of the joint family. The fourth defendant was the sister of the

* Appeal No. 89 of 1913.

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first plaintiff and was joined as a party to the suit as the plaintiffs claimed to recover certain immoveable properties of the family which had been given over to her by the father of the first plaintiff and the fourth defendant in 1908. The first to third defendants, who were the members of the other branches of the family contended that there was a prior partition in the family in 1895–96 of the outstandings and of the immoveable properties belonging to the family and that the lands subsequently purchased were the separate properties of the several members: subsequent to the institution of the suit, the second plaintiff who was a minor was married and expenses were incurred therefor prior to the passing of the decree in the Court of first instance. The plaintiffs claimed that the expenses abovesaid should be paid out of the family property and that provision should be made in the decree for the expenses of the future marriage of the third plaintiff who was unmarried and was still a minor at the date of the suit. The Subordinate Judge of Tinnevelly, who tried the suit, held that there was only a division of the outstandings in 1895 and that the family was joint in other respects and passed a decree for partition. The Subordinate Judge disallowed the claim for payment of the marriage expenses of the second plaintiff which were incurred during the pendency of the suit and also disallowed the claim for provision being made in the decree for the expenses of the future marriage of the third plaintiff. The Subordinate Judge upheld the gift in favour of the fourth defendant. The plaintiffs appealed to the High Court, on all the questions decided against them in the lower Court. The High Court held that there was a division in 1895 only of some portion of the outstandings of the family and that the status of the family was unaffected and that some portion of the outstandings as well as the immoveable properties were liable to division in this suit.

[The portion of the judgment of the High Court dealing with the evidence relating to the question of division above mentioned has been omitted, as not material to this report. Their Lordships then dealt with the question of the validity of the gift of lands in favour of the fourth defendant, and that of the claims of the second and third plaintiffs in respect of the expenses of their marriage. The portion of the judgment relating to the above questions has been reported herein.]

K. Srinivasa Ayyangar and *S. Ramaswami Ayyar* for the appellants.

A. Rangaswami for the first respondent.

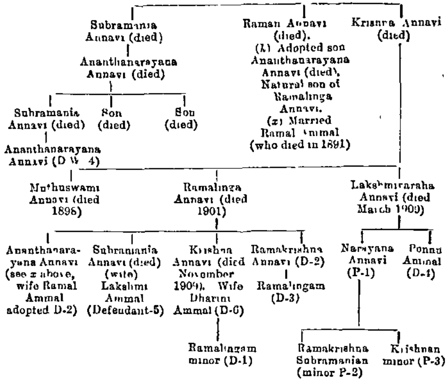
K. Jagannadha Ayyar for respondents Nos. 1 and 6.

S. Srinivasa Ayyangar and *T. M. Minakshisundaram Ayyar* for respondents Nos. 2 and 3.

M. D. Devadoss for the fourth respondent.

SANKARAN NAIR AND OLDFIELD, JJ.

The following judgment of the Court was delivered by SANKARAN NAIR, J. :—This is a suit for partition. The following pedigree will show the relationship of the parties.



Narayana Annavi the first plaintiff is the son of Lakshmivaraha Annavi who is now deceased. The second and third plaintiffs are the minor sons of the first plaintiff. The first, second and third defendants are the descendants of Ramalinga Annavi, the brother of Lakshmivaraha Annavi. The fourth defendant is the first plaintiff's sister who claims to be in possession of certain properties transferred to her by her father. The plaintiffs state that those transfers are invalid and the properties still continue in the possession of the joint family. The fifth and sixth defendants are two widows of deceased co-parceners and they are

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joined as parties to the suit as provision has to be made for their maintenance.

The contention of the first defendant is that there was a partition in the family about the year 1895-96 during the lifetime of the three brothers "Muthuswami Annavi, Ramalinga Annavi and Lakshmivaraha Annavi and that Ramalinga Annavi was only in management of the properties set apart for his share and after him the first defendant's father Krishna Annavi continued in management of those properties and that the plaintiffs are not entitled to any share in the properties that belonged exclusively to Ramalinga's branch The fourth defendant denied that the alienations in her favour are invalid. The Subordinate Judge found that there was a partition effecting a severance of interest in respect of the debts due to the family in the year 1895-96, but the family retained its undivided status in respect of lands and houses, and that under that partition of the debts the second defendant obtained two-eighths and the balance of the debts remaining due to the family with the exception of Rs. 5,000 which was set apart for Muthuswami Annavi was equally divided between Ramalinga and Lakshmivaraha. He also found that the items of property included in the sale-deed, Exhibit III, belonged exclusively to the second defendant. The properties purchased since the partition by the family were directed to be divided between the parties in the proportions in which the debts were divided in 1895-96. The lands which were left undivided in 1895-96 were directed to be divided between the parties according to the shares to which they would be entitled under the Hindu law. He also upheld the transfers in favour of the fourth defendant In appeal it is contended that all these findings are wrong.

[Their Lordships dealt with the question of the status and of the division of the properties of the family and then proceeded as follows :—]

The deed of gift in respect of the properties in schedule XV (c) was executed only on the 4th November 1908. *It was* given to the fourth defendant by her father as her stridhanam. If this deed had been impeached in his lifetime, he might have claimed his share in all the properties which are now found to belong to the joint family and given to her such properties as he pleased. Having regard to his share we are unable to say that

NARAYANA *v.* RAMALINGA.

SANKARAN NAIR AND OLDFIELD, JJ.

his gift was unreasonable. See *Sundaramayya* v. *Seetamma*(1). Moreover he was living with her in his old age and she was taking care of him and it was in consideration of the care she took of him that these properties were given to her. The transaction cannot therefore be treated as a mere gift. In these circumstances we are of opinion that the gift is not invalid.

The appeal is argued next against the lower Court's findings on issue No. 9 that the plaintiffs are not entitled to any amount for the expenses of the marriages of the second and third plaintiffs. The second and third plaintiffs are the first plaintiff's minor sons, and the expenses of the marriage of the second plaintiff were incurred after the suit was filed. The third plaintiff is still unmarried.

It has been settled by *Kameswara Sastri* v. *Veeracharlu*(2), that marriage is so far a normal and obligatory incident in a Hindu's life that the expenses of its performance are chargeable against the joint family, to which he belongs In the present case, the severance of the joint family was effected only by the decree under appeal. *Thandayuthapani* v. *Raghunatha*(3). The lower Court's decision as to the expenses of the second plaintiff's marriage accordingly cannot be sustained. They must be credited to plaintiffs in the account which will have to be taken.

As regards third plaintiff reliance is placed on *Srinivasa* v. *Tiruvengadathiengar*(4), in which after two learned Judges had differed, a third held that the expenses of the marriage of an unmarried co-parcener should be awarded to him or his guardian at partition We regret that we are unable to follow this decision. It is not material that the argument in it, based on the fact that the marriage of an opposing co-parcener had already been performed by the family, is not relied on here Nor do we deal with the social considerations, which had weight with SADASIVA AYYAR, J. Nor is it necessary for us to decide, as we have been pressed to do, that if provision for future marriages is obligatory it is so only between co-parceners of one generation, though the references in the texts to "brethren" may support that conclusion. Our ground of decision is the broader one that the learned Judges, SUNDARA AYYAR and SPENCER, JJ, who have accepted the view contended for by the plaintiffs did so on

(1) (1912) I L R., 35 Mad., 628
(2) (1911), I L R., 34 Mad , 422.
(3) (1912) I L.R , 35 Mad , 239
(4) (1915) I.L.R , 38 Mad , 556.

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the assumption that marriage being obligatory, anticipatory provision must necessarily be made for it at partition. That assumption appears to us unfounded.

We take it that the account given of the texts in the case relied on is exhaustive, since no others have been cited before us. In each we have merely a simple and general injunction that the brethren, who make a partition, must perform subsequent samskaras for those, who have not yet undergone them. It is not necessary for the present purpose to decide whether this injunction imposes a legal, and not merely a pious obligation It is sufficient that the texts, the sole foundation of the plaintiffs' claim enjoin nothing expressly or impliedly as to the method, by which performance of this obligation is to be secured, and nothing as to reservation of funds for it. For all that is enjoined, the uninitiated or unmarried member's right is only to obtain funds from the brethren, when they are required, that is, when and if the expenditure has been or is about to be incurred. There is therefore no reason in the texts for enabling him to do so earlier On the other hand, it seems unreasonable to order present payment of money, which might never or only partly be utilized in the manner intended and of which it might be difficult or impossible to recover the unspent portion. For it is unlikely that the money would be preserved intact or would be traceable. On the death of the unmarried member in question the unspent portion would not necessarily revert to the other members, who made it, as his heirs, since his heirs might not be those members, but his mother or his father. Again it would be inconvenient for the Court to estimate, it might be years in advance, *expenses* the amount of which would depend on the future tastes and status of the unmarried member and his bride's family. For these reasons we find issue No 9 against the plaintiffs as regards the third plaintiff's marriage expenses.

According to our findings the houses and *manaikats* which belonged to the family in 1895-1896 will be divided as family properties. All parties bear their own costs

[See *Karuturi Gopalam* v. *Karuturi Venkataraman*(1) decided by WALLIS, C.J., and SESHAGIRI AYYAR, J., following *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao*(2).]

K.R.

(1) (1915) 29 M.L.J., 710. (2) (1915) I.L.R., 38 Mad., 553

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

MUNGULURI SIVARAMAYYA (COUNTER-PETITIONER AND CREDITOR No. 10), APPELLANT,

1915. July 20, 21 and 28

v.

SINGUAMAHANTI BHUJANGA RAO AND ANOTHER—(PETITIONER AND CREDITOR No 11), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), sec. 46, cl 3—Appeal out of time—Deduction of time for obtaining copy, if permissible—Delay, if excusable—General provisions of Limitation Act, if applicable—Limitation Act (IX of 1908), ss. 5, 12 and 29—Conversion of appeal into Civil Revision Petition, when permissible—Order without notice to Official Receiver, illegal

An appeal under section 46, clause 3 of the Provincial Insolvency Act, which was preferred to the High Court beyond the period of time fixed therein, is barred by limitation as the time requisite for obtaining a copy of the order appealed against cannot be deducted under that Act or under sections 12 (2) and 29 of the Limitation Act

Quære.—Whether the Court can excuse the delay under section 5 of the Indian Limitation Act (IX of 1908).

Case law on the subject considered

The High Court is competent to convert such an appeal into a Civil Revision Petition under section 15 of the Charter Act, and to set aside the order, where the lower Court passed the order in favour of a creditor of an insolvent without notice to the Official Receiver.

Abdulla v. *Salaru* (1896) I.L.R., 18 All, 4, followed.

APPEAL against the order of J. J. COTTON, the District Judge of Gōdāvari at Rajahmundry, in Insolvency Application No. 551 of 1913, in Insolvency Petition No. 8 of 1909.

The facts of the case appear from the judgment of OLDFIELD, J.

B. Narasimha Rao for the appellant.

T. Prakasam for the respondents.

OLDFIELD, J.—The appellant is tenth creditor of a person who has been adjudicated insolvent by the District Judge of Gōdāvari and besides being an unsecured creditor has according to his counter-affidavit filed in the lower Court a mortgage on part of the property now in question. The petitioner in the lower Court, here respondent, is another creditor who alleged in his

OLDFIELD, J.

* Appeal Against Order No. 155 of 1914.

SIVARAMAYYA v. BHUJANGA RAO —— OLDFIELD, J.

petition, Insolvency Application No. 551 of 1913 that he held an agreement executed by the insolvent, his son, to transfer the property to him in discharge of his debt, that he had once prayed for execution of a document by the Court or Official Receiver in whom the assets had vested, that receiving no orders he had later asked for leave to sue and that again receiving no orders he finally asked for a direction to the Official Receiver to execute the document. Respondent made the defendant alone a party to his petition and appellant says in his counter-affidavit that he appeared to oppose it after hearing of it merely by chance. The lower Court passed the order under appeal directing the Official Receiver to execute a transfer as prayed. It also in the same order allowed a claim by respondent to two items as his own, and not the insolvent's property.

One defect in this order is that it makes no reference to the important contentions of appellant *inter alia* that the agreement in question could not prevail against his mortgage for want of registration and was unenforceable owing to lapse of time and that the claim to two items which does not appear to have been made in the petition under disposal, had already been negatived by the Court after enquiry. But the proceedings were subject to the more fundamental objection that though the insolvent's assets had vested in the Official Receiver under section 16 (2) (a), Provincial Insolvency Act, the lower Court dealt with them by its order in the absence of that officer and without hearing his objections We are astonished that this mistake should have been made, and we cannot regard it as rectified by the impleading of the Official Receiver in this Court. The result is that the lower Court has passed an order irregular in a material respect and of no legal effect since the person directly concerned has had no opportunity to oppose it.

It is however argued that no interference with this result is possible, because this appeal is out of time inasmuch as section 46 (4), Provincial Insolvency Act, contains nothing authorizing an appellant to deduct time spent in obtaining copies from the period of limitation it fixes and, the Provincial Insolvency Act being a special law within the purview of section 29 (1) (b) of the Limitation Act, section 12 (2) of the enactment is also inapplicable, and it is further contended that section 5 of the Limitation Act is inapplicable for similar reasons and that we

therefore cannot take the course which my learned brother proposes and excuse the delay. On the first point I should follow *Abu Backer Sahib* v. *Secretary of State for India*(1) in preference to *Dropadi* v. *Hera Lal*(2) holding that valid ground for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act has not been shown and decide that the appeal is out of time. On the second point I should not be prepared to dissent from my learned brother's proposal to give weight to the circumstances of the case and the novelty of this objection and excuse the delay if it were clear that it could legally be excused and if the matter were *res integra*, I should be inclined to the view taken in *Nija butoolla* v. *Wazir Ali*(3) *Forest Act Reference*(4) and *Seshama* v. *Sankara*(5) that the general provisions of the Limitation Act including section 5 are applicable inasmuch as they do not alter or affect any period of limitation within the meaning of section 29 (1) (*b*). Later decisions however of this Court—*Veeramma* v. *Abbiah*(6) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurti*(7)—are to the contrary effect, and it would be necessary either to follow them or refer the matter to a Full Bench for authoritative decision.

My learned brother however agrees with me that in the exceptional circumstances of this case an alternative course is open to us which we propose to take—to treat the appeal as a revision petition and deal with it as such under section 15 of the Charter Act. Those exceptional circumstances consist in the clear illegality of the lower Court's action, the fact that its order may if acted on prejudice the creditors as a body, though it cannot really bind them or the Official Receiver who represents them. There is the further circumstance that, if interference is delayed, respondent might alienate the property and irreparable loss might result. *Abdulla* v. *Salaru*(8) is a precedent for interference with an appealable decision. In these circumstances we revise the lower Court's order by setting it aside and directing that the petition before it be reheard, after the Official Receiver has been made a party and be disposed of with reference to all of his and appellant's contentions. There

(1) (1911) I.L.R., 34 Mad., 505
(2) (1912) I.L.R., 34 All., 496.
(3) (1882) I.L.R., 8 Calc., 910.
(4) (1887) I.L.R., 10 Mad., 211.
(5) (1888) I.L.R., 12 Mad., 1 at p. 5
(6) (1895) I.L.R., 18 Mad., 99.
(7) (1897) I.L.R., 20 Mad., 249
(8) (1896) I.L.R., 18 All., 4.

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will be no order as to costs in this Court. Costs to date in the lower Court will be provided for in the order it eventually passes.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree that the District Judge's order has to be set aside for the reasons given by my learned brother, so I concur in the order passed by him under section 15 of the Charter Act.

On the question whether section 5 of the Limitation Act gives this Court the power to excuse the delay in the presentation of this appeal, I agree with the decisions in *Nija butoolla* v. *Wazir Ali*(1), *Forest Act Reference*(2) and *Seshama* v. *Sankara*(3) which answer that question in the affirmative. *Veeramma* v. *Abbiah*(4) was not concerned with the power of the Court to excuse delay under section 5 but with the provisions of section 7 of the old Limitation Act (present section 6) the application of which provisions would have 'affected' and 'altered' the period of limitation provided by a special statute by excluding the interval during which the plaintiff was under disability and thus by lengthening the period. The decision in *Appa Rau Sanayi Aswa Rau* v. *Krishnamurti*(5) no doubt interprets the reasoning in *Veeramma* v. *Abbiah*(4) as involving the conclusion that section 5 of the Limitation Act is also inapplicable to a case governed by a special statute With the greatest respect I feel inclined to doubt if the reasoning of all the three Judges who decided *Veeramma* v. *Abbiah*(4) really leads to that conclusion though some of the observations in the judgment of one of the learned Judge's (SHEPHERD, J.) might so point. I respectfully dissent from the decision in *Appa Rau Sanayi Aswa Rau* v. *Krishnamurti*(5), the learned Judges who decided that case themselves conceding that the argument urged before them in favour of the applicability of section 5 appeared "to have considerable force."

K.R.

(1) (1882) I.L.R., 8 Calc., 910. (2) (1887) I.L.R., 10 Mad., 211.
(3) (1889) I.L.R., 12 Mad., 1 at p. 5 (4) (1895) I.L.R., 18 Mad., 99.
(5) (1897) I.L.R., 20 Mad., 249.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Coutts Trotter.

ULLATHIL KOLATHIL NETHIRI MENON (PLAINTIFF), APPELLANT,

1915. March 24 and 25 and July 15 and 30.

v.

MULLAPULLI GOPALAN NAIR AND THIRTEEN OTHERS (DEFENDANTS NOS. 1 TO 13 AND THE NINTH DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

rust, charitable—Acts of majority binding on minority—Indian Trusts Act (II of 1882), sec. 42—"Any trustees or trustee," meaning of—Payment to some only of the trustees, not a valid payment.

An act of the majority of a body of charitable trustees binds the whole ody. A mortgage purporting to be on behalf of all but executed only by a ajority of the trustees when the others have declined to join in its execution binding on all the trustees.

Teramath v. Lakshmi (1883) I L R., 6 Mad., 270, followed.

A payment to one only of several trustees is not a valid payment unless he as or is held out by his co-trustees as having authority to receive the same.

The words "any trustees or trustee" in section 42 of the Indian Trusts Act ean the trustee where there is only one, the trustees where there are more.

Ramlalu v. Committee of Rameshwar (1899) 1 Bom L.R, 667, not followed.

Semble: If a document is drawn up in the names of several persons and t is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so.

Sivasuami Chetty v. Serugan Chetty (1902) I L.R., 25 Mad, 389 and *Latch v. Wedlake* (1840) 11 A. & E. 959, followed.

It is a question of fact in each case as to what was the intention of the parties.

SECOND APPEAL against the decree of A. EDGINGTON, the District Judge of South Malabar, in Appeal No. 306 of 1912, preferred against the decree of K. A. KANNAN, the District Munsif of Ottapalam, in Original Suit No. 29 of 1911.

The facts appear from the judgment.

O. V. Anantakrishna Ayyar for the appellant.

G. S. Ramachandra Ayyar and *Eroman Unni* for the respondent.

SPENCER AND COUTTS TROTTER, JJ.

The following judgment of the Court was delivered by COUTTS TROTTER, J.:—The facts of this case are reasonably clear, and can be shortly stated as follows: Defendants Nos. 9 to 13 are the *uralans* or trustees of a temple known as the Tiruvegapura

* Second Appeal No. 439 of 1913.

NETHIBI MENON v. GOPALAN NAIR — SPENCER AND COUTTS TROTTER, JJ.

Devaswom, and the lands referred to in the suit are the property of the temple, and at the period material to this suit the management of the property of the temple was vested in the whole body of *uralans*. In 1904 the lands in question in this suit were mortgaged to the first defendant on behalf of the tavazhi of defendants Nos. 1 to 6 with a corresponding obligation on them to pay certain rents and revenues while in possession to the *uralans* (Exhibit A). In this state of things, the ninth defendant, who appears for some reason to have been on bad terms with his fellow *uralans*, brought a suit against them, obtained a decree, and attached in execution the moveables of the temple, including the vessels and jewels necessary for the performance of the daily worship. It thereupon became an urgent matter to free the vessels and jewels, and the plaintiff came forward with the requisite funds. Meetings of the *uralans* were held which the ninth defendant though summoned refused to attend, and it was argued that the plaintiff should be reimbursed by making over to him certain of the rents and revenues due under Exhibit A. For this purpose a karar was drawn up, Exhibit B, and it is on this document that he brings his action. As drawn up, the contracting parties are expressed to be all the five *uralans* of the one part and the plaintiff of the other part; but the ninth defendant could not be got to execute it and in fact never did execute it. Finally it was executed by the remaining four *uralans* on the 24th April 1909 and handed to the plaintiff, who forthwith paid into Court the monies necessary to release the moveable property of the temple. When the plaintiff endeavoured to recoup himself by collecting the monies due to him under Exhibit B, he was met by a refusal based upon various grounds and among them the allegation that the monies had already been paid to defendants Nos. 9 and 12, and in support of this allegation a receipt was produced, dated 27th November 1910 and signed by defendants Nos. 9 and 12 and the *anandravan* of defendant No. 11's tarwad (Exhibit I). He thereupon instituted the present suit; so far he has failed in both Courts below, and he now comes in second appeal before this Court. No one conversant with the facts of this case can fail to entertain strong suspicions that the alleged payment to the defendants Nos. 9 and 12 was a fiction, and Exhibit I a sham document concocted to defeat the plaintiff's just claim; and that

was part of his case in the Courts below: the manner in which this issue was treated below is most cursory and unsatisfactory; however both Courts have found that the payment was made; that is a finding of fact in support of which there was no doubt some evidence, and we must accept it here; that being so, two questions only arise for our decision. First, was Exhibit B a valid document or was it vitiated by the fact that only four of the five contracting trustees executed it? and secondly, was the payment evidenced by Exhibit I a good discharge to the defendants from the plaintiff's claim? At one time a third point was suggested, viz., that Exhibit B only effected an assignment of an actionable claim; but this was not seriously pressed, and is at once refuted by an examination of the documents. As to the first point, the law is well settled and clearly understood both in this country and in England. The majority of a body of charitable trustees can legally bind the whole body—*Wilkinson* v. *Malin*(1), *In re Whiteley, Bishop of London* v. *Whiteley*(2) and *Teramath* v. *Lakshmi*(3)—but if a document is drawn up in the name of all, and it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so. See *Sivasami Chetty* v. *Sevugan Chetty*(4) and *Latch* v. *Wedlake*(5). It is a question of fact as to what was the intention of the parties. In this case the District Munsif has found as a fact that they intended the document to be executed by all the five trustees, and the District Judge has accepted his finding; if there is evidence to support that finding, we cannot interfere with it on second appeal; if there was no evidence to support it, it is our duty to set it aside. Upon a careful consideration of the facts, we think that not only was there no evidence in support of this finding, but that all the evidence points wholly and conclusively the other way. The document was drawn up certainly as early as the 17th March 1909, as on that day the four trustees sent an urgent notice to the ninth defendant informing him that it was drawn up, that his signature to it was required, and that if he did not sign it, the other four would sign it without him and "give it the same effect as if he had also taken part" (Exhibit C_1). Another

(1) (1832) 2 Tyr, 544. (2) (1910) 1 Ch., 600.
(3) (1887) I L R., 6 Mad., 270. (4) (1902) I L.R, 25 Mad., 389.
(5) (1840) 11 A. & E., 959, s.c., 113 E R, 678.

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equally urgent notice in similar terms was sent to the *ninth* defendant on the 9th April (Exhibit C_2). As he did not answer these communications the document was executed by the other four trustees on the 24th April and handed to the plaintiff, who thereupon paid the money in satisfaction of the decree. The Judges below have been misled by an answer in the plaintiff's cross-examination, which appears in the deposition as follows: "The intention when Exhibit B was written was that ninth defendant should also execute it." That is doubtless perfectly true; but the learned Judges have overlooked the fact that more than a month elapsed between the writing of the document and its execution; that during the month the ninth defendant had been asked repeatedly to sign, and had failed to do so, and that the remaining *uralans* had announced their intention of signing themselves and delivering the document to the plaintiff. The intention of the *uralans* is sufficiently evidenced by their own words in Exhibits C_1 and C_2; that of the plaintiff is equally manifest from the fact that as soon as he got the document signed, he parted with his money. We think that there was no evidence to support the finding of the Lower Courts, and we set it aside and declare Exhibit B to be a valid and binding document.

There remains the question as to whether the payment to two of the five trustees is a valid payment. There is no doubt that even one out of many trustees can receive and give a good discharge for rent and similar payments of income, if he has or is held out by his co-trustees as having authority to do so. Here it is not contended that the two *uralans* had any such authority actual or by estoppel. But it is said that though the Indian Trusts Act does not apply to charitable trusts, its provisions should guide us by analogy in matters of this sort; and that was the view adopted in *Rumbabu* v. *Committee of Rameshwar*(1), and that section 42 of the Indian Trusts Act if applied validates this payment. The Court in that case (JENKINS, C.J. and RANADE, J.) applied the provisions of section 42 of the Act to a case of a charitable trust; and proceeded to give an interpretation of the section. It runs as follows:—

"Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable,

(1) (1899) 1 Bom. L.R., 667.

transferable or deliverable to them or him by reason or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof."

It will be noticed from the report of the Bombay case that the learned Judges quote the section as beginning "any trustee may," whereas the words are "any trustees or trustee may." They proceed to interpret the section as meaning that any member of a body of trustees may give an effectual receipt for a payment made to him solely. We do not agree with the decision; and we do not think that the learned Judges would have decided it as they did, if their attention had been drawn to the sections of the English statutes upon which the Indian section is modelled. These sections are 23 and 24 Vict., c. 149, sec. 29; 22 and 23 Vict, c. 35, sec. 33; and 44 and 45 Vict., c. 41, sec 36. Before the first of those enactments, a person who paid money over to trustees was responsible to the *cestui que trust* for seeing to the proper application to the trust of the moneys so paid. The object of the English sections (their purport is the same, but they apply to different classes of trust) was to put an end to so great a hardship, and to discharge those who in good faith paid trustees from any further responsibility as to the disposal of the moneys. Such being the origin of the English sections, we think it is clear that on their true construction the words "any trustees or trustee" mean "the trustee where there is only one, the trustees where there are more;" and we see no reason for applying a different construction to the words of the Indian Trusts Act. Accordingly we hold that the payment to the defendants Nos. 9 and 12 and the receipt (Exhibit I), failed to discharge defendants Nos. 1 to 6, and leaves them no answer to the plaintiff's claim.

The appeal is allowed with costs in all Courts, and the plaintiff must have a decree in the terms of his plaint, except as regards the rent due for the Malayalam year 1080, which is not now pressed. In default of payment within six months, the properties in suit must be sold.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1915.
August 2.

M. NARAYANAN SINGH (PETITIONER), APPELLANT,

v.

AIYASAMI REDDI AND TWO OTHERS

(RESPONDENTS, PLAINTIFF), RESPONDENTS.*

Court Fees Act (VII of 1870), sch. II, art 17—Court fee payable—Judgment-debtor's title disputed—Cancelling of attachment—Suits Valuation Act (VII of 1887), sec. 4.

Where the prayer in a plaint is not only to cancel an attachment but also for a declaration that the judgment-debtor has no interest in the property, the value of the suit is the value of the entire property claimed by the plaintiff

APPEAL under clause 15 of the Letters Patent against the order of KUMARASWAMI SASTRIYAR, J., in Civil Revision Petition No. 907 of 1913, preferred against the order of the District Judge of Chinglepat, in Original Suit No. 31 of 1913.

The facts appear from the judgment.

S. Krishnamurti Ayyar for the petitioner.

A. Krishnaswami Ayyar for the respondent.

SESHAGIRI AYYAR AND NAPIER, JJ.

The judgment of the Court was delivered by SESHAGIRI AYYAR, J :—We think the learned Judge is right. The first defendant obtained a decree against the second defendant and attached the suit property as his. The plaintiff put in a claim petition. He made the judgment-debtor and the decree-holder (second and first defendants) parties to that petition. His claim was disallowed and he has brought this present suit under Order XXI, rule 63. The value of the property in suit is Rs. 4,000, whereas the decree of the first defendant is for Rs. 300. The question for determination is what is the value of the suit for purposes of jurisdiction. The Court fee under schedule II, article 17 of the Court Fees Act, will be the same whatever the value of the property. The District Judge held that the suit ought to be instituted in his Court as the value of the land in dispute exceeded the pecuniary limits of the District Munsif's jurisdiction. The defendant asks this Court to revise that order

* Letters Patent Appeal No. 363 of 1914.

on the ground that the value of the suit is the value of the decree obtained by the first defendant against the second defendant.

Under section 4 of the Suits Valuation Act, the plaintiff is not entitled to put a higher value on the suit than what is covered by his interest in the litigation. The decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra*(1) is to the same effect. Their Lordships say that the value of the action is its value to the plaintiff. If that criterion is applied, the suit ought to be valued as with reference to the relief sought by the plaintiff. In *Fisher* v. *Arunachella Chettiar*(2), this Court came to the conclusion that for purposes of jurisdiction the right put forward by the plaintiff fixes the value of the suit.

On the other hand the decision of the Full Bench in *Krishnaswami Naidu* v. *Somasundaram Chettiar*(3) lays down that in determining jurisdiction the lowest value whether it be that of the decree under execution or of the property under attachment should be accepted as determining the forum for the trial of the suit. We find no reference in this judgment to the decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra*(1). Moreover in the present case both to the claim proceedings and to the suit, the judgment-debtor was a party. The prayer in the suit is not only to cancel the attachment but also for a declaration that the judgment-debtor has no interest in the property. The proper issue must relate to the conflicting title of the plaintiff and of the second defendant, and the decision on it will be binding on both. Consequently, the value to the plaintiff of this suit is his full interest in the land, the attachment of which he seeks to raise. The learned Judges who decided *Krishnaswami Naidu* v. *Somasundaram Chettiar*(3) base their decision on the ground that the judgment-debtor will not be affected by the decision in the suit. The present case is distinguishable from the Full Bench ruling because the plaintiff here has distinctly asked for an adjudication against the second defendant. It is doubtful whether the Full Bench decision is good law having regard to the decision in *Phul Kumari* v *Ghanshyam Misra*(1). However that may be, we feel no difficulty in holding in this case that the learned Judge is right in his view

(1) (1908) I.L.R., 35 Calc., 202 (P C) (2) (1909) 19 M.L J., 236.
(3) (1907) I L.R , 30 Mad., 335

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SESHAGIRI AYYAR AND NAPIER, JJ.

that the value of the suit is the value of the entire property claimed by the plaintiff.

We dismiss the Letters Patent Appeal with costs.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1915. July 30 and August 19.

Re S. RANGAYYA AND THREE OTHERS (ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898), sec. 439, criminal revision under—Compounding of offences—Incompetency of High Court to sanction composition, in revision—Criminal Procedure Code (Act V of 1898), sec. 345, exhaustive.

The High Court sitting as a Court of revision has no power to sanction the compounding of offences mentioned in section 345, Criminal Procedure Code, which is exhaustive of the Courts which can sanction the composition of offences and the stages at which the composition can be effected.

Emperor v. *Ram Piyari* (1909) I.L.R., 32 All., 153, dissented from

PETITIONS under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the convictions and sentences passed by A. FOTHERINGHAM, the Joint Magistrate of Bezwada, in Calendar Cases Nos. 77 and 84 and 118 and 119 of 1914 and Criminal Miscellaneous Petitions filed by all the petitioners in the above two Criminal Revision Petitions praying for sanction to give effect to the compromise entered into by both parties.

The facts of the case appear from the order of TYABJI, J.

E. R. Osborne, T. Ramachandra Rao and *G. Venkataramayya* for the petitioners.

Nugent Grant, the Acting Public Prosecutor for the Crown.

TYABJI, J.

TYABJI, J.—The first point involved in this revision case is whether the desire of the parties to compound the offence of causing grievous hurt punishable under section 325 of the Indian Penal Code can affect our decision. The point arises in a case where two brothers brought a charge and countercharge against each other for causing grievous hurt and rioting and each of them was sentenced by the Joint Magistrate to one month's

* Criminal Revision Cases Nos. 3 and 28 of 1915 (Criminal Revision Petitions Nos. 1 and 24 of 1915).

rigorous imprisonment. From these sentences they could not appeal but they have applied in revision and are now desirous of compounding.

The composition of offences is dealt with in section 345 of the Criminal Procedure Code. Sub-section (1) specifies the offences which may be compounded without leave of Court by the injured person. It contains no reference to the stage at which the proceedings may be.

Sub section (2) provides that the offence of causing grievous hurt may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

Sub-sections (3) and (4) extend the sphere of composition by permitting it, (*a*) in the cases of abetments of and attempts to commit the offences that may be compounded, and (*b*) by permitting guardians of minors, etc., to compound.

Sub-section (5) refers to cases where a person has been committed to trial or where he has been convicted and he has appealed, in either of which cases it is provided that no composition for the offence shall be allowed without the leave of the Court concerned.

Sub-section (6) gives to a composition the effect of an acquittal.

Sub-section (7) disallows composition except as provided by the section.

The section therefore contains provisions with regard to (*a*) the persons who may compound, (*b*) the nature of the offences that may be compounded, (*c*) the stage of the criminal proceedings at which composition is sought to be made; (*d*) it also provides that in regard to some offences the mere consent of the injured person shall not suffice for composition; he must obtain the permission of the Court, the Courts being specified whose permission to compound has to be obtained. Sub-section (7) must therefore be taken to mean that no offence shall be compounded except where the provisions of section 345 are satisfied as to each of these four matters. The section mentions the Court before which the prosecution is pending, to which the accused is committed for trial and before which an appeal is pending. There is no reference to the High Court in its revisional powers. Conversely it is noteworthy that section 439 (which defines the

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915. November 26 and 29 and December 7.

MOHIDEEN IBRAHIM NACHI (FIRST RESPONDENT), APPELLANT,

v.

L. MAHOMED IBRAHIM SAHIB BY AGENT L. M. E. LEBBAI THAMBI (PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), ss. 2, 12, 21, 24 and 25—Muhammadan Law—Shaffai, school of—Guardianship of minor son—Indian Majority Act (X of 1875)—Habeas Corpus, nature of.

A father can apply under section 25 of the Guardians and Wards Act (VIII of 1890) for the custody of his minor son though the minor had all along been in the custody of his grandmother but never in the custody of his father.

Per SADASIVA AYYAR, J.—The word "custody" in all the three places where that word occurs in section 25 (1) includes both actual and constructive custody of a minor.

Under Muhammadan Law, a minor continues to remain in the custody of his guardian till he attains the age of 18, notwithstanding that under the Shaffi School to which he is subject, his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15.

The word "Guardian" in section 21 includes the guardianship both of person and property.

Reade v. Krishna, (1886) I.L.R., 9 Mad., 391, followed.

Per NAPIER, J.—The object of sections 24 and 25 is to declare the right of the guardian of the person of a minor to the continuous custody of his person and to provide a machinery for enforcing it.

The writ of *Habeas corpus* proceeds on the fact of an illegal restraint and can have no application to cases where there is no question of restraint.

APPEAL against the order of A. EDGINGTON, the District Judge of Tinnevelly, in Original Petition No. 580 of 1915.

The respondent herein, a Muhammadan, native of Kayalpatam in the Tinnevelly district, filed a petition under section 25 of the Guardians and Wards Act (VIII of 1890) in the District Court of Tinnevelly praying for an order directing the return to him of his minor son whom, at the time of his wife's death in 1905, he left in the custody of his wife's mother. He further alleged in his petition that the petitioner herein (the first respondent in the

* Appeal Against Order No. 235 of 1915.

Court below) had been detaining his son in order to have him married against the wishes of the father. The petitioner contended that the boy had never been in his father's custody and so the Guardians and Wards Act had no application. The District Court overruling the above contention ordered the return of the boy to his father. The petitioner preferred this Civil Miscellaneous Appeal against the above order.

S. Srinivasa Ayyangar for the appellant.

C. V. Ananthakrishna Ayyar and *N. M. Malim Sahib* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This appeal is against the order of the District Judge of Tinnevelly passed under section 25 of the Guardians and Wards Act directing that the minor Shaik Abdul Khadir who is between 15 and 16 years old be returned to the custody of his father the petitioner. The appellant is the petitioner's mother-in-law (the mother of the deceased mother of the minor Shaik Abdul Khadir).

The contentions in appeal are: (1) "that it has not been proved to be for the welfare of the minor to be returned to the custody of the father" (sixth ground of appeal); (2) "the District Judge erred in holding that section 25 of the Guardians and Wards Act applied to the case" (sixth ground of appeal), and (3) "the parties being shaffis and the boy being 16 has a discretion in law to reside with his mother and in her absence with his grandmother" (fifth ground of appeal).

As regards the first of these three contentions, the District Judge's conclusion that it is for the welfare of the minor that he should return to the father has not been shown to be erroneous. On the question as to welfare, the wishes of the minor who is over 14 should, no doubt, be consulted, not as conclusive on the matter but as an important factor to be taken into account in arriving at a conclusion. The minor was examined as the appellant's second witness and he says "I know my grandmother well and I have not seen my father for several years. That is the only reason why I say I want to live with my grandmother." The learned District Judge has considered this preference which in the words of the District Judge "is not unnatural but which can hardly be deemed intelligent." I would therefore repeal the first contention.

IBRAHIM NACHI v. IBRAHIM SAHIB. —— SADASIVA AYYAR, J.

As regards the second contention, section 25, clause 1 of the Guardians and Wards Act, is as follows: "If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his *return*, and *for the purpose of enforcing the order may* cause the ward to be arrested and to be delivered into the custody of the guardian."

The appellant's learned vakil argued that, as the minor's maternal grandmother was the lawful guardian of his person under the Muhammadan law after the mother's death and till he attained the seventh year of his age and she was in *custody of* the minor's person till that age and that as she has only continued in the custody of the person of the minor till now, the father never had the actual custody of the boy's person from when the father (respondent) became entitled to such custody and hence the minor did not live in the custody of the father at any time nor was he removed from the father's custody and therefore no order for his *return* to such custody can be made under section 25.

In *Annie Besant* v. *Narayaniah*(1), their Lordships of the Privy Council say at page 820 that "a suit *inter partes* is not the form of procedure prescribed *by the Act* for proceedings in a District Court touching the guardianship of infants." This observation does not however definitely lay down that the Act is exhaustive as to the remedies of guardians. The preamble of the Act (Act VIII of 1890) is "Whereas it is expedient to *consolidate* and amend the law relating to guardian and ward." In *Sham Lal* v. *Bindo*(2), BLAIR and BANERJEE, JJ., held that the Guardians and Wards Act was intended by the Legislature to be a complete code defining the rights and remedies of guardians and wards, that no separate suit would lie by a Hindu father for the custody of his child and that he must resort to the remedy given by section 25 of the Act. In the very recent case—*Utmu Kuar* v. *Bhagwanta Kuar*(3)—CHAMIER and PIGGOTT, JJ., follow *Sham Lal* v. *Bindo*(2) and held that a guardian appointed under the Act was only entitled

(1) (1915) I.L.R., 38 Mad., 807 (P.C.); s.c., 27 M.L.J., 30.
(2) (1904) I.L.R., 26 All., 594. (3) (1915) I.L.R., 37 All., 515.

to apply under the Act for the custody of the ward and could not bring a separate suit. In *Utma Kuar* v. *Bhagwanta Kuar*(1) a very similar argument to that put forward in the case before us was urged before the learned Judges, namely, that as the mother was not in custody of the child when she was appointed guardian of the person, section 2 which mentions "Order for *return* to her custody" cannot confer jurisdiction on the Court to pass an order for placing the minor for the first time in the custody of the guardian. The learned Judges overruled this contention on two grounds: (*a*) that the Court had power under section 12 of the Act to place the minor in the temporary custody of the appointed guardian notwithstanding that the application of the guardian for her appointment as such had been granted already, and (*b*) that section 25 can be availed of by the guardian even though she had not been in the actual custody of the minor at the time of her appointment as such as she might be deemed to have got custody "technically" from when her appointment was made and that an order to place the boy in her custody can therefore be brought under the words "Order for *return to custody*" used in section 25

While I feel doubtful (with the greatest respect) as regards the applicability of section 12, I have after anxious consideration arrived at the opinion that though some straining of the language of section 25 has to be resorted to, the clear intention of the Legislature will be carried out by the interpretation placed by the Allahabad High Court on that section. I do not think it at all likely that the Legislature intended to omit to provide for the *grant of a power to the District Court to entertain an application* by a guardian for the custody of his ward for the first time even where the District Court had itself appointed him as such guardian, in a case where the ward had never before been in his custody, while the Act has been anxious to enact that orders for temporary custody of the ward could be made even before the appointment of the guardian. Nor it is likely that a remedy by a separate suit in such cases was intended by the Legislature. In *Jagannadha Rao* v *Kamaraju*(2), the words "taking out of the keeping of the lawful guardian of such minor" found in section

(1) (1915) I.L.R., 37 All. 515. (2) (1901) I.L.R., 24 Mad., 284.

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SADASIVA AYYAR, J.

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(1) (1915) I.L.R., 38 Mad., 807 (P.C.); s.c., 27 M.L.J., 30.
(2) (1904) I.L.R., 26 All., 594. (3) (1915) I.L.R., 37 All., 515.

if his intelligence is sufficiently developed to allow of his being entrusted with the administration of his property. The minor who, having attained the age of puberty, has an intelligence insufficiently developed to be entrusted with the management of his property remains in a state of incapacity; otherwise his incapacity ceases *ipso facto* on his attaining majority." The Shafi law also seems to fix the age of 15 as the age of majority unless signs of puberty have shown themselves earlier (but not earlier than 9). In *Reade* v. *Krishna*(1), it was held that though under Hindu Law the father is not entitled to the custody of the person of his son after the boy attained 16 years of age, the passing of the Indian Majority Act of 1875 (section 3) by continuing the minority of the boy till he completed the eighteenth year of his age, extended the right of the father to the custody of the boy's person till such age of 18. Notwithstanding the able arguments of Mr. S. Srinivasa Ayyangar that that decision is unsound so far as it deals with the right of a Hindu son to personal emancipation from the *patria potestas* after he attains his sixteenth year, I am not prepared to dissent from that decision especially as section 2, clause (*c*) of the Indian Majority Act impliedly affects the "capacity" in all ways of any person who had not attained the majority under the law applicable to him before 2nd March 1875, other than in respect of the matters excepted in the section. If, notwithstanding the personal emancipation under Hindu Law, a Hindu boy continues under the custody of his father till 18, a Mussalman boy also is bound to remain in the custody of his guardian till he attains 18 notwithstanding that under the Shafi Law to which he is subject, his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15. I would therefore reject this third contention also. It only remains to notice two minor arguments advanced for the appellant. One of them was based upon the practice of the English Courts in granting writs of Habeas Corpus. The principal cases relating to the English practice were considered in *Reade* v. *Krishna*(1) and it was pointed out in that case that the writ of Habeas Corpus is not the appropriate remedy for enforcing the natural right of the

(1) (1886) I.L.R., 9 Mad., 391.

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NAPIER, J.

Habeas Corpus under section 491 of the Criminal Procedure Code directed against the person alleged to be detaining the minor. The learned Judge decided on the authority of the English cases that it was not a proper case for the issue of an order. The nature of the writ is stated by COLERIDGE, J., in a passage quoted on page 312 of the above judgment :—" Habeas Corpus proceeds on the fact of an illegal restraint " There is no question of restraint here, nor does the section deal with such a position. Under section 25 of this Act the order goes to the minor not to the person with whom he is residing and is independent of the question of consent or restraint. The right of a guardian to the custody of the person of a minor is clearly stated in section 24. He is "charged with the custody of the ward and must look to his support, etc." It is his statutory duty, and I cannot read section 25 which follows as limiting his powers of enforcing his right to the extreme cases of leaving or removal. In my min those words must be read to include cases where the custody-a law is in a certain person but the minor refuses to come or i. detained. The cases where the Court has strained the language of a section to give effect to other provisions and the policy of the Act will be found in Maxwell on Interpretation of Statutes and Halsbury's Laws of England. In my opinion this is a case where it may properly be done.

S V.

PRIVY COUNCIL.*

SECRETARY OF STATE FOR INDIA,

v.

CHELLIKANI RAMA RAO.

1916.
March 31,
April 4, 5
and July 7

[On Appeal from the High Court of Judicature at Madras.]

Limitation Adverse possession—Claim by person to lands notified by Government as reserved forest lands under Madras Forest Act (Madras Act V of 1882)—Onus of proof—Islands formed in bed of sea at mouth of tidal navigable river—Right of the Crown to such islands—Limitation Act (XV of 1877) arts 144 and 149—Right of appeal to High Court from decision of District Court under Madras Forest Act—Right under general provisions as to appeals in Civil Procedure Code.

In this appeal the question for determination was whether the Secretary of State in Council (appellant) was entitled to incorporate the lands in dispute into a reserved forest under the Madras Forest Act (Madras Act V of 1882), such lands being islands formed in the bed of the sea near the mouth or delta of the river Godāvari, a tidal navigable river, and within 3 miles of the mainland.

Held, that such islands were the property of the Crown which was not bounded in its dominion of the bed of the sea by the rise or fall of the tide The Crown is the owner, and the owner in property of islands arising in the sea within the territorial limits of the Indian Empire.

The onus of establishing title to property by reason of possession for a certain requisite period lies on the person asserting such possession

Objectors to afforestation preferring claims under the Forest Act against the Secretary of State for India are in the same position as persons *bringing a suit* in an ordinary Court for a declaration of right to which article 144 of schedule II of the Limitation Act, 1877, is applicable, the period of 12 years however being extended to 60 years by article 149, and the onus of establishing possession for the required period is upon the claimants.

Radha Gobind Roy v. *English* (1880) 7 C L.R., 364, followed

Secretary of State for India v. *Vira Rayan* (1885) I L.R, 9 Mad, 175, distinguished.

In this case, *Held* (reversing the decision of the High Court) that on the evidence the claimants had not proved adverse possession for a period sufficient to establish a right against the Crown.

Though an appeal from the District Judge to the High Court is not provided for in the Madras Forest Act in a claim to lands which have been notified as reserved forest lands under the Act, such an appeal will lie under the provisions of the Civil Procedure Code. Where in such proceedings the District Court is reached, that Court is appealed to as one of the ordinary Courts of the country

* *Present:*—Lord SHAW, Lord SUMNER, Lord PARMOOR, Sir JOHN EDGE, Mr. AMEER ALI and Sir LAWRENCE JENKINS.

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with regard to whose procedure, orders and decrees the rules of the Civil Procedure Code are applicable. In such a case the ordinary incidents of litigation could only be excluded by specific provisions to that effect.

Kamaraju v. *Secretary of State for India* (1888) I.L.R., 11 Mad., 309, approved

Rangoon Botatung Company v. *Collector of Rangoon* (1912) I.L.R., 40 Calc., 21; s.c., L.R. 39 I.A., 197, distinguished

APPEAL No. 104 of 1914 being two consolidated appeals from two decrees (30th September 1909) of the High Court at Madras which reversed and varied respectively two decrees (27th July 1904) of the District Judge of Gōdāvari, by which two orders (19th October 1903) made by the Forest Settlement officer of Gōdāvari were upheld.

The above decrees and orders were made on claim petitions 1 and 2 of 1902 under the Madras Forest Act (Madras Act V of 1882).

The facts are for the purpose of this report sufficiently stated in the report of the second appeals to the High Court (Sir RALPH SILLERY BENSON, Offg. C.J., and MUNRO, J.) which will be found in I.L.R., 33 Mad., 1.

ON THIS APPEAL—

Sir H. Erle Richards, K.C., and *Kenworthy Brown* for the appellant first contended that the respondents had no right under the Madras Forest Act (Madras Act V of 1882) or under any other law to appeal to the High Court from the decisions of the District Court. The point however had not been taken in the Court below [Lord SHAW said in their Lordship's opinion it should be heard now, as, if the appellant was right, the case would otherwise not be properly before the Board]. Under that Act the only right of appeal given in respect of claims made to forest land under the Act is by section 10, and that is an appeal from the Forest Settlement officer to the District Judge. The Forest Settlement officer has under section 8 to inquire into and record evidence as to the claim, and under section 10, sub-section (1), he may admit or reject it. Then under sub-section (2) the claimant in case only of rejection of the claim may within 30 days appeal to the District Judge. No further appeal in matters to which the present cases related was contemplated by the Act. The fact that there was no other time provision made showed that no further appeal was intended. Unless there is some special provision in the Act for an appeal to the High Court, no appeal, it was submitted, would lie. The provisions of

the Civil Procedure Code were not applicable to the earlier stages of these claims, and that being so there was no reason why they should apply in order to give an appeal to the High Court. Such an appeal would not come under the specific provisions of section 540 of that Code, nor under section 584 relating to second appeals, that is as an appeal on a point of law. The finding of the District Judge was not a decree within the definition of "decree" in the Civil Procedure Code If it had been intended that there should be a right of appeal under the Code it would have been so stated. But the only right of appeal is given under section 10 of the Forest Act itself where the order of the District Judge is called a "decision" Reference was made to *Rangoon Botatung Company* v. *Collector of Rangoon*(1) and *Kamaraju* v. *Secretary of State for India*(2). In the latter case the High Court, it was contended, had wrongly held that the decision of the District Court was a "decree." Both the cases cited were appeals from a special tribunal, namely, the Collector of Rangoon, and the Forest Settlement Officer Analogous cases were *Minakshi Naidu* v *Subramanya Sastri*(3) and *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu*(4). The Forest Act, it was submitted, was a Code in itself for the purpose of procedure, and under it only one appeal was given, and that was by section 10 of the Act.

It was then contended that the title to the lands in dispute was in the Crown: the Crown however never had possession of them; they had only formed recently. On the undisputed facts of the cases the respondents could have no title except by adverse possession for 60 years, and they had failed to prove adverse possession, or any continuous possession for that period, which would extinguish or interrupt the title the appellant had in the lands. The facts raised no inference or presumption of fact or law which rendered it necessary for the appellant to negative the suggested title of the respondents under the Limitation Act, but, on the contrary, the evidence showed that there was no adverse possession before 1882 The onus had

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(1) (1912) I L R, 40 Calc, 21, s c, L R 39 I A, 197

(2) (1888) I L R, 11 Mad., 309 at pp 311 and 314 (F.B.)

(3) (1887) I L.R, 11 Mad, 26, s c, L.R, 14 I.A, 160

(4) (1914) I.L R, 37 Mad., 443 at pp 453 and 454, s c, L R, 41 I A., 258 at p 264.

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been put by the High Court on the Crown to show that the respondents' possession commenced or became adverse within 60 years the period of limitation. The Crown had evidence that the respondents were not in actual possession before 1882. The High Court says that is not sufficient, and that the Crown must show affirmatively that they were not in possession for 60 years and on the facts the High Court draws an inference that they had been in possession for 40 years previous to 1882. The onus of proof, it was submitted, had been wrongly placed by the High Court on the appellant. The article of the Limitation Act applicable was 149 of Schedule II of the Limitation Act, 1877, which gives the Secretary of State a period of 60 years running from the time when it would begin to run in a suit by a private person, viz., from the time when the possession of the defendant became adverse, but the period was 60 and not only 12. The title to the lands is in the Crown; see section 110 of the Evidence Act (I of 1872) as to "presumption of ownership." [SIR LAWRENCE JENKINS.—Is there in Madras any Regulation equivalent to Bengal Regulation XI of 1825 as to the title of the Crown to islands thrown up in a navigable river?] In *Secretary of State for India* v. *Kadirikutti*(1), Regulation XI of 1825 is referred to as being recognized in Madras. If these cases came under article 144 of the Limitation Act the onus would be, as it should be under article 149, on the respondents to show that they had sufficient possession to give them title against the Crown. According to the procedure under the Madras Forest Act the respondents, it was submitted, must prove that the title of the Secretary of State had become extinguished under section 28 of the Limitation Act, and that they had not done. Reference was made to *Koonwur Singh* v. *Nund Lall Singh*(2) a case under Regulation III of 1793, *Rao Karan Singh* v. *Bakar Ali Khan*(3), *Radha Gobind Roy* v. *Inglis*(4), *Faki Abdulla* v. *Babaji Gangaji*(5), *Hanumanta Kolaji* v. *Mahadev Kondaji*(6), *Tarabai* v. *Venkatrao*(7), *Alima* v. *Kutti*(8), *Secretary of State for India* v. *Vira Rayan*(9),

(1) (1890) I.L.R., 13 Mad., 369 at p. 375 (2) (1860) 8 M.I.A., 199 at p. 220.
(3) (1882) I.L.R., 5 All., 1; s.c., L.R., 9 I.A., 99.
(4) (1880) 7 C.L.R., 364 at p. 367. (5) (1890) I.L.R., 11 Bom., 458 at p. 462.
(6) (1893) I.L.R., 18 Bom., 513. (7) (1902) I.L.R., 27 Bom., 43 at p. 50.
(8) (1900) I.L.R., 14 Mad., 96. (9) (1885) I.L.R., 9 Mad., 175 at p. 179.

a case under the Forest Act, *Secretary of State for India* v. *Bavotti Haji*(1), also under the Forest Act and *Secretary of State for India* v. *Kota Bapanamma*(2). These cases all show that under article 144 the onus would be on the respondents. There was a distinction between that article and article 142, an article which did not apply to the present case.

Sir R. Finlay, K.C., and *B. Dubé* for the respondents contended as to an appeal not lying to the High Court that the decision of the District Judge under the Madras Forest Act was clearly a decree within the definition in the Civil Procedure Code, and referred to *Kamaraju* v. *Secretary of State for India*(3). [Their Lordships did not want to hear more on that point.]

On the main point in the case it was admitted by the Crown that the lands in dispute were formed more than 60 years prior to the Government notification of 2nd December 1901, and that the Crown had never been in possession of them The lands were not therefore at the disposal of the Government at the date of the notification, and no proceedings would therefore be taken with regard to them under the provisions of the Madras Forest Act, 1882. The Secretary of State was not in any better position by proceeding under the Forest Act than he would be by proceeding in a suit to recover the lands. He was, it was submitted, in the position of a plaintiff in a suit for ejectment, and the onus was on him to show that he was entitled to eject the respondents from the lands in dispute. Reference was made to Darby and Bosanquet on the statistics of limitation, pages 299 and 544. There was no such distinction as was suggested for the appellant between cases under article 142 of the Limitation Act and those under article 144. There was nothing to show that the possession of the respondents did not go further back than 1882 The onus was rightly put on the Crown to show that the possession of the respondents commenced within 60 years of the notification. Reference was made to *Koowur Singh* v. *Nund Lall Singh*(4), *Rao Karan Singh* v *Bakar Ali Khan*(5), *Radha Gobind Roy* v. *Inglis*(6), *Manomohan Ghose* v. *Mothura Mohun Roy*(7), *Secretary of State for India* v *Vira Rayan*(8),

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(1) (1891) I L R., 15 Mad, 315. (2) (1895) I.L R., 19 Mad., 165 at p 166
(3) (1888) I.L R., 11 Mad., 309 at p 311 (F.B) (4) (1860) 8 M.I.A., 199.
(5) (1882) I.L R., 5 All., 1, s c, L.R, 9 I A, 99. (6) (1880) 7 C L R., 364.
(7) (1881) I.L.R., 7 Calc., 225 at p. 232. (8) (1885) I.L.R, 9 Mad., 175.

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Secretary of State for India v. *Kota Bapanamma*(1), *M*… *Chandra Mozoomdar* v. *Mokesh Chandra Neogi*(2), *An*… *manjari Chowdhrani* v. *Tripura Sundari Chowdhrani*(3), *Kr*… *Aiyar* v. *Secretary of State for India*(4), *Inayat Husen* v… *Husain*(5), *Pandurang Govind* v. *Balkrishna Hari*(6), *Atto*… *General, British Columbia* v. *Attorney-General, Canad*… Cole on Ejectment, page 6 and *Kally Churn Sahoo* v. *Secr*… *of State for India*(8). Whatever title the Crown may hav… to the lands in dispute it had, on the facts of the case, be… extinguished under the law of limitation.

Sir H Erle Richards, K.C., replied referring to *Kishen* … *Pandey* v *Narendur Dutt*(9) as to the onus of proof bein… parties in whose power it lies to produce it. The principle … the onus should not be on the Crown was stronger in … of jungle land of the character of that in the present cla… If anyone who cuts wood, or does any similar act of posses… can put the Crown to proof of title, it would be unreason… hard upon the Crown *Rao Karan Singh* v. *Bakar* … *Khan*(10), *Innasi muttu Udayan* v *Upakarath Udayan*(… *Secretary of State for India* v. *Krishnamoni Gupta*(12) … *Radha Gobind Roy* v. *Inglis*(13) were also referred to.

The judgment of their Lordships was delivered by

LORD SHAW

Lord SHAW.—These are consolidated appeals from two dec… of date the 30th September 1909, pronounced by the High C… of Judicature at Madras The appeals relate to certain par… of land claimed by two zamindars. These zamindars' cla… were, on the 19th October 1903, in certain proceedings un… the Madras Forest Act (V of 1882), dismissed by the Fo… Settlement officer of Gōdāvari. His judgments were affirmed

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(1) (1896) I L R., 19 Mad., 165
(2) (1888) I.L.R., 16 Calc , 473 , s c , L R., 16 I.A., 23 at p 26
(3) (1887) I.L.R., 14 Calc , 740 , s.c , L.R , 14 I.A , 101.
(4) (1910) I L R., 33 Mad., 173
(5) (1897) I L.R., 20 All 152 at p 154
(6) (1869) 6 Bom , H.C. R. 125.
(7) (1914) A C , 153 at pp. 174, 175.
(8) (1881) I.L R , 6 Calc , 725.
(9) (1874) L.R , 3 I.A., 85.
(10) (1882) I L R., 5 All., 1 at p. 6 , s c., L R , 9 I.A., 99 at p. 102.
(11) (1900) I.L R , 23 Mad , 10 ; s.c , L R , 26 I A., 210.
(12) (1902) I L.R., 29 Calc , 518 at p 535 , s c., L R , 29 I A , 104 at p. 1…
(13) (1880) 7 C.L.R., 364

two decisions of the District Court of Gōdāvari, dated the 27th July 1904. These decisions of the District Court were, however, reversed and varied by the High Court by the decrees now under appeal to the Board. The appellant is His Majesty's Secretary of State for India.

The question for determination is whether the appellant is entitled to constitute or incorporate the lands into a reserved forest under the Forest Act. The respondents are objectors and claimants under the Statute.

The physical facts are not in dispute; they have been found by the Courts below. They are quite simple. The lands are islands which have been formed in the bed of the sea near the mouth or delta of the river Gōdāvari. The Gōdāvari is a tidal and navigable river The islands are within a short distance, much under 3 miles, of the mainland. The lands are now mostly jungle lands.

The Crown desires to constitute them into a reserved forest. The respondents object, and claim the lands. Their assertion is that these lands have been possessed by them and their predecessors in title from time immemorial, and that the lands are theirs. This assertion of property the Crown denies.

By the Statute already named, it is provided (section 3) that the Governor in Council may constitute any land at the disposal of the Government a reserved forest; that he shall publish a notification (section 4) containing this declaration, specifying "as nearly as possible the situation and limits of such land," and appointing a Forest Settlement officer "to enquire into and determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over" such land. Provision is made (section 6) for requiring, within a period of three months from the proclamation, every person claiming right "either to present to such officer within such period a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof." Thereafter the Forest Settlement officer is to enquire and to record evidence (section 8). And (section 10) the Forest Settlement officer "shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part." If the claim be admitted, there are stipulated proceedings for the

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surrender, exclusion or acquisition of the right. But (section 10, ii) "if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

What happened in the present case was that the claim was rejected. An appeal by the respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench, *Kamaraju* v. *the Secretary of State for India in Council*(1) a decision which was given in 1888 and has been acted on in Madras ever since.

It was urged that *Rangoon Botatung Company* v. *The Collector, Rangoon*(2) enounced a principle, which formed a precedent for excluding all appeal from the decision of the District Court in such cases as the present. Their Lordships do not think that that is so. In the Rangoon case a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court, which under the Act meant "a principal Civil Court of Original Jurisdiction." Two Judges sat as "the Court" and also as the High Court to which the appeal is given from the award of "the Court." The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the Courts specifically set up by the statute for the determination of that value.

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to

(1) (1888) I.L.R., 11 Mad., 309 (F.B.).
(2) (1912) I.L.R., 40 Calc., 21; s.c., L.R., 39 I.A., 197.

possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation. The objection taken is accordingly repelled.

Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, "De Jure Maris." He describes how "the king hath a title to *maritima incrementa* or increase of land by the sea, and this is of three kinds, viz.:—

"1. Increase *per projectionem vel alluvionem.*

"2. Increase *per relictionem vel desertionem.*

"3. *Per insulæ productionem.*"

The lands in dispute fall under the third category, which is thus dealt with by Hale:—

"3 The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof These upon the same account and reason *primâ facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water."

The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

The case is not complicated by any point as to geographical situation; the question of whether a limit from the shore seawards should be beyond three miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terræ*—no such questions arise here. The point is geographically within even three miles of British territory; at that point islands have risen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown.

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The doubt raised upon this proposition was substantially rested on certain dicta pronounced in *Reg.* v. *Keyn*(1). The Crown, admitted to be owners of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it is said, extend further seaward. It should not be forgotten that the *Franconia case* had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.

When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound. Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the *Cornwall case*—but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore.

In *Lord Fitzhardinge* v. *Purcell*(2), Lord PARKER, then PARKER, J., expressed himself thus:—

". . . Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are *primâ facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership The bed of the sea, so far as it is vested in the Crown, and *à fortiori* the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of *incrementa maris* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable

(1) (1876) L.R., 2 Ex.D., 63. (2) (1908) 2 Ch.D., 139 at p. 166.

river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

It is true that the case cited dealt merely with the right of fowling, but it was necessary in the determination as to that right to settle the true nature of the right in the land itself

In Scotland the law is firmly settled, and in a similar sense. The question raised in *Lord Advocate* v. *Clyde Navigation Trustees*(1), was whether the latter body could dispose of dredgings taken from the river by depositing them in the bed of Loch Long, a sea-water loch. The Crown resisted the claim, maintaining its ownership in the bed of the loch and in the bed of the sea for a distance of three miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord KYLLACHY, who expressed himself thus: " . . . with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, viz., the strip or area of sea within cannon-shot or three miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land ? or is it only a *protectorate for certain purposes, and particularly navigation and* fishing ? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium*, but none the less is it in my opinion a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property " In the Inner House this view of the

(1) (1891) 19 Rettie,174

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law was not dissented from, and Lord YOUNG expressly agreed with it.

Last of all may be mentioned *Lord Advocate* v. *Wemyss*(1). The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question—not as to rights upon or over that portion of the bed of the sea, but as the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part. Upon this question the statement of Lord WATSON was expressed as follows: "I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown."

In the opinion of the Board, this is also the law of India The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*. As to practical results: the confusion that might be produced by leaving islands, emergent within the three-mile limit, to be seized by the first comer is clear beyond controversy. He might be a foreign citizen: he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord WATSON would involve to this and to other nations.

The law in the sense now affirmed has not been denied effect in the Courts of this country, even when its enforcement has operated to the advantage or supposed advantage of foreign States. Lord STOWELL dealt with such a position of affairs in

(1) (1900) A.C., 48.

"*The Anna*,"(1). The case had reference to the capture of a vessel while on a voyage from the Spanish Main to New Orleans. The place of capture was two miles off certain islands. Those islands, at the mouth of the Mississippi, were, much as in the present case, formed by the silting up of sand and slob, but yet surrounded by navigable channels and in the open sea. The case sought to be made was that such islands were no part of American territory, and formed no datum for measuring the seaward mileage therefrom. This argument was rejected. Lord STOWELL observed:—

"Consider what the consequence would be if lands of this description were not considered as appendent to the main land, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

Their Lordships do not doubt that the general law, as already stated, is supported by the preponderating considerations of practical convenience, and that, upon the particular case in hand, the ownership of the islands formed in the sea in the estuary or mouth of the Gōdāvari river is in the British Crown.

In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim fails. This was the way in which the matter was looked at, first by the forest settlement

(1) (1815) 5 C. Rob., 373

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"for over seventy years your petitioner's estate has been in the exclusive and absolute enjoyment of the land and forest now said to be reserved as Government forest,"

and in the other petition the claim was—

"that the long and peaceful enjoyment of the same by the petitioners and their predecessors in title the petitioners have acquired a title by prescription to the said lands and forests, and the rights, if any, of others to the same are excluded by lapse of time."

In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by article 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may be made to *Radha Gobind Roy Saheb* v. *Inglis*(1), decided by this board. Reference was made to various cases decided in lower Courts and stress was especially laid upon the decision in the Malabar case, *Secretary of State for India in Council* v. *Vira Rayan*(2). The facts therein were essentially different from the present. After a historical survey of the peculiar position of the lands there in question the learned Judges found "That the land appertains to the district of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part by it, that forest lands are the property of the Crown." The ratio of the decision was found in this historical circumstance peculiar to Malabar. None of the cases cited have affected the authority of *Radha Gobind Roy* v. *Inglis*(1).

Finally, their Lordships have some difficulty in understanding the view of the High Court to the following effect:—

"Though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification

(1) (1880) 7 C.L.R., 364. (2) (1885) I.L.R., 9 Mad., 175.

is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification."

In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms "subsisting title." And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any onus on that subject.

Their Lordships will humbly advise His Majesty that these appeals should be allowed, and that the judgments of the District Court of date the 27th July 1904 should be restored. The respondents will pay the costs of this appeal and in the Courts below.

Appeals allowed.

Solicitor for the appellant: *Solicitor, India Office.*

Solicitor for the respondents: *Douglas Grant.*

J. V. W.

PRIVY COUNCIL.*

1916.
June 22
and July 10.

JANAKI AMMAL (DEFENDANT),

v.

NARAYANASAMI AIYER (PLAINTIFF).

[On Appeal from the High Court of Judicature at Madras.]

Hindu Law—Reversioner—Right of presumptive reversionary heir to declaration of his right—Suit against widow in possession of her husband's estate for waste and wrong dealing with property—Failure to prove charges—Right of reversioner to sue for protection of the husband's estate.

A plaintiff who brought a suit as presumptive reversionary heir against a widow in possession of her husband's estate, in order to protect the property, and made charges against the widow of waste, misappropriation and other wrong dealing with the property, none of which charges were established, was held not entitled to a declaration of his right as reversionary heir, even though his title had been disputed, in the suit It is not legitimate to give such a plaintiff, under cover of a prayer for "further relief," and after the substantial heads of his claim have failed, any greater right to obtain such a declaration than he would have had if it had been asked for directly, and unaccompanied by other and unfounded claims

Jaipal Kunwar v. Indar Bahadur Singh (1904) I.L.R., 26 All., 238, s.c., L.R., 31 I A., 67 and *Venkatanarayana Pillai v Subbammal* (1915) I.L R, 38 Mad, 406, s c., L.R, 42 I A., 129 distinguished.

APPEAL 105 of 1914 from a decree (23rd August 1912) of the High Court at Madras, which varied a decree (28th October 1907) of the Subordinate Judge of Mayavaram.

The suit which gave rise to this appeal was brought by the respondent for an injunction to restrain the appellant from dealing with the assets of the estate of her deceased husband, and for the appointment of a receiver, alleging misappropriation and waste

The appellant was the widow of one Ramaswami Aiyer who died in 1906 intestate leaving property of considerable value. She had a widow's interest in the property, and the mother of her deceased husband was entitled to succeed to it on the widow's death.

The respondent was a distant kinsman of the deceased and was admittedly his nearest male relative living.

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* *Present.*—Lord SHAW, Lord PARMOOR and Mr. AMEER ALI.

The suit was instituted on 18th October 1906, the plaintiff thinking that certain dealings of the appellant with the property were prejudicial to his rights as the reversioner presumptively entitled to it. The plaint set out the facts as above and the acts of waste alleged, and prayed for a decree to protect his interest as reversionary heir, and for further relief. The widow and Lakshmi Ammal the mother of the deceased were made defendants.

The widow as first defendant denied the allegations of wrong dealing and waste, and challenged the plaintiff's title as next reversionary heir to the property.

The Subordinate Judge found that the widow had not committed acts of waste or wrong dealing as alleged, made a decree declaring that the plaintiff was the next reversionary heir of the deceased, and that the alienation of a sum of Rs. 10,000 by the widow to Lakshmi Ammal was not binding on the plaintiff, but granting no other relief.

Both parties appealed, and the High Court (MILLER and ABDUR RAHIM, JJ.) upheld the Subordinate Judge's finding that the acts of waste and misappropriation alleged were not proved and dismissed the plaintiff's appeal On the widow defendant's appeal the High Court varied the decree of the Subordinate Judge by omitting the declaration as to the alienation of the Rs. 10,000. As to the first declaration in the decree the High Court said :—

"We think it may remain in the decree. The question whether the plaintiff was entitled to sue as next reversionary heir was fought out in the suit and much evidence taken. The Subordinate Judge decided it on the evidence and though the declaration was not essential, and he might have dismissed the suit, yet the peculiar circumstances of this class of suits seem to make it not undesirable that it should remain to prevent further litigation on the question between the plaintiff and the first defendant, should the former find it necessary to attack again the latter's management of the estate."

On this appeal.

Kenworthy Brown, for the appellant, contended that in the absence of any proof of waste, or other wrong dealing by the widow with the assets of her husband's no suit for a declaration of his title could be maintained by the respondent as the next presumptive reversionary heir. He had no vested right in the estate, but only a *spes successionis* to it if he survived the

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appellant and her mother-in-law. Reference was mad *Venkatanarayana Pillai* v. *Subbammal*(1). The present suit been brought in a representative capacity, and it was there contrary to principle that there should be such a declaratic the respondent's right as the Courts below had given. T was no right to such a declaration during the lives of widow and the mother of the deceased : *Kathama Natchic Dorasingha Tever*(2). Reference was also made to *Davi Angel*(3), *Hamilton* v. *Earl Dysart*(4) and Mayne's Hindu I 7th edition, paragraphs 605, 624 and 647. The case did come within section 42 of the Specific Relief Act (I of 1: which was practically the same as section 8 of Act VII 1859, the Civil Procedure Code in force at the date of decision in *Kathama Natchiar* v. *Dorasingha Tever*(2). ' suit should have been dismissed with costs.

E B Raikes for the respondent contended that the appella defence was a denial that the respondent was the next reversio she therefore challenged his title which he proved to the sa faction of both the Courts below. As next reversioner he was proper person to sue for the protection of the estate, and therefore had, it was submitted, a "legal right as to propert within the meaning of section 42 of the Specific Relief Act. T lower Courts had a discretion to make a declaratory dec which they had exercised in the respondent's favour; and t Board would be reluctant to interfere with the discretion of High Court so exercised : see *Jaipal Kunwar* v. *Indar Baha Singh*(5)

Kenworthy Brown said he had nothing more to add.

LORD SHAW.

The judgment of their Lordships was delivered by L SHAW :—

This is an appeal from a decree of the High Court Judicature at Madras of the 23rd August 1912, modifying decree of the Subordinate Judge of Mayavaram, dated the 2 October 1907.

(1) (1915) I.L.R., 38 Mad., 406 , s.c., L.R., 42 I.A., 120
(2) (1875) L.R., 2 I.A., 169 at pp 172, 174 and 181.
(3) (1862) 4 D F. G. & J, 524 at p. 529.
(4) (1914) 1 Ch.D., 831 : affirmed (1916) A.C., 57.
(5) (1904) I.L.R., 26 All., 238 , s.c., L.R., 31 I.A., 67.

The suit was brought with reference to the estate of one Ramasami Iyer, of Konerirajapuram, who died intestate on the 24th June 1906. It is not disputed that the widow holds the property under the Hindu law as "a widow's estate." The mother of the late owner is the person entitled to succeed should she survive this widow. On the expiry of these lives the estate will descend to the next reversionary heir of the deceased.

The rule of the Hindu law with regard to the nature of the widow's estate may have been subject to various forms of expression, but in substance it is not doubtful. Her right is of the nature of a right of property; her position is that of owner, her powers in that character are, however, limited; but, to use *the familiar language of Mayne's "Hindu Law," paragraph* 625, page 870, "so long as she is alive no one has any vested interest in the succession." These propositions were not disputed.

The law as to the situation of the reversionary heirs is also in substance quite clear; there is, as stated, no vesting at the date of the husband's death, and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives; that is to say, in the present case, at the death of the survivor of the appellant and her late husband's mother. Even where the Courts *have proceeded, prior to* the opening of the succession, to give any declaration, that has been done for special reasons only, as in *Jaipal Kunwar* v. *Indar Bahadur Singh*(1), and—to use the language of Sir Arthur Wilson (page 70)—it is made clear that "whenever the succession opens by the death of the widow the present decision will have settled nothing as to who should succeed."

It follows from this state of the law that it is impossible to predicate at this moment who is the reversionary heir of the deceased proprietor. If a Court of Law proceeded to make any declaration of right upon that subject such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of

(1) (1904) I.L.R., 26 All., 238 at p. 244; s.c., L.R., 31 I.A., 67 at p. 70.

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LORD SHAW.

reversionary heir. *A priori*, accordingly, a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility.

It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all from a *spes successionis*, is recognised by Court of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. The law on this subject was recently expounded in the judgment of this Board delivered by Mr. AMEER ALI in *Venkatanarayana Pillai* v. *Subbammal*(1).

This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go.

The suit in the present case was brought by the plaintiff against the defendant and appellant, making charges of a serious character against the conduct and management of the estate by the deceased's widow. Collusion, concealment, maladministration, malice, and fraud were charged, and the statement was made that heavy loss would be incurred, if the properties were left in her possession—subject to waste by her. The appointment of a receiver upon the estate was prayed for, and an injunction was asked restraining the widow from doing any act injurious to the plaintiff's reversionary interest. The third prayer of the plaint was for "granting such further relief as to the Court may seem fit and proper."

It may be at once said that, of the serious charges made, none were held to be well founded in fact: and no reason was

(1) (1915) I.L.R., 38 Mad., 406; s.c., L.R., 42 I.A., 125.

found by the Courts below either for the appointment of a receiver or the granting of an injunction. By the decree of the Subordinate Judge, however, of date the 28th October 1907, the following order was made, namely, "that plaintiff is declared to be the next reversionary heir of the deceased Ramaiyar after the lifetime of defendants Nos. 1 and 2" (his widow and mother). This was done under the third prayer just referred to. For the reasons above set forth it is plain that such a declaration is unavailing as well as premature. It appears to have arisen on account of a dispute as to whether the plaintiff's relationship to the deceased had been made out, and the Courts below may have been misled by the circumstance of that dispute into permitting the question of a declaration to enter the decree. The form of the declaration was that the plaintiff was "the next reversionary heir."

In their Lordships' opinion the plaintiff-respondent was not entitled to such a declaration. Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matters before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff, under cover of a request for "further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the suit should be dismissed, and that the respondent do pay the costs before the Board and in the Courts below.

Appeal allowed.

Solicitor for the appellant: *Douglas Grant*

Solicitors for the respondent: *Chapman-Walker and Shephard.*

J.V.W.

PRIVY COUNCIL.*

1916.
June 23 and
July 14.

MAHARAJAH OF BOBBILI (PLAINTIFF), APPELLANT,

v

NARASARAJU PEDA BALIARA SIMHULU BAHADUR AND ANOTHER (DEFENDANTS), RESPONDENTS

[On Appeal from the High Court of Judicature at Madras.]

Limitation Act (IX of 1908), Sch. I, art. 182—Application for execution of decree to Court which passed the decree—Application made after transfer of decree to another Court for execution—"Proper Court", meaning of—Civil Procedure Code, 1882, ss 223 and 224—Civil Procedure Code, Act V of 1908, ss. 38, 39 and 41

In this appeal their Lordships of the Judicial Committee held (affirming the decision of the High Court) that an application for execution of a decree not having been made to the "proper Court" within the meaning of article 182 of Schedule I of the Limitation Act, 1908, was insufficient to prevent limitation from running, and that the execution of the decree was consequently barred

Maharajah of Bobbili v Narasaraju Peda Baliara Simhulu Bahadur Garu (1914) I.L.R., 37 Mad., 231, *upheld*

APPEAL No 111 of 1914 from a judgment and decree (2nd May 1912) of the High Court at Madras which affirmed a judgment and order (25th October 1910) of the District Judge of Vizagapatam.

The main question for determination on the present appeal was whether an application for execution of a decree presented by the appellant (decree-holder) under the circumstances of the case was barred by limitation. Both Courts found it was so barred.

The facts are sufficiently stated in the judgment of the High Court (SANKARAN NAIR and AYLING, JJ.) in *Maharajah of Bobbili v. Narasaraju Peda Bahar Simhulu Bahadur Garu*(1).

On this appeal which was heard ex-parte.

De Gruyther, K.C., and *B. Dube* for the appellant.

The question whether or not the application for execution of the decree was barred, depended on whether it had been made

* Present.—The Lord Chancellor (Lord BUCKMASTER), Lord ATKINSON and Sir JOHN EDGE.

(1) (1914) I.L.R., 37 Mad., 231.

to the proper Court." The High Court, it was submitted, had put a wrong construction on the words "proper Court" in article 182 of Schedule I of the Limitation Act, 1908, which was the article applicable to the case. Under section 223 of the Civil Procedure Code, 1882 (section 38 of the Code of 1908), the decree could be executed "either by the Court which passed the decree, or by the Court to which it is sent for execution." The District Court, therefore, it was contended, as the Court which passed the decree, did not cease to have jurisdiction to execute it, although it had been transferred: it was a "proper Court" to which to make the application, notwithstanding it did not in the exercise of its discretion grant the relief asked for. Such an application if duly made and recorded was sufficient to prevent the decree from being barred. Other sections of the Code show that concurrent execution may be made in two Courts and an order allowing this may be made by the Court which passed the decree, showing that Court retained its jurisdiction over the decree. Reference was made to sections 224, 226, 228, 232 and 234 of the Code of 1882 and sections 39 and 41 of the Code of 1908.

SIR JOHN EDGE

The judgment of their Lordships was delivered by SIR JOHN EDGE.—This is an appeal from a decree, dated the 2nd May 1912, of the High Court at Madras, which affirmed an order, dated the 25th October 1910, of the District Judge of Vizagapatam dismissing an application of the 27th April 1910, for the execution of a decree of the 5th April 1904, on the ground that the application was time-barred when it was made. The question as to whether the application of the 27th April 1910 was barred by limitation depends on whether a previous application for the execution of the decree which had been made on the 13th December 1907 was made to the proper Court within the meaning of article 182 [179 ?] of the second schedule of the Indian Limitation Act, 1877. The period of limitation applicable in this case was three years from the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree. The respondents have not appeared and have not been represented in this appeal. The facts, as their Lordships have ascertained them from the papers in the record before them, may be briefly stated.

MAHARAJAH OF BOBBILI v. NARASARAJU BAHADUR. — SIR JOHN EDGE.

The appellant, on the 5th April 1904, obtained a money decree against the respondents in the Court of the District Judge of Vizagapatam.

In September 1904 the appellant presented a petition to the Court of the District Judge by which he prayed that the decree should be sent to the Court of the Munsif of Parvatipur for execution on the ground that the properties of the respondents were situate within the local limits of the jurisdiction of the Court of the Munsif, and thereupon the District Judge by his order of the 30th September 1904, made under section 223 of the Code of Civil Procedure, 1882, sent the decree for execution to the Court of the Munsif of Parvatipur, and in compliance with section 224 of that Code sent to the Court of the Munsif (*a*) a copy of the decree; (*b*) a certificate that satisfaction of the decree had not been obtained by execution within the jurisdiction of the District Court; and (*c*) a certificate that no order for the execution of the decree had been made except the order for the transfer of the decree.

On the application of the appellant the Court of the Munsif of Parvatipur in execution of the decree attached immovable property of the respondents which was within the local limits of the jurisdiction of that Court Subsequently on the 10th March 1905, two months' time was, on their application, granted by the Court of the Munsif under section 305 of the Code of Civil Procedure, 1882, to the respondents, and it is stated that the petition for execution was dismissed. No further steps were taken to get the decree executed by the Court of the Munsif.

On the 9th July 1907, the appellant applied to the Court of the Munsif for a copy of the decree which had been sent to that Court under section 224 of the Code of Civil Procedure, 1882, and by order of the head clerk of the Court of the Munsif of the 11th July 1907, he was informed that "No copy of decree in record. It appears that it was returned to the District Court with non-satisfaction certificate." That information was incorrect. On the 13th December 1907, the appellant presented a petition to the Court of the District Judge in which he alleged that he had presented in 1905 a petition to the Court of the Munsif of Parvatipur for the attachment of the immovable property of the respondents; that the attachment was made; and that subsequently the decree had been retransferred to the District Court;

and prayed (1) "that the property described in the schedule hereto attached may be sold under section 287 of the Civil Procedure Code for the realization of the amount mentioned in column 8, and further costs in execution;" and (2) that notice under section 248 of the Code of Civil Procedure, 1882, might be issued to the respondents. No property was, in fact, described in the schedule, but in their Lordships' opinion it is plain that the object of this petition was to obtain from the Court of the District Judge an order for the sale of the property which had been attached by order of the Court of the Munsif. The petition, being defective, was returned to the appellant for amendment, and without having been amended was again presented to the Court of the District Judge on the 28th January 1908, the fact that it had been presented was, by order of the District Judge, recorded on the 25th March 1908, but nothing further appears to have been done on that petition.

The next thing which happened was that, on the 27th April 1910, the appellant presented to the Court of the District Judge a petition for the execution of the decree by sale of the immovable property which had been attached by the Court of the Munsif. In that petition the appellant alleged that the decree had been returned by the Court of the Munsif to the Court of the District Judge. On the 12th July 1910, the District Judge directed that the Munsif of Parvatipur should be requested to report whether the copy of the decree was retransmitted to the District Judge's Court, and, if so, when. On the 3rd August 1910, the Munsif of Parvatipur returned to the Court of the District Judge the copy of the decree which had been sent to the Munsif's Court for execution and the certificate of non-satisfaction. In October 1910, the District Judge proceeded to deal with the petition of the 27th April 1910 of the appellant, who was represented by a vakil, and on the 25th October 1910 held that the petition of the 27th April 1910 had not been presented to the proper Court, and that the petition of the 13th December 1907 not having been presented to the proper Court the presentation of the latter petition did not prevent limitation running, and dismissed the application for execution as having been time-barred, and also apparently as having been presented to the wrong Court.

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SIR JOHN EDGE.

The appellant appealed to the High Court at Madras, which by its decree of the 2nd May 1912, affirmed the order of the District Judge of the 25th October 1910. From that decree of the High Court this appeal has been brought.

As the decree of the 5th April 1904 had by order of the Court of the District Judge been sent on the 30th September 1904 to the Court of the Munsif of Parvatipur for execution by the latter Court, and as the copy of the decree with the satisfaction certificate was not returned to the Court of the District Judge until the 3rd August 1910, and as the petition of the 13th December 1907 was for execution of the decree by sale of the immovable property of the respondents which was within the local limits of the jurisdiction of the Munsif's Court, their Lordships, having regard particularly to sections 223, 228 and 230 of the Code of Civil Procedure, 1882, are satisfied that when that petition of the 13th December 1907 was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached by the Court of the Munsif should have been made, and that the proper Court to which that application should have been made was the Court of the Munsif of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. Consequently, the application by the petition of the 27th April 1910 was, when made, time-barred under article 182 of the second schedule of the Indian Limitation Act, 1908, as no application had been made within three years in accordance with law to the proper Court for execution or to take some step in aid of execution, of the decree. Further their Lordships agree with the District Judge that the application of the 27th April 1910 was not made to the proper Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant *Douglas Grant.*

J.V.W

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Seshagiri Ayyar and Mr Justice Kumaraswami Sastriyar.

RAJAH SAHIB MEHARBAN-I-DOSTON SRI RAJA ROW V. K. M SURYA ROW BAHADUR, SIRDAR, RAJAHMUNDRY SIRCAR AND RAJAH OF PITTAPUR (PLAINTIFF), APPELLANT,

1915. March 22 and April 1.

v

G VENKATA SUBBA ROW AND FIVE OTHERS (DEFENDANTS), RESPONDENTS *

(Madras) Estates Land Act (I of 1908), ss 210 and 211 and art. 8 of part A of schedule—Limitation Act (XV of 1877), sec. 7—Suits for arrears of rent—Minority as a ground of exemption—Statutes of Limitation, when retrospective—Principles to be applied—Madras General Clauses Act (I of 1891), ss. 6, cl. (c) and 8, cl (d)

A "landholder" under the Madras Estates Land Act, who became a major on 5th October 1906 brought suits for recovering arrears of rent due for fasli 1315, after the Estates Land Act came into force, but within three years of his attaining majority On the date the suits were brought, more than three years had elapsed after the rents had become due The lower Courts dismissed the suit as barred by the limitation of three years prescribed by sections 210 and 211 and article 8 of part A of the schedule to the Estates Land Act:

Held by WALLIS, C J and KUMARASWAMI SASTRIYAR, J., agreeing with SADASIVA AYYAR, J [SESHAGIRI AYYAR, J, dissenting] (a) that notwithstanding section 211, which prohibited the application of section 7 of the Limitation Act (XV of 1877) to suits under the Estates Land Act, the plaintiff was entitled to the exemption and extension given by section 7 of the Limitation Act, and (b) that the suits were therfore within time Section 211 of the Estates Land Act should not be construed retrospectively so as to destroy or practically destroy rights of action existing on the date that Act came into force.

Retrospective operation of Statutes considered.

Ramakrishna Chetty v Subbaraya Ayyar (1915) I.L.R., 38 Mad., 101 and *Gopeshwar Pal v. Jiban Chandra* (1914) I L R, 41 Calc, 1125, followed.

Per SESHAGIRI AYYAR, J.—As section 211 of the Estates Land Act expressly prohibited the application of section 7 of the Limitation Act, the suit was barred by the three years' rule of limitation prescribed by the Estates Land Act.

It is the rule of limitation that is in force at the time the suit is instituted that governs the action and not the one under which the rights accrued.

* Letters Patent Appeals Nos 129 and 130 of 1913.

RAJAH OF PITTAPUR v. VENKATA SUBBA ROW.

Soni Ram v. *Kanya Lal* (1912) I.L.R., 35 All., 227 (P.C.), followed.

APPEALS under article 13 of the Letters Patent against the decree of SADASIVA AYYAR, J., in *Sri Surya Row* v *Venkata Subba Row*(1).

The facts necessary for this report are fully set out in the judgments of SESHAGIRI AYYAR and KUMARASWAMI SASTRIYAR, JJ.

B. Somayya for the appellants in both the appeals.

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(1) (1916) I.L.R., 39 Mad., 646.

The *following* contains the judgments delivered on 9th October 1913 by SANKARAN NAIR, J., and SADASIVA AYYAR, J., who differed from each other, and confirmed the decree of the Lower Court under section 98, Civil Procedure Code.—

1913 August 25 and October 9

RAJAH SAHIB MEHARBAN I-DOSTAN SRI RAJA ROW V. K. M. SURYA ROW BAHADUR SIRDAR, RAJAHMUNDRY SIRCAR AND RAJAH OF PITTAPUR (APPELLANT),

v.

G. VENKATA SUBBA ROW AND FIVE OTHERS (RESPONDENTS)*

SECOND APPEAL against the decree of M. O. PARTHASARATHI AYYANGAR, the District Judge of Gôdâvari, in Appeals Nos 111, etc., of 1910, preferred against the decisions of R. V. SUBBA RAO PANTULU, the Suits Deputy Collector of Gôdâvari, in Summary Suits Nos 128, etc., of 1910, respectively.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—These are suits brought by a landlord for the recovery of rent from his tenants under section 189 of the Estates Land Act.

The question is whether the suits are barred by limitation. The District Judge is of opinion they are barred. The landlord appeals.

Under section 210 every suit instituted after the period of limitation specified therefor in the schedule shall be dismissed. The period of limitation prescribed in the schedule is three years from the date referred to therein. In these cases that period has expired. These suits therefore must be dismissed. But it is argued that, as the plaintiff was a minor when the rent fell due and the suit was brought within three years of the plaintiff attaining majority, the suit is not barred under section 7 of the Limitation Act and, though section 211 enacts that section 7 of the Limitation Act shall not apply to suits instituted under the Estates Land Act, we are bound to hold that, in the absence of express terms to that effect or necessary implication, this Act does not take away the right of action that has already accrued and, as the plaintiff was entitled to sue when the Act was passed, he is entitled to maintain the suit within the time he had before the passing of the Act.

The following cases are relied upon in support of this argument.—

Sundaramaiyah v. *Muthu Ganapathigal*(1), *Ramakrishna Chetty* v. *Subbaraya Ayyar*(2) and *Munghoori Bibi* v. *Akel Mahmud*(3)

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* Second Appeals Nos. 323, etc., of 1912.

(1) (1912) M.W.N., 652. (2) (1915) I.L.R., 38 Mad., 101

(3) (1913) 17 C.L.J., 316.

The suit is for the recovery of arrears of rent, brought under section 77 of the Estates Land Act. The arrears accrued before the Act came into force. The period of limitation prescribed in schedule A, article 8 of the Act, is three years from the date when the arrears became due. Section 211 enacts that section 7 of the Limitation Act is inapplicable to suits under the Estates Land Act.

Before the Act I could have sued in a Civil Court and availed myself of section 7 of the Limitation Act.

[WALLIS, C.J.—You do not contend that after the Estates Land Act you could sue in the Civil Courts.]

No, not in view of section 189 of the Act.

[SESHAGIRI AYYAR, J.—If you had instituted your suit before the Act came into force in the Civil Court then the jurisdiction

I agree that, if the words of a section admit of a construction that will not interfere with vested rights, that construction must be adopted. Here, however, we are dealing with an Act which is complete in itself, like the Rent Act which it repealed. See *Kumara Akkappa Nayanim Bahadur* v *Sithala Naidu*(1). When an Act has got its own provisions as to limitation the general rules in the Limitation Act do not apply, and it was held by the Calcutta High Court, in accordance with this principle enunciated in *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*(1), that section 7 of the Limitation Act does not apply to rent suits. See *Girija Nath Roy Bahadur* v. *Patani Bibee*(2).

Reading the sections of the Act, not only are the words quite clear, as I have pointed out, the policy also appears to be clear. The Legislature considered it is not desirable having regard to the relative position of zamindars and ryots, that questions between them should be kept open for long periods of time or that the resources of a ryot available for the current year's cultivation should be crippled with the obligation of discharging old arrears. The practical hardship is greater on the ryot than on the zamindar. Again in this Presidency the zamindaris of minors would be, as was in this case, under the Court of Wards and, if they were not able, or did not think it right to collect the rent from tenant, it was a sufficient reason to justify any legislature in concluding that the zamindar after he attains his age should not be allowed to harass the ryot. I would therefore confirm the decrees and dismiss all appeals with costs. But as my learned brother is of a different opinion, the decrees are confirmed and the Second Appeals dismissed with costs under section 98, Civil Procedure Code.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The only question in these cases is whether a suit brought by a landlord after the passing of the Madras Estates Land Act for rent due for faslis which expired before the Act came into force is governed by the old rule of limitation provided for by the Limitation Act of 1877 or whether it was governed by the special rules of limitation mentioned in sections 210 and 211

(1) (1897) I.L.R., 20 Mad., 476. (2) (1889) I.L.R., 17 Calc., 263.

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of the Civil Court would not have been taken away because of the Act.]

My argument is this: if the effect of the application of the new rule is to extinguish the rights already accrued then the new rules ought not to be applied. I refer to *Ramakrishna Chetty* v. *Subbaraya Ayyar*(1).

[SESHAGIRI AYYAR, J.—Prior to the Estates Land Act did section 7 of the Limitation Act apply to suits for rent, under the Rent Recovery Act?]

Yes, if the suit was brought under general law in the Civil Court, but it was not applicable to summary suits under the Rent Recovery Act. See *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*(2). The following cases were also referred to, viz., *Munjhoori Bibi* v. *Akel Mahmud*(3), *Budhu Koer* v *Hafiz Husain*(4), *Gopeshwar Pal* v. *Jiban Chandra*(5), *Soni Ram* v. *Kanhaiya Lal*(6) and *Delhi and London Bank, Limited* v. *Orchard* (7), on the question as to when an Act will or will not have retrospective operation.

B. Narasimha Rao for the respondent.

There is no killing of the right of action. Section 7 of the Limitation Act gives only a personal exemption and it is only this *personal exemption* that is now taken away by section 211 of

(1) (1915) I.L.R., 38 Mad., 101. (2) (1897) I.L.R., 20 Mad., 476.
(3) (1913) 17 C.L.J., 318. (4) (1914) 18 C.L.J., 274.
(5) (1914) I.L.R., 41 Calc., 1125; s.c., 19 C.L.J., 549 at p. 562.
(6) (1913) I.L.R., 35 All., 227 (P.C.). (7) (1878) I.L.R., 3 Calc., 47 (P.C.)

of the Estates Land Act and in the schedule annexed to the said Act. If the old rules of limitation applied, the plaintiff, who was a minor till October 1906 when the cause of action arose for the greater portion of the claims in dispute in these suits, had three years by virtue of section 8 of the Limitation Act of 1877 from the cessation of minority to bring these suits. These suits brought in October 1909, just within three years of October 1906 are not, in that view, barred by limitation. But if the special rules mentioned in sections 210 and 211 of the Estates Land Act applied, the plaintiff will be barred as section 211 expressly says that sections 7 and 8 of the Indian Limitation Act of 1877 shall not apply to the suits and applications mentioned in section 210 (which include suits for rent). On the question whether the old rules of limitation or the new rules of limitation apply to claims for rent due for periods which had elapsed before the Estates Land Act came into force, when a suit is brought on these claims after the passing of the Estates Land Act, there was a conflict of opinion between MILLER, J., and ABDUR RAHIM, J., in *Sundaramaiyah* v. *Nalla*

the Estates Land Act. Section 211 expunges section 7 of the Limitation Act. There is no right of action alive at the time of the Act. *Colonial Sugar Refining Company* v. *Irving*(1) is not against me. It says where the intention is clear, enactments may have retrospective effect. In none of the cases referred to by the other side is there such a special section like section 211. All those cases are based on general considerations.

V. Ramadoss for respondent in Letters Patent Appeal No. 130 of 1913.

The opinion of ABDUR RAHIM, J., in *Sundaramaiyah* v. *Muthu Ganapathigal*(2) is against the contention of the appellant. *Munjhoori Bibi* v *Akel Mahmud*(3) was a case falling within a rule like section 210 of the Estates Land Act It was not a case of a minor. *Sakina Bibee* v. *Mahomed Ishak*(4) is in my favour. Refers to sections 7, 8, 9, 185 and 187 of the Bengal Tenancy Act; and *Arayil Kali Amma* v. *Sankaran Nambudripad*(5), when there is a provision in an Act that it shall come into force only after a certain time then there is sufficient intimation given to the parties. [see *Chidambaram Chetty* v. *Karuppan Chetty*(6), *Hope Mills* v. *Vittaldas*(7)] and arguments based on hardship to parties ought not to be listened to.

(1) (1905) A C, 369. (2) (1912) M W.N, 652 at p. 654
(3) (1913) 17 C.L J, 316 (4) (1910) 15 C W N, 185.
(5) (1911) I L.R, 34 Mad, 292. (6) (1911) 9 M L T, 75
(7) ((1910) 12 Bom, L.R., 730

Ganapathigal(1) The same question arose in *Ramakrishna Chetty* v *Subbaraya Ayyar*(2), before BENSON and SUNDARA AYYAR, JJ, and the view of MILLER, J, was upheld in this latter case I am free to admit that, if it was a question of first impression, I would have followed the plain language of sections 210 and 211 of the Madras Estates Land Act and treated such suits also as barred by limitation. But having regard to the *dicta* of the Privy Council in *Colonial Sugar Refining Company* v. *Irving*(3) and *Lala Soni Ram* v *Kanhaia Lal*(4) and the fact that a Divisional Bench of this Court has held otherwise in *Ramakrishna Chetty* v. *Subbaraya Ayyar*(2), I am inclined to follow the ruling of the said Divisional Bench. If the Divisional Bench ruling is to be so followed, the decrees of the lower Courts should be reversed and the suits remanded for disposal of the issues other than the issue of limitation, which question of limitation has been considered by both Courts I would pass the above order, costs hitherto abiding the result

(1) (1912) M W.N., 652 (2) (1912) I.L R., 38 Mad., 101.
(3) (1905) A.C, 369. (4) (1914) 25 M L J., 131.

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WALLIS, C.J.

WALLIS, C.J.—I think that SADASIVA AYYAR, J., was right in following the carefully considered judgment of BENSON and SUNDARA AYYAR, JJ., in *Ramakrishna Chetty* v. *Subbaraya Ayyar*(1), and that the principle to be applied is that where an Act contains provisions for the limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act. This rule of construction was adopted to give effect to the presumed intention of the Legislature not to take away vested rights in this fashion; it is recognised in section 8 of the Madras General Clauses Act, 1891, and the provisions now in question must be taken to have been enacted with reference to it. In *Ramakrishna Chetty* v. *Subbaraya Ayyar*(1), it was held with reference to this Act that the six years' period applicable under article 116 to a registered contract continued to apply to a suit for rent under the Madras Estates Land Act which would otherwise have become barred by the coming into force of that Act at a time when the period of limitation prescribed by it for suits of this nature had already expired. In the present case the claim for rent was not barred at the date of the passing of the Act as it was kept alive under section 7 of the Limitation Act owing to the minority of the plaintiff Sections 210 and 211 enact rules of limitation for suits under the Act, and section 211 expressly provides that section 7 and certain other sections of the Limitation Act shall not apply to suits under this Act. Thus the result of the passing of the Act, which came into force two days after it received the Viceroy's assent, was to leave no opportunity for the exercise of the plaintiff's vested right of suit, unless the provisions of section 211 (1) be read subject to an implied exception in cases where these provisions would otherwise absolutely destroy the plaintiff's right of suit which was in existence when the Act came into force. In addition to the cases cited in that judgment, I may refer to the recent decision of a Full Bench of five Judges of the Calcutta High Court—*Gopeshwar Pal* v. *Jiban Chandra*(2), where

(1) (1915) I.L.R., 38 Mad., 101.

(2) (1914) I.L.R., 41 Calc., 1125; s.c. 19 C.L.J., 540.

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WALLIS, C J.

JENKINS, C.J., delivering the judgment of the Court after citing *Commissioner of Public Works (Cape Colony)* v. *Logan*(1), *Colonial Sugar Refining Company* v. *Irving*(2) and *Jackson* v. *Woolley*(3), observed "Here the plaintiff at the time when the Amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act."

These observations are applicable to the present case and I think the appeals must be allowed, the decrees of the lower Courts be reversed, and the case remanded for disposal according to law. The respondents will pay the appellant's costs of the appeals. Other costs will abide and follow the event.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J —With all respects I have ventured to differ from the conclusion at which the learned Chief Justice has arrived.

The circumstances which raise the question of law are these. Before the passing of the Estates Land Act, suits for arrears of rent were cognisable only by the ordinary Civil Courts. Such suits were governed by the Indian Limitation Act As a necessary incident of such rights, minors were entitled to institute their suits within three years of their attaining majority, if the cause of action for rent arose during their minority. The claim in the suit now under appeal relates to the arrears which accrued due in fasli 1315 when the appellant was a minor. He attained his majority in 1906. The Estates Land Act was passed by the local Legislature in March 1908 In it a provision was inserted that the Act shall come into force on the 1st of July 1908. His Excellency the Governor gave his assent to it on the 25th March 1908. The assent of His Excellency the Governor-General was given on the 28th June. The Act came into force on the 1st of July. Section 189 of the Act enacts that suits for arrears of rent shall be instituted in the Revenue Courts, and removes such cases for the cognisance of Civil Courts. Section 211 provides that certain sections of the General Limitation Act *shall not apply* to suits instituted under the Act. The minority section (7) is one of them. The present suit was instituted by the

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(1) (1903) A.C., 355.
(2) (1905) A.C., 369.
(3) (1858) 8 E. & B., 764

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appellant in the Revenue Court after the Estates Land Act came into force. It is conceded that the suit would be barred if section 7 of the Limitation Act did not apply. I am forced to the conclusion that the suit is barred The pre-existing right, which carried with it the benefit of the Limitation Act, was to institute the suit in the Civil Court. That right could not have been sued upon under the old law in the Revenue Court The new forum is the creature of the statute. It was designed to afford a speedy remedy to the parties. The plaintiff has chosen to avail himself of that advantage. He is also bound by the disabilities which the law imposes on such persons. I can follow the argument which claims for the plaintiff the right to institute his suit in the ordinary Civil Courts with the attendant advantage of counting in his favour a period of three years after attaining majority. To such an argument, the plea that the Legislature should not be presumed to have deprived parties of their vested rights by *post facto* legislation may apply. But a litigant cannot approbate and reprobate He cannot claim the advantage which the new law gives without submitting to the restrictions which it imposes.

The principle that vested rights should not be taken away by implication cannot apply to the present case. Section 211 lays down that the minority section of the Limitation Act *shall not apply*. There is no room for speculation here. It is an express prohibition If a suit is instituted under the Act, it is not open to argument that section 211 is not applicable to it. The clear indication of the Legislature takes this case out of the general rule. See per Lord HATHERLEY in *Pardo* v. *Bingham*(1). The closely reasoned judgment of BENSON and SUNDARA AYYAR, JJ., in *Ramakrishna Chetty* v *Subbaraya Ayyar*(2), was much relied upon in the course of the argument. I am not differing from the main propositions which that case enunciates. Excepting on one matter of detail, to which I shall refer later on, I fully concur in the conclusions therein stated In my opinion, it is not correct to say that the plaintiff in this case is deprived of his rights by giving retrospective effect to the Estates Land Act. He acquires one of his rights only under the Act, namely, the right to sue in the Revenue Court. He had a vested right for a

(1) (1869) L.R., 4 Ch., 735. (2) (1915) I.L.R., 38 Mad., 101.

longer period of limitation before the Act came into force. As has been well stated "a statute is not retrospective . . . because a part of the requisites for its action is drawn from time antecedent to its passing" per Lord DENMAN, C.J., in *The Queen* v. *St. Mary's Whitechapel*(1). That is the position in the present case. Lord Justice BUCKLEY points out in *West* v. *Gwynne*(2): "As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights." This *dictum* is specially applicable to enactments which while taking away some rights confer others which are no less important See also *Ex parte Dawson*(3). On the ground that section 211 is express, and on the further ground that the principle of retrospective extinguishment of vested rights does not arise in this case, I hold that the decision in *Ramakrishna Chetty* v *Subbaraya Ayyar*(4) does not affect this case. In *Munjhoori Bibi* v. *Akel Mahmud*(5), *Budhu Koer* v. *Hafiz Husain*(6) and *Gopeshwar Pal* v *Jiban Chandra*(7), there was no express provision as in section 211 of the Estates Land Act. Moreover in all those cases, a completed pre-existing right was sought to be put an end to by implication

On the other hand, where the statute provides for a new procedure for the enforcement of rights, it is always retrospective, per Lord BLACKBURN in *Gardner* v. *Lucas*(8) In the present instance it is the procedure by which the arrears are to be recovered that is changed The plaintiff is directed to seek redress in a Revenue Court instead of in the Civil Court The decision of the Judicial Committee in *Soni Ram* v. *Kanhaiya Lal*(9) lays down that the Limitation Act in force at the time the suit is instituted governs the action, and not the one under which the rights accrued That decision governs the present case. See also *Chidambaram Chetty* v. *Karuppan Chetty*(10) and *Hope Mills* v. *Vittaldas*(11). There is one

(1) (1863) 12 Q B , 127 (2) (1911) 2 Ch , 1
(3) (1875) L R 19 Eq , 433 (4) (1915) I L R , 38 Mad , 101.
(5) (1912) 17 C L J 316. (6) (1914) 18 C.L J , 274
(7) (1914) I L R., 41 Calc , 1125 s.c., 19 C L J 549
(8) (1877) 3 A C , 582 (9) (1913) I L R , 35 All , 227
(10) (1911) 9 M L T., 75 (11) (1910) 12 Bom L R , 730

RAJAH OF PITTAPUR v. VENKATA SUBBA ROW. — SESHAGIRI AYYAR, J.

circumstance which has not been noticed in *Ramakrishna Chetty v. Subbaraya Ayyar*(1). I stated at the outset the material dates regarding the passing of the Act and of the sanction obtained. One underlying principle of the cases which lean against retrospective operation is that if the new Act gives no days of grace for its coming into operation, but makes it law as soon as it is passed, Courts should hold that the Legislature did not intend to interfere with vested rights. But where litigants had previous notice and could have enforced their rights before the Act became law they cannot claim relief. On the day the Legislature passed the Act, it deliberately put off its operation for over three months It did not say that it shall become law as soon as the Governor-General's assent was obtained. It purposely gave parties a period of grace during which their remedies under the law as it stood could have been enforced. The plaintiff in claiming exemption by virtue of an equity should not be heard to say that although he might have enforced his rights between March and July 1908, he can plead that the Act does not apply to him because no time was fixed for its coming into force after the assent of the Governor-General was obtained

As I feel strongly that the plaintiff has no right to avoid the statute under which he has come to Court, I respectfully differ from the conclusion at which the learned Chief Justice has arrived and agree with SANKARAN NAIR, J, in holding that the suit is barred by limitation

KUMARASWAMI SASTRIAR, J

KUMARASWAMI SASTRIAR, J.—The appellant who is the Raja of Pittapur and whose estate was under the management of the Court of Wards attained majority on the 5th October 1906. He filed suits to recover rent due for fasli 1315 and claimed exemption from the bar of limitation on the ground that he had under section 7 of the Limitation Act three years from the date of his attaining majority to file suit for arrears of rent accrued due during his minority. The Deputy Collector, in whose Court the suits had to be filed under section 77 of the Madras Estates Land Act, held that section 211 of the Act applied and that the suits were barred as the plaintiff was not entitled to the benefit of section 7 of the Limitation Act. The District Judge taking the

(1) (1915) I.L.R., 38 Mad., 101

same view confirmed the decrees of the Deputy Collector. In Second Appeal Mr. Justice SANKARAN NAIR held that section 211 of the Estates Land Act applied retrospectively and barred suits which would have been in time but for the Estates Land Act; while Mr. Justice SADASIVA AYYAR was of a contrary opinion.

The question raised in this appeal is whether section 211 is retrospective and bars suits which would have been in time if the ordinary law of limitation were applied. The point is not free from difficulty, but I am of opinion that both on principle and on the balance of authority the section ought not to be applied so as to kill causes of action that were alive on the date of the passing of the Act.

It is a well-known rule of construction that retrospective operation ought not to be given to a statute so as to take away vested rights unless that effect cannot be avoided without doing violence to the language of the enactment and that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. I need only refer to *Reid* v. *Reid* (1) and *Lauri* v. *Renard*(2). The same view was taken by the Privy Council in *Mohamad Abdus Samad* v *Kurban Hussan*(3), *Colonial Sugar Refining Company* v. *Irving*(4). Section 6, clause (c) of the General Clauses Act and section 8, clause (d) of the Madras Act I of 1891 are statutory recognitions of the same rule.

It is argued that as rules of limitation are rules of procedure and as nobody has a vested right as regards matters of procedure the plaintiff cannot plead section 7 of the Limitation Act as giving him a longer period of limitation as at the date of the suit the Estates Land Act had enacted that the section is not to apply to suits for rent. Reference has been made to *Arayil Kali Amma* v. *Sankaran Nambudripad*(5) and *Soni Ram* v. *Kanhaiya Lal*(6). As observed by MOOKERJEE, J., in *Mohamad Bibi* v. *Abdul Mohamed*(7), a statute of limitation ceases to be a statute of mere procedure where it shortens the period and is sought to be used to defeat causes of action which had accrued

(1) (1886) I.R., 31 Ch D., 402
(2) (1892) 3 Ch.D., 402.
(3) (1903) 3 I. L. R., 26 All., 119 (P.C.)
(4) (1905) A.C., 369
(5) (1911) I. L. R., 34 Mad., 292
(6) (1913) I.L.R., 35 All., 227.
(7) (1913) 17 C.L.J., 352.

earlier than the length of time prescribed in the new law. The distinction has always to be borne in mind between mere matters of procedure and rights of suit which the procedure affects. The effect of the decision of the Privy Council in *Soni Ram* v. *Kanhaiya Lal*(1) on cases like the present has been discussed by the Full Bench of the Calcutta High Court in *Gopeshwar Pal* v. *Jiban Chandra*(2) and I agree with the conclusion arrived at by the Full Bench that the provisions of an enactment should not, unless it is absolutely necessary, be construed so as to make it impossible to exercise a vested right of suit. As pointed out by Justice CHATTERJEE (at p. 1129) their Lordships of the Privy Council had not to consider the retrospective operation of special period of limitation provided by a local law coming into operation at once. In *Arayil Kali Amma* v. *Sankaran Nambudripad*(3), MILLER and KRISHNASWAMI AYYAR, JJ., seem to rest their decision on the ground that the new Limitation Act gave time to suitors to make applications under the old Act as the Legislature postponed the coming into operation of the Act on 1st January 1909. In *Sundaramaiyah* v. *Muthu Ganapathejal*(4) Justice MILLER who was a party to *Arayil Kali Amma* v. *Sankaran Nambudripad*(3), was of opinion that section 210 of the Estates Land Act cannot be retrospective. As the assent of the Governor-General was received only about three days before the Estates Land Act came into operation and as it is doubtful if the public knew of the assent before 1st July 1908 it cannot be said that the public had due notice It cannot be said that they were bound to assume that consent was a mere matter of form and would be given as a matter of course especially as petitions had been sent by landlords against the measure.

The question as to the retrospective operation of section 210 was discussed in *Ramakrishna Chetty* v. *Subbaraya Ayyar*(5), where it was held that the rule of limitation in Madras Act I of 1908 was inapplicable to cases when the period of three years provided by it had expired before the Act came into force. The judgment of BENSON and SUNDARA AYYAR, JJ., deals exhaustively with the whole question and I see no reason to dissent from the view taken by the eminent Judges who decided the case.

(1) (1914) I L R., 35 All., 227. (2) (1914) I L R., 41 Calc., 1125; 19 C L J., 544.
(3) (1911) I L R., 34 Mad., 292 (4) (1912) M W.N., 652
(5) (1915) I L R., 38 Mad., 101.

I do not think it makes any difference whether the alteration of the period of limitation is due to a *special provision in schedule A* to the Act or to *a special section in the body of the Act*. So far as I can see there is no difference in principle between the present case and *Ramakrishna Chetty* v. *Subbaraya Ayyar*(1). In both cases the legislature shortened the period of limitation for suits for rent so far as the plaintiff was concerned and if the three years' rule in Schedule A applied, the suit would have been barred

Some considerations were urged during the argument which I think are beside the point. It has been argued that as the Estates Land Act has prescribed a new forum which the plaintiff has elected to sue in he is precluded from seeking the benefit of the exemption conferred by section 7 of the Limitation Act. Section 77 of the Estates Land Act gives the plaintiff no option as to the forum and there is in the present case neither election nor benefit so far as he is concerned. It has also been suggested that the object of the legislature was to preserve tenants from long-standing demands. This may be so as regards causes of action arising after the Act came into force or running at its date, but I can see no grounds for supposing that the legislature intended to deprive landlords of rents justly due to them at the date of the passing of the Act

The correct rule seems to me to be that though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which were alive at the date when the new enactment came into force and which under the old law would expire afterwards, the change cannot unless there is a clearly expressed intention to the contrary either by apt words in the enactment or otherwise, be retrospective so as to destroy rights of suits which were alive on the date.

I agree with the Chief Justice and would allow the Letters Patent Appeals and reverse the decisions of the Courts below and remand the suits for disposal. The respondents will pay the appellant's costs of these appeals. Other costs will abide and follow the result.

C.M.N.

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(1) (1915) I.L.R., 38 Mad., 101.

APPELLATE CIVIL.

1915. March 13 and April 1

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SATHYABHAMA (PLAINTIFF), APPELLANT,

v.

KESAVACHARYA (DEFENDANT), RESPONDENT.*

Hindu widow—Maintenance secured by deed—Subsequent unchastity—Living chaste at the time of suit, effect of.

Where, in a suit by a Hindu widow against her deceased husband's brother for maintenance at the rate fixed by agreement, it was found that the plaintiff had since lived an immoral life but reformed her ways at the time of the suit,

Held that she lost her right to the rate fixed in the deed but was entitled to a starving allowance

Texts and case law reviewed

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 46 of 1913, preferred against the decree of K. APPAJI Rao, the District Munsif of Puttur, in Original Suit No. 334 of 1912.

The facts appear from the judgment.

H. Balakrishna Rao for the appellant.

B. Sitarama Rao for the respondent.

AYLING AND SESHAGIRI AYYAR, JJ

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—This is a suit by a widow against her deceased husband's brother for maintenance. There was an agreement on the 30th April 1906 by which the amount was fixed. The plea of the defendant is that since the date of the agreement the plaintiff had been leading an immoral life and that consequently she is not entitled to claim maintenance. The Courts below have found that she did lead an immoral life, but that, at the time of the suit, she had reformed her ways and was living with her people. Mr. B. Sitarama Rao wanted to argue that she had gone wrong with a Sudra, that that entails upon her degradation from caste and that consequently she is not entitled to any maintenance. But there is no finding that the pregnancy which is found, was caused by cohabitation with the Sudra. We cannot allow that question to be argued in Second Appeal.

* Second Appeal No. 2506 of 1913.

On the facts found by the Courts below, the question for consideration is, whether the plaintiff is not entitled to what is called starving allowance from the defendant. It was argued in appeal that the fact that the maintenance was secured by a deed differentiated this case from *Nagamma* v. *Virabhadru*(1). We cannot accept this contention. The instrument is only evidence of the amount which is payable as maintenance. The basis of the claim against the defendant being the duty to maintain, the fact that it is secured by a deed in writing is not a reason for holding that subsequent unchastity would not work a forfeiture. The decision in *Bhup Singh* v. *Lachman Kunwar*(2), related to a compromise which was arrived at regarding the claim of the widow for possession of the property as heiress. It was held that the subsequent unchastity of the widow did not deprive her of this property. That decision has no bearing upon the present case. The right to maintenance is dependent upon texts which do not affect succession or inheritance.

There is no direct authority upon the question. The text of Manu in Chapter XI, section 189, applies to all women entitled to maintenance Under that text if a woman becomes unchaste she is entitled to a starving allowance. The Prayaschitha Kanda of Yagnavalkya Smrithi (verses 297 and 298) lays down the rules regarding provisions to be made for women who have misconducted themselves. It has been suggested by the learned vakil for the respondent that these verses only apply to cases of women who have committed sins other than immorality; but the concluding portion of the commentary of Vijnaeswara on the Smrithi makes it clear that the two verses are intended to cover cases of unchaste women. The commentary is this: "To those women, who have suffered degradation (from caste) and for whom the rite of presenting (disconnecting) water libations, etc, have been performed, accommodation, (that is), a small cottage built of straws and leaves should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description *along with (the protection) of preventing her from being enjoyed again by another man should be given.*" This last

(1) (1894) I.L.R., 17 Mad., 392. (2) (1901) I.L.R., 26 All., 321.

SATHYA-BHAMA v. KESAVA-CHARYA. —— AYLING AND SESHAGIRI AYYAR, JJ.

sentence makes it clear beyond doubt that the commentator had in mind the case of fallen women. The text and the commentary, it is conceded, apply to all women alike whether they be wives, widows of co-parceners or mothers. Therefore according to Manu and Yagnavalkya women who have gone wrong should be given some maintenance. The punishment for their unchastity is that they lose their right to the ordinary rate of maintenance. As against these two texts, the well-known text of Narada has been quoted which says that if a widow of a co-parcener is guilty of immorality, her maintenance should be resumed. This statement is quoted and commented upon by all the Smrithi writers (Mayuka, section 8, placitum 6; Smrithichandrika, chapter XI, section 34 and Viramitrodaya, chapter III, part I, section 10). But in none of these texts is there any provision for a woman who had repented and was subsequently leading an honest life. It is not to be presumed from the omission to provide for such a contingency, that the resumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance. This question was raised in *Visalatchi Ammal* v. *Annasamy Sastry*(1) but was left undecided. In *Nagamma* v *Virabhadra*(2), the learned Judges following certain Bombay decisions held that a widow who had misconducted herself was not entitled to maintenance. In the latest Bombay case—*Parami* v. *Mahadevi*(3)—, the earlier cases are not approved. In the Madras case, the question whether subsequent reformation would make any difference was not considered. In *Kandasami Pillai* v. *Murugammal*(4), the learned Judges based the decision on the ground that the fallen woman had tried to foist upon her husband a child born of adulterous intercourse; and it was decided that such a woman was not entitled even to a starving allowance. This decision in *Kandasami Pillai* v. *Murugammal*(4)—was considered by MILLER and SANKARAN NAIR, JJ., in *Subbannaya* v. *Bhavani*(5) and the learned Judges were of opinion that it should be confined to cases where the woman was continuing to lead an immoral life. In *Nagalakshmamma* v. *Visvanatha Sastrulu*(6), the wife was not shown to have repented of her misconduct.

(1) (1870) 5 M H C R, 150
(2) (1894) I L R., 17 Mad., 392.
(3) (1910) I.L.R., 34 Bom., 278
(4) (1896) I L R, 19 Mad., 6
(5) Second Appeal No 725 of 1912
(6) (1912) 23 M L J, 259

SATHYA-BHAMA v. KESAVA-CHARYA. — AYLING AND SESHAGIRI AYYAR, JJ.

Mr. B. Sitarama Rao argued that the decision in *Subbannaya* v. *Bhavani*(1) should not be extended to widows of co-parceners. As pointed out already, both the text of Manu and that of Yajnavalkya make no distinction between wives and other women, and we see no reason on principle why the widow of a co-parcener should be in a less advantageous position than the wife on the question of being allotted a starving allowance. There are observations in *Ramanath* alias *Ramannad Thur Poddar* v. *Rajonimoni Dasi*(2) to the effect that widows who had repented of their misconduct should be given a bare maintenace. The recent decision in *Parami* v. *Mahadevi*(3), although it related to the case of a wife contains observations regarding the rights of other women to compassionate allowance We see no reason for not applying the principle enunciated in that decision to the case before us. We think that the widow is entitled to some maintenance, although she is not entitled to the rate provided for in the deed. The Courts below have found that Rs. 24 a year may be awarded to her in this behalf. We accept that finding. We reverse the decrees of the Courts below and decree maintenance at Rs 24 a year, from January 1911 till date of suit. Each party will bear his or her own costs throughout.

S V

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr Justice Sadasiva Ayyar

1915 July 12.

K. NARAYANA MOOTHAD *et al.* (PLAINTIFFS—PETITIONERS), APPELLANTS,

v.

THE COCHIN SIRKAR NOW REPRESENTED BY J W BHORE, THE DEWAN OF COCHIN (FIRST DEFENDANT—RESPONDENT), RESPONDENTS *

Jurisdiction—Ruling Prince or Chief—Consent of Local Government Submission to jurisdiction—Waiver—International Law Civil Procedure Code (Act V of 1908), sec. 86, construction of

Where His Highness the Rajah of Cochin was impleaded as a defendant in a suit in the capacity of a trustee of a temple, without the consent of the Local Government under section 86 of the Code of Civil Procedure (Act V of 1908)

(1) Second Appeal No 725 of 1912 (2) (1890) I L R, 17 Calc, 674 at p 678
(3) (1910) I L R, 34 Bom., 278
* Letters Patent Appeals Nos. 133 to 135 of 1913.

NARAYANA MOOTHAD *v.* THE COCHIN SIRCAR.

Held, that the suit was not maintainable as against the Rajah of Cochin in the absence of consent of the Local Government under section 86 of the Code of Civil Procedure

Per OLDFIELD, J.—The recognition of cases of waiver, as excepted from the ordinary provision of International Law as understood in England, cannot be imported into the clear language of the Indian Code.

Chandulal v. Awad bin Umar Sultan (1897) I.L.R., 21 Bom., 351, dissented from.

Per SADASIVA AYYAR, J.—Objection to jurisdiction is enough to show that there was no voluntary submission by the defendant to the jurisdiction of the Court.

Parry & Co. v. Appasami Pillai (1881) I.L.R., 2 Mad., 407, approved.

Veeraraghava Iyer v. Muga Sait (1916) I.L.R., 39 Mad., 24, referred to.

APPEALS under clause 15 of the Letters Patent against the judgment of TYABJI, J., in *Narayanan Moothad* v. *Cochin Sirkar*(1).

The facts of the case appear from the judgment of OLDFIELD, J.

T. R. Ramachandra Ayyar and *N. A. Krishna Ayyar* for the appellants.

C. V. Anantakrishna Ayyar for the respondent.

OLDFIELD, J. OLDFIELD, J.—The question in these appeals is whether His Highness the Rajah of Cochin was legitimately impleaded as a defendant in connected suits in the absence of consent by the local Government under section 86, Code of Civil Procedure.

It is urged firstly, that the absence of such consent is immaterial, because His Highness has waived his privilege by proceeding, after pleading it, to plead also on the merits. I do not consider whether the course of his pleading did in fact amount to a waiver or not, because in my opinion the recognition of cases of waiver, as excepted from the ordinary provision of International Law as understood in England, cannot be imported into the clear language of the Indian Code The contrary view was no doubt taken in *Chandulal* v. *Awad bin Umar Sultan*(2). But with all respect I find the reasoning therein inconclusive and doubt whether reference to the supposed intention of the legislature is permissible or, if permissible, whether it is sufficiently comprehensive

Secondly, it is argued that the suits are really against the deity of the suit temple, represented by the Rajah, and that, as they are not against the Rajah himself, the section is inapplicable Reference to the plaints however shows that the suits are

(1) (1915) I.L.R., 38 Mad., 635. (2) (1897) I.L.R., 21 Bom., 351.

for releif against the Rajah and others on the ground that the first mentioned has usurped the position of trustees and has used the power thus obtained to plaintiffs' prejudice. The suits are therefore not against the deity, as represented by the Rajah.

OLDFIELD, J.

In these circumstances the appeals fail and must be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother. Mr. Ramachandra Ayyar relied on certain *obiter dicta* found in the judgments of the learned Chief Justice and of Justice SESHAGIRI AYYAR in *Veeraraghava Iyer* v. *Muga Sait*(1) for the proposition that it is not enough merely to object to the jurisdiction to show that there was no voluntary submission by the defendant to the jurisdiction of the Court. *Parry & Co* v. *Appasami Pillai*(2) distinctly held otherwise The learned Chief Justice guardedly says that because there are two English cases, *Boissiers* v. *Brockner*(3) and *Guiard* v. *DeClermont and Donner*(4) which hold that such mere objection is insufficient, *Parry & Co.* v. *Appasami Pillai*(2) is probably no longer law. SESHAGIRI AYYAR, J., first says that he would hesitate to follow owing to the decision of CAVE, J., in the former case; the learned Judge then says that "the conditions of existence in this country may not justify the application of the principle enunciated by CAVE, J.", and finally says that it was "unnecessary to decide" in that particular case "which of the two" conflicting decisions *Parry & Co.* v *Appasami Pillai*(2) or *Boissieri* v. *Brockner*(3) should be followed. I am prepared to follow *Parry & Co.* v. *Appasami Pillai*(2) as it has not been overruled and as the reasoning therein seems to me sound; I am not prepared to follow the English cases contra.

I agree that the appeals should be dismissed with costs.

K R.

(1) (1916) I.L.R., 39 Mad., 24.
(2) (1881) I.L.R., 2 Mad. 407
(3) (1889) 6 T.L.R., 85.
(4) (1913) 30 T.L.R., 511.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Ayyangar.

1915. July 21 and 22 and August 12.

SHAIK IBRAHIM ROWTHER *alias* CHINNAPPA ROWTHER AND THREE OTHERS (DEFENDANTS NOS 1 to 4), APPELLANTS,

v

MUHAMMAD IBRAHIM ROWTHER AND THREE OTHERS (PLAINTIFFS AND DEFENDANTS NOS 5 AND 6), RESPONDENTS.*

Muhammadan Law—Lubbais of Coimbatore district—Right of succession—Exclusion of females—Custom—Retention of rule of Hindu Law—Proof of Custom, standard of—Family Custom, proof of—Abandonment of Custom.

Among the Lubbais of the Coimbatore district, who are Hindu converts to Muhammadanism, a custom prevails under which they retain the rule of Hindu Law which excludes females from the right of succession,

Mirabivi v. *Vellayanna* (1885) I.L.R., 8 Mad., 464 and *Kunhambi* v. *Kalanthar* (1914) 27 M L J., 156, referred to.

It is open to them to abandon the custom and follow the ordinary rule of Muhammadan Law

Rajkeshan Singh v *Ramjoy Surma Mozoomdar* (1876) I L.R., 1 Calc, 186, referred to.

Per SRINIVASA AYYANGAR, J.—Custom in its legal sense means a rule exceptional to the general rule of law. In India, in many cases, it is impossible to say that any particular usage which is pleaded is in derogation of a general law, consequently the inquiry in many cases is as to what is the law and not what is the usage at variance with law

Nature of custom and standard of proof thereof required in England and in India compared.

Harbai v *Gorbai* (1875) 12 Bom, H C.R., 294, *Rarichan* v. *Perachi* (1892) I L R, 15 Mad, 281 *Kunhi Raman* v *Kunhi Parvathi* (1910) M.W.N., 642 and *Fanindra Deb* v *Rajeswar Dass* (1885) 12 I A., 72, referred to

APPEAL against the decree of K. SRINIVASA RAO, the Subordinate Judge of Coimbatore, in Original Suit No. 28 of 1909 (*on the file of* R. D. BROADFOOT, the District Judge of Coimbatore).

The parties in this case are Lubbai Muhammadans of the Coimbatore district, who were Tamil-speaking Hindus who became converts to Muhammadanism. The question relates to the right of succession of the daughters along with the sons of a deceased Muhammadan to the estate left by their father. One Muhammad Hussain Rowther died in 1904, leaving him

* Second Appeal No. 106 of 1914.

surviving three sons (who were defendants Nos. 1 to 3 in the suit), a widow (the fourth defendant), and two daughters Ponnuthayee Sulaihabi. The two daughters died. The first plaintiff is the husband of Ponnuthayee and the second plaintiff is her daughter. Defendants Nos. 5 and 6 are the children of the other daughter Sulaihabi. The plaintiffs sued to recover their share under the Muhammadan Law in the share of Ponnuthayee in the estate of her deceased father Muhammad Hussain Rowther. Defendants Nos. 1 to 4 pleaded that according to a custom prevailing among the Lubbai Muhammadans of the Coimbatore district and alternatively according to a custom prevailing among the parties and their relations, the property of a deceased Lubbai devolved on the sons to the exclusion of the daughters, as under the Hindu Law. The Subordinate Judge of Coimbatore, who tried the original suit, held that the alleged custom was not established and that the plaintiffs were entitled to their share as the heirs of the deceased Ponnuthayee in respect of her interest in her father's property along with the defendants Nos. 1 to 4 under the ordinary Muhammadan Law. The defendants Nos. 1 to 4 preferred an appeal to the High Court.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the first appellant.

T. M. Krishnaswami Ayyar for the appellants Nos. 2 to 4.

E. S. W. Senathi Raja, T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondents.

WALLIS, C.J.

WALLIS, C.J.—This case raises a question of considerable difficulty and importance as to the existence of a special custom among Lubbais or Tamil-speaking converts to Muhammadanism in the District of Coimbatore, or alternatively in the family of the parties to the present suit, who belong to that district, to depart from the Muhammadan rule of succession and as alleged by the defendants to follow the Hindu Law as regards the law of property, succession and partition. This however is too broadly pleaded as the only question arising in the suit is whether they follow the particular rule of Hindu Law which excludes females from the right of succession The suit is brought by the plaintiffs who are respectively the husband and minor daughter of the deceased Ponnuthayee as her heirs to recover her share under the Muhammadan Law in the estate of her father, the late Muhammad Hussain Rowther who pre-deceased her. In 1877,

SHAIK v. MOHAMMAD. — WALLIS, C.J.

in a suit tried by INNES, J., on the original side of the High Court, the custom relied by the defendants in the present case was proved to exist, but the case was compromised whilst under appeal, and in *Mirabivi* v *Vellayanna*(1) which came before the High Court in second appeal this Court reversed the decree of the lower Courts finding a similar custom proved in the Palghat country which adjoins the Coimbatore district. The decision of course proceeded on the evidence in the case, but the question was approached from the stand point that it was for the parties setting up the custom to show that though following their religion generally Lubbais had adopted from the Hindu Law the principle of the exclusion of the females. The onus no doubt was rightly placed, but, having regard to the fact that we are dealing with Tamil-speaking people whose adoption of Mahomedanism in many cases due to force cannot be referred to an earlier date than the second half of the eighteenth century, I should prefer to state the question as being, whether after their conversion they had adhered in these respects to the usages to which they had been accustomed as Hindus, and, with great respect, I am unable in the face of the evidence in this case to attach much weight to the suggestion that the state of things which we find existing may be due to unwillingness on the part of Muhammadan females to assert their rights against the male members of the family. Of the later cases this is the first to come before this court on first appeal so as to enable the court to appreciate the evidence for itself, but there have been several cases in the lower courts in which the custom was upheld when set up, and the plaintiff has had to rely largely on the fact that in certain other cases it was not set up. Exhibits L, C, N, R, H, and 9 show that in suits of 1890, 1892, 1894, 1903, 1904 and 1910 arising in the district the women's right to succeed in accordance with Muhammadan Law was not contested. Exhibit G relates to a suit of 1893 in which the custom was pleaded and negatived by the lower courts whose judgments were upheld in second appeal; as, on the other hand, Exhibit B and exhibit B-1 relate to a suit of 1901 in which the District Judge held that the evidence went to show that the parties who were Lubbais had adhered to the Hindu Law in this respect, but had hesitated to plead such

(1) (1885) I L R, 8 Mad., 464.

adherence expressly for fear of being considered not to be good Muhammadans, and had set up instead a family custom under which women were excluded from the succession as regards immoveable property and were given cash and jewels in lieu of their share. He accordingly upheld the decree of the District Munsif disallowing the custom on the ground that it was not pleaded that the parties had adhered to the rule of Hindu Law and that the family custom derogatory to Muhammadan Law had not been proved. Exhibit 18 relates to a suit of 1893 in which it was expressly pleaded on behalf of the minor plaintiff by his mother as his next friend that according to well-established custom the widow and daughter of a deceased Lubbai do not take any share in the inheritance, and the razinamah decree, exhibit XVII, proceeded on this view. Exhibit 3 again is a judgment of the *District Judge, now Mr. Justice* OLDFIELD *in a suit of 1904* which upheld the custom in that case, and exhibit XVI is a judgment of a later District Judge in another suit to the same effect. The general result would therefore seem to be that in more recent years, whenever the custom has been set up, it has been established, and the number of instances in which it has not been set up would appear, as was observed by Mr. Brodie in Exhibit B-1, to be due to the growing disinclination of members of the community to adhere to a usage which is not in accordance with a strict observance of the Quran. Looked at as a whole the evidence in my opinion goes far to show that the Lubbais of this part of India at the date of their conversion preferred to retain the Hindu rule excluding women, as it was not unnatural they should, and I should infer that the usage was general until some time before 1877 when we first hear of the question coming before the courts, as any difference on the point must probably exist before they have given rise to litigation. But it also seems to me perfectly natural that as the evidence shows, there should be of late years a growing tendency to depart from the usage and conform in this matter to the precepts of their sacred law. Now assuming that the special usage among Lubbais of this part of the country has been proved, and that it would be open to individual families to abandon it and conform to the ordinary law governing their co-religionists, as to which see the observations of their Lordships in *Rajkishen Singh* v. *Ramjoy Surma Moozoomdar*(1) it would be a question of fact whether they

(1) (1876) I.L.R., 1 Calc., 186.

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had in fact abandoned it, and such abandonment would have to be proved. It is unnecessary to consider this question further because so far as the parties to the suit are concerned, I think that the evidence, oral and documentary, of their transactions is amply sufficient to show that they adhere to the Hindu rule, even if we put aside the various judgments concerning other persons coming from the same part of the country which support this conclusion

[His Lordship dealt with the evidence in detail and proceeded as follows] :—

I think the evidence, oral and documentary, is sufficient to show that the defendants' family have adhered with perhaps most of the other Lubbais of the neighbourhood to the Hindu rule excluding the succession of females. As observed in *Kunhambi* v. *Kalanthar*(1), it is under the provisions of the Civil Courts Act a question of fact in each case as to the usage followed by the family, and in the present case, I think, the usage is sufficiently proved.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—The principal question for decision in this case is as to the devolution of the property of a Muhammadan named Hussain Rowther who died, it is said, about the end of the year 1904. He left him surviving three sons defendants 1 to 3, a widow, the fourth defendant, and two daughters Ponnuthayee and Sulaihabi. There was another son who is now dead, but whether he left any heirs other than the parties to the suit does not appear. The two daughters are dead. The first plaintiff is the husband of Ponnuthayee and the second plaintiff is her daughter. Defendants Nos. 5 and 6 are the children of the other daughter Sulaihabi.

Plaintiffs sue to recover their share, under the Muhammadan Law, of the share of Ponnuthayee in the estate of her father Muhammad Hussain Rowther. Muhammad Hussain Rowther and the parties to the suit are Lubbais. The claim is opposed by defendants 1 to 4, who plead that, according to the custom prevailing among Lubbai Muhammadans of the Coimbatore district and alternately according to the custom prevailing among the parties and their relations, the property of a deceased Lubbai devolves on the sons to the exclusion of the daughters, as under

the Hindu law, they also state that unmarried daughters are maintained out of the paternal estate and stridhanam given to them at the time of marriage, as in Hindu families. Custom in its legal sense means a rule exceptional to the general rule of law. In countries like England where there is a uniform territorial law binding on all persons, a custom in derogation of that law, when allowed, requires very strict proof. But in India where there are innumerable sects each following its own usage which constitutes its law, in many cases it is impossible to say that any particular usage which is pleaded is in derogation of a general law. For instance, the Numbudris and Nairs of the West Coast are Hindus, but they are mostly governed by their usages. In the case of many of the aboriginal tribes who come in under the general designation of Hindus, the presumption that they are governed by the Hindu law of Smriti writers and their commentators, is so slight that very little evidence suffices to displace this presumption. Among the Nattukottai Chetties of Southern India who are orthodox Hindus, there are usages relating to adoption which are entirely at variance with the rules of Hindu Law. The Moplahs of North Malabar, who are Muhammadan converts from Hinduism, generally follow the marumakkatayam system, modified in some matters by rules of Muhammadan Law, as in the case of succession to self-acquired property. The Khojas and Memon cutchies of Bombay who are Muhammadans by religion follow the Hindu law of succession. *Again a family domiciled in Southern* India is presumed to be governed by the Mitakshara School of Hindu Law, but if it is proved that they emigrated from the northern or Mahratta country, this presumption is rebutted, and the family is presumed to retain the law of the *place from which it emigrated.* In many cases the enquiry is as to what is the law and not as to what is the usage at variance with law. *Hirbai* v. *Gorbai*(1), *Rarichan* v. *Perachi*(2) and *Kunhi Raman* v. *Kunhi Parvathi*(3). The Judicial Committee in dealing with a family custom forbidding adoption said "looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu Law is modified by a family custom forbidding adoption,

(1) (1875) 12 Bom. H C.R., 294 at pp. 316 and 317.
(2) (1892) I.L.R., 15 Mad., 281. (3) (1910) M.W.N., 642.

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but whether with respect to inheritance the family is governed by Hindu Law, or by customs which do not allow an adopted son to inherit." *Fanindra Deb Raiket* v. *Rajeswar Das*(1). The standard of proof which is required in any particular case may therefore vary.

The parties to the suit being Muhammadans by religion they are presumably governed by their religious law, i.e., the Muhammadan Law in matters of succession. There is however the fact that the Lubbais are a mixed class of Muhammadans consisting partly of compulsory converts to Islam made by the early Muhammadan invaders and Tippu Sultan. (See *Madras Census Report of* 1891.) They generally speak Tamil in their houses. Their marriage ceremony is said to closely resemble that of the low Hindu castes. (See Thurston on *Castes and Tribes*, volume IV, page 200.) It is therefore probable that many of the Lubbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion, though in course of time they would try to give up such usages and adopt rules of devolution of property prescribed by their religious law. An examination of the evidence in this case presents these features.

In 1878 this custom was pleaded in a suit in the Original Side of this Court, and Mr. Justice INNES, after a careful consideration of the large mass of evidence, both oral and documentary, placed before him, came to the conclusion that " in the district of Coimbatore there are customs peculiar in regard to marriage and succession, and the most prominent feature in the rule observed as regards succession is that, on the death of a man leaving sons and unmarried daughters and a widow, the sons take to the exclusion of the females who are simply maintained, and that married daughters are regarded as entitled, as among Hindus, to no provisions whatsoever." Exhibit XII. It is noticeable that the evidence in this case consisted mostly of witnesses from the village of Pallipatti in which and in the neighbouring villages the defendants and their relations mostly live. This decision was appealed against but the appeal was however compromised.

This custom was again set up in *Mirabiti* v. *Vellayanna*(2). That was a case of Lubbai Muhammadans residing at

(1) (1885) I.L.R., 11 Calc., 463 at p 476; s.c., 12 I.A., 72.
(2) (1885) I.L.R., 8 Mad. 464.

Palghat. Both the first Court and the first Appellate Court held the custom proved. But the High Court interfered in second appeal holding that the evidence was not sufficient to prove the custom. The learned judges were able to find satisfactory explanation in the evidence in that case as regards the various instances proved in that case of devolution in accordance with the principles of Hindu law.

The next occasion when the matter was the subject of controversy was in the year 1901. Exhibits B and B (1). Exhibit B is the judgment of Mr. Sadasiva Ayyar (now Mr. Justice SADASIVA AYYAR) as District Munsif of Coimbatore and B (1) is the judgment of Mr. Brodie, the District Judge on appeal. A careful perusal of the two judgments leads to only one conclusion, namely, at that time that is so late as 1901, it was the practice of the Lubbai Muhammadans of Coimbatore district to follow Hindu usages in matters of succession. In a paragraph 6 of the appeal judgment Exhbit B (1), Mr. Brodie observes that " though no doubt the customary law of the Lubbais in this district has up to date been more in accordance with Hindu than Muhammadan law as is only natural, I observe a tendency on the part of the defendants in such cases as the present to resort to any defence to defeat such claims amongst themselves rather than plead that they are governed in anything by Hindu Law as this lays them open to the reproach of not being strict observers of Muhammadan practices. The actual decision was in favour of the claim of a female to a share, but this was based on the absence of the plea that the parties were governed by Hindu Law in matters of succession

Again in 1906 the District Judge of Coimbatore held the custom proved in Exhibit III.

This matter came up for adjudication again in 1910 and it was held that among the Lubbais of Pallapatti the custom of exclusion of females was prevalent. Exhibits IX and XIV.

There is only one other judgment to which I need make reference, i.e., Exhibit G. What is printed in the records is merely the decree in the second appeal, but our attention was drawn to the judgments in the lower Courts. It appears that in a previous litigation between the parties this custom was set up, but was found against for want of evidence. In the present litigation the question was disposed of on the plea of *res judicata*. This decision is not of use either way. The respondent relied on several

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judgments in partition suits in which the right of females to shares was not disputed. They are Exhibits L and M in 1890, Exhibit C in 1892, Exhibit N in 1894, Exhibit R in 1903, Exhibit H in 1904 and Exhibit Q in 1910. In Exhibit XVIII, a plaint in a suit of 1893, the custom was expressly pleaded by a mother suing as next friend of her minor son, the suit was compromised, but the compromise decree Exhibit XVII proceeded on this view. The documents referred to above prove in my opinion the general prevalence among the Lubbais of the Coimbatore district of this custom of excluding females from participating in the property of their deceased ancestors at the time of partition, and also that in recent times the custom was not set up in some cases owing to the disinclination of members of this community to follow usages at variance with their religious law.

There is evidence in this case which establishes that the family of the parties follow this custom.

His Lordship then dealt with the evidence in detail and proceeded as follows :—

The evidence above set out taken along with the evidence of the general prevalence of the practice is, I think sufficient to prove the family custom set up.

It is remarkable that the fourth defendant the widow, who if the Muhammadan law applied, would be entitled to an eighth share in the properties of her husband which are of considerable value, disputes the claims of the plaintiffs along with her sons defendants Nos. 1 to 3. No explanation is given for her disclaiming any interest in the valuable properties of her husband nor is there any reason shown for her joining her sons as against her own daughters' children. I am therefore unable to agree with the conclusion of the lower Court on this point. On this ground the decree of the lower Court will have to be reversed and the plaintiffs' suit dismissed with costs throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

N. V. RAMA CHETTY (FIRST DEFENDANT), APPELLANT,

v.

A. L. A. R. R. M. ARUNACHALAM CHETTIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1914. October 30, November 6 and 1915. August 18.

(Madras) Estates Land Act (I of 1908), ss 11 and 151—Suit for injunction by landholder against tenant—Agricultural holding—Erection of building on part of the holding—Part rendered unfit for agricultural purposes—Holding as a whole not rendered unfit, effect of—Right of landholder to reliefs under section 151—Bengal Tenancy Act VIII of 1885, sec. 23

Section 151 of the Madras Estates Land Act gives the landholder a right to sue for any of the reliefs mentioned in clauses 1 and 2 thereof only when the holding *as a whole* was rendered substantially unfit for agricultural purposes by the acts of the ryot committed on the whole or any part of the holding.

Hari Mohun Misser v. *Surendra Narayan Singh* (1907) I L R., 34 Calc., 718 (P.C.), followed.

SECOND Appeal against the decree of A C DUTT, the District Judge of Ramnad, in Appeal No. 106 of 1913, preferred against the decree of K. NARAYANASWAMI AYYAR, the Deputy Collector of Devakota, in Summary Suit No. 556 of 1912

The material facts appear from the judgment.

T. Rangachariyar and *R. Kuppuswami Ayyar* for the appellant.

S. Srinivasa Ayyangar for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The first defendant is the appellant The plaintiffs who are the landlords of the plaint land brought this suit for the following reliefs :—

(*a*) that the permanent damage to the plaint land area of ¼ *kurukkam* inflicted by the defendants by their having erected two walls on the site and placed two stone pillars thereon be removed at the defendants' expense,

(*b*) that the defendants may be made to pay the plaintiffs their costs.

The plaint ¼ *kurukkam* area is in one corner of a big tope land measuring a little over 12 *kurukkams* in extent in the village of Kalakkudi. The plaintiffs' complaint is that as the

* Second Appeal No. 1566 of 1913.

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12 and odd *kurukkams* were granted as tope lands on tope *cowle* (that is for cultivation of fruit trees) the defendants had no right to convert any portion of the lands into a building site and the defendants by enclosing ¼ *kurukkam* by walls, by raising its level and by fixing stone pillars, have made that portion unfit for Horticulture. The suit was brought in the Revenue Court under section 151 (2) of the Madras Estates Land Act.

The second issue raised in the case was whether the suit land or any portion of it has been materially impaired in its value for agricultural purposes and, if so, when? The Suits Deputy Collector gave his finding as follows "It is clear from the evidence that the ¼ *kurukkam* in question has been rendered unfit for cultivation. I therefore find this issue in favour of plaintiffs." Now the issue was whether the suit land or *any portion of it* has been materially impaired in its value for agricultural purposes and the finding is that ¼ *kurukkam* in question has been rendered unfit for cultivation. There is no finding that the suit land of 12 and odd *kurukkams* taken *as a whole* has been materially rendered unfit for cultivation as a tope.

The lower Appellate Court in a very short judgment says. "It may be that the plot in question is only a small fraction of the holding but that circumstance would not take the case out of the purview of section 151 of the Madras Estates Land Act;" and on this finding, the Suits Deputy Collector's decree directing the defendants to remove the walls and to restore the land to its original state was confirmed.

Of the contentions in Second Appeal before us, only one need be considered, the others not being seriously pressed. That one contention is that the Courts below have not considered and tackled the question whether there was a material impairing of the holding of 12 and odd *kurukkams* taken as a whole by acts done on the plaint ¼ *kurukkam* area and that is what they had to consider under section 151, clause 2 of the Madras Estates Land Act.

Section 151, clause 1 of the Act is: "A landholder may institute a suit before the Collector to eject an occupancy ryot from his holding only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes." Clause 2 allows the landholder to sue not only for the relief of eject-

ment mentioned in clause 1 but also for injunction, or for the repair of the damage or for compensation or for a combination of these three reliefs. I am unable to accept the ingenious argument of the respondents' learned vakil Mr. S. Srinivasa Ayyangar that the right given by the second clause to the landholder allowing him to sue for an injunction is not governed by the condition laid down in the first clause, namely that the ryot must have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for agricultural purposes. The second clause is clearly a supplement to the first clause giving the supplementary and alternative reliefs to the relief of ejectment given by the first clause, the right to sue for those supplementary and alternative reliefs however being governed by the same conditions.

The provisions of section 151 were compared by learned vakils on both sides during the arguments with provisions of section 11. Section 11 says "a ryot mays use the land in his holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes." It will be seen that there is a slight difference between the wording of section 11 and the wording of clause 1 of section 151 in two points. The word "substantially" is omitted in section 11 before the words "unfit for agricultural purposes." Again the word "and" is substituted in section 151 for the "or" before the word "render." Lastly the words "for agricultural purposes" appear only at the end of section 11 whereas they appear after both the verbal clauses in section 151, clause 1. I am unable to see what the difference between "materially impairing the value of the holding for agricultural purposes" and "rendering it substantially unfit for agricultural purposes" is or why the conjunction "and" was substituted for "or" in the latter section. I do not think that any real distinction was intended to be made by the slight differences in phraseology between section 11 and section 151, clause 1.

The substantial question for decision is therefore whether section 151 intended to give the landholder a right to sue for any of the reliefs mentioned therein in all cases even if only a part of the holding was rendered unfit for agricultural purposes or whether it intended to give the right to sue for any of those reliefs, only when the holding *as a whole* was rendered

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substantially unfit for agricultural purposes by the acts of the ryot committed on the whole or on any part of the holding. On this question I think we are bound by the decision of the Privy Council in *Hari Mohun Misser* v. *Surendra Narayan Singh*(1). In that case, the Calcutta High Court in construing section 23 of the Bengal Tenancy Act (on which section 11 of the Madras Estates Land Act is founded) laid down that the landholder is entitled to an injunction to remove an indigo vat built upon a portion of a large holding "because that portion had become evidently unfit for agricultural purposes." Their Lordships of the Privy Council say that the proposition of law so laid down by the High Court (namely, that even if a part of a holding had become unfit for agricultural purposes, the landlord is always entitled to an injunction to rectify the acts done on that part of the holding) cannot be upheld as that proposition was laid down too broadly and unconditionally. Their Lordships say that "reference must be had to the circumstances of individual cases," "to the size of the holding," "to the area withdrawn from actual cultivation," and "to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation" before the relief of injunction could be granted.

We are bound to follow this ruling of their Lordships and as we find that the lower Courts have in arriving at their conclusion merely considered the question whether the ¼ *kurukkum* in dispute was rendered unfit for agricultural purposes and have not considered the question whether with reference to the circumstances of this individual case with regard to the size of the holding, with regard to the area withdrawn from actual cultivation and with regard to the effect of such withdrawal upon the fitness of the holding, the value of the holding, as a whole has been materially impaired for the purpose of horticulture, we cannot confirm their decrees.

I would therefore call for a finding from the lower Appellate Court on the following issue on the evidence already on record. "Has the holding of 12 and odd acres taken as a whole been materially impaired in value for agricultural purposes" (which include horticultural purposes) "or rendered substantially unfit for the said purposes owing to the acts found

(1) (1907) I.L.R., 34 Calc., 718 (P.C.).

to have been committed by the defendants on the ½ *kurukkam* referred to in the plaint having reference to the circumstances of this case, having regard to the size of the holding as a whole and to the size of the area withdrawn from actual cultivation and to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation."

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SADASIVA AYYAR, J.

In compliance with the order contained in the above judgment the District Judge of Ramnad submitted a finding on the issue remitted in the negative

NAPIER, J.—I concur.

NAPIER, J.

This Second Appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

SADASIVA AYYAR AND NAPIER, JJ.

JUDGMENT.—We accept the finding and setting aside the decrees of the lower Courts we dismiss the plaintiffs' suit with costs in all Courts payable by the plaintiffs to the first defendant.

K.R

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

Re K. PARAMESWARAN NAMBUDRI (SECOND ACCUSED), PETITIONER.*

1915. July 29 and August 6.

Criminal Procedure Code (Act V of 1898), sec. 195—False endorsement on a promissory note—Indian Penal Code (Act XLV of 1860), sec. 193, complaint under—Sanction—Necessity

Where a complaint of false endorsement on a promissory note to prove a payment of Rs 1,500 was preferred to a Second Class Magistrate but was transferred to a First Class Magistrate and where, between the date of filing of the complaint and its transfer, a suit on the promissory note was filed.

Held, that the sanction of the Civil Court under section 195 (1) (*b*) was necessary before the Court could take action on the complaint ,

Held also, that the date of the presentation of the complaint before a Magistrate having no jurisdiction to entertain it was not the date of the institution of the Criminal Proceedings

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the

* Criminal Revision No 18 of 1915.

Re PARAMESWARAN NAMBUDRI.

order of W. RABJOHNS, the Sub-Divisional Magistrate of Mallapuram, in Calendar Case No. 25 (since renumbered as No. 106) of 1914.

The facts appear from the order of TYABJI, J.

A. Swarama Menon for the petitioner.

N. Grant, The Acting *Public Prosecutor*, for the Crown.

AYLING, J

AYLING, J.—The complaint in this case sets out that some time in the month of Chingom, 1087 (Malabar) corresponding to August 1912, the accused persons, the present petitioners, wrote an endorsement on a promissory note, which had been executed in favour of the complainant (present counter-petitioner), purporting to record a payment of Rs. 1,500 towards that promissory note. No such payment according to complainant was ever made and his case is that the endorsement was written with the intention that it might appear in evidence in case he (complainant) brought a civil suit to recover the amount due on the promissory note.

Now assuming that complainant is in a position to make out (1) that the accused wrote the endorsement, (2) that the payment which it purports to record was never made, (3) that the intention of the accused was that the endorsement should appear in evidence in judicial proceedings then the offence of fabricating false evidence defined in section 192, Indian Penal Code, and made punishable by section 193, Indian Penal Code, would seem to be established. The intention above referred to must almost necessarily be a matter of inference but if it were shown that the accused could have had no other object than the appearance of the endorsement in evidence in case a suit should be brought on the promissory note, then I do not think the uncertainty at the time of writing the endorsement as to whether any suit would ever actually be brought affects the completeness of the offence. The question is whether in this case the Joint Magistrate before whom the complaint was presented on 20th February 1914, was precluded from taking cognizance of the offence by reason of section 195 (1) (*b*), Code of Criminal Procedure. I agree with my learned brother that the earlier presentation of the complaint before a Magistrate who had no jurisdiction to entertain it, may be disregarded.

It is admitted that before 20th February 1914, complainant had actually filed a suit on the promissory note (Original Suit

No. 275 of 1912 on the file of the Court of the District Munsif of Walawanad) and got a decree which was at that time under appeal. The question is whether this circumstance renders the sanction of the Civil Court necessary under section 195 (1) (*b*), Code of Criminal Procedure.

It has been argued before us that it does not, inasmuch as the suit had not admittedly been instituted at the time when the endorsement was written, and the offence committed. I cannot accept this view. The object of this clause of the section seems to be to save the time of Criminal Courts being wasted and accused persons being needlessly harassed by erecting a safe-guard against rash, baseless or vexatious prosecutions for the offences specified. It aims at doing so by providing that where, prior to the institution of the criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion the complaint is one worthy of investigation I see no reason why this safe-guard should be limited to cases where the offence is committed *pendente lite* and should not extend to cases of fabrication of false evidence in advance. Its desirability is just as great in the one case as in the other. It is of course necessary that the "proceeding in any Court" referred to in the clause should be actually instituted before the Criminal Court is asked to take cognizance of the offence If it is not, there is nothing in section 195 to prevent the Court from taking cognizance of the case. And once the Court has lawfully taken cognizance of the case, its jurisdiction is not affected by the subsequent coming into existence of a circumstance which would have barred its jurisdiction, if it had existed at the time of institution.

In my opinion this was a case in which the sanction of the Civil Court was necessary and the complaint should have been dismissed by the Joint Magistrate.

TYABJI, J.

TYABJI, J.—In this case we are asked to revise an order of the Sub-Divisional Magistrate of Malapuram, dated 23rd April 1914, in which he held that he should take cognizance of the complaint before him notwithstanding that no sanction had been obtained under section 195 of the Criminal Procedure Code

Re PARAMESWARAN NAMBUDRI.

TYABJI, J.

The facts alleged in the complaint are that an endorsement had been falsely made in the handwriting and signature of the second accused to the effect that Rs. 1,500 has been paid in respect of a certain promissory note; and it is admitted before us that if the complainant's story is true, then false evidence was fabricated on or about the 30th of August 1912: the complainant's case is that it was fabricated for the purpose of being used in some stage of a judicial proceeding and that therefore an offence under section 193, Indian Penal Code, was committed.

The complaint was filed in the first instance before a Second Class Magistrate on 19th November 1912; but as he had no jurisdiction to take cognizance of it, it was transferred on the 20th February 1914 to a Magistrate of the First Class. Between the date of the complaint before the Second Class Magistrate and the transfer to the First Class Magistrate's Court, Civil Proceedings were instituted (viz., Original Suit No. 275 of 1912 in the Court of the District Munsif of Walavanad resulting in Appeal No. 40 of 1913 which was disposed of on 13th October 1913). The promissory note is alleged to have been filed as an exhibit in these Civil Proceedings.

It seems to me to be clear that the complaint before the Second Class Magistrate cannot be considered for fixing the date of the Criminal Proceedings as that Magistrate had no jurisdiction to try the offence If this is correct then the offence is alleged to have been committed on or about 30th August 1912, Civil Proceedings were commenced some time after, and then on 20th February 1914 the complaint was filed before the First Class Magistrate. It is admitted that the sanction of the Civil Court has not been obtained and the question arises whether the omission to do so is fatal to the proceedings in the First Class Magistrate's Court.

Section 195 (1) (*b*) of the Criminal Procedure Code as it has to be read in the present connection provides that no Court shall take cognizance of any offence punishable under section 193 of the Indian Penal Code of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding when such offence is committed in or in relation to any proceeding in any Court except with the previous sanction of the Court. The real point arising in this case is, whether it can be predicated of the offence in question, that "it is committed in or in

relation to any proceeding in any Court," notwithstanding that the offence was complete before any proceeding had been taken in the Civil Courts.

In *Noor Mahomad* v. *Kaikhosru*(1) the Acting Chief Presidency Magistrate, *in his reference to the High Court, pointed out* that if the clause in question is interpreted very widely it may retrospectively render nugatory many complaints which are valid when filed; and the Court accepting the Magistrate's view was of opinion that when the offence in question is one under section 471 of the Indian Penal Code (use of a forged document) and the document is alleged to have been used outside the Court, no sanction is necessary. According to this case if the document has already been used outside the Court and the charge refers to that offence no sanction is necessary, though subsequently to such use, legal proceedings are instituted and the document is produced or given in evidence in Court, and apparently though such production in Court may have been prior to the complaint. A similar view is expressed by KNOX, J., in *Lalta Prasad* v. *King-Emperor*(2) No authority has been cited to us having reference to section 195 (1) (*b*). The case brought to our notice were all under section 195 (1) (*c*).

Clauses (*b*) and (*c*) agree in some respects, but differ in this—that the offence is identified in clause (*b*) by reference to the fact that it has a direct connection with some proceedings in Court, viz., having been (i) committed in or (ii) in relation to the proceeding, whereas in clause (*c*) the offence has to be connected not with the proceeding, but (i) with a document produced or given in evidence in the proceeding, and (ii) by the fact that the document has been produced or given in evidence by a party to the proceeding.

In the one case it suffices if the offence has reference to the proceeding, in the other it must have reference to a party to the proceeding, and to a document produced or given in evidence by the party. The corresponding portions of the particular expression on which the present decision turns are also not the same, clause (*b*) runs "When the offence is committed" clause (*c*) "When the offence *has been* committed"

(1) (1902) 4 Bom. L.R. 263 (2) (1912) 10 A.L.J., 294

Re PARAMESWARAN NAMBUDRI

TYABJI, J.

In *Giridhari Marwari* v. *The Emperor*(1) the counsel for the prosecution contended that subsequent legal proceedings altered the circumstances in regard to a charge for forgery (section 463) so that the prosecution could not proceed though the offence was complete, and the complaint had been made, before any legal proceedings had been instituted. But the contention was opposed to the decision in *Noor Mahomad* v. *Kaikhosru*(2) to which I have just referred and the Court did not in *Giridhari Marwari* v *The Emperor*(1) itself express any opinion on the question. In *Teni Shah* v. *Bolahi Shah*(3) it is merely stated at page 480: "This forgery is alleged to have been committed in respect of a document produced at a proceeding in this Court; it comes therefore within the express words of section 195 and before the petitioner could be prosecuted for forgery sanction is required." The case does not take us any further.

These decisions as I have already said are with the reference to clause (*c*). The offences referred to in clause (*b*) fall under two classes:—

(i) Some of them (e.g., those under the Indian Penal Code, sections 205 *et seq* are such as can be committed *only* in or in relation to legal proceedings;

(ii) There are others (including the offence under section 193, Indian Penal Code) which may be committed irrespective of legal proceedings.

It is only in regard to an offence falling under the latter head that the qualification "when such offence is committed in or in relation to any proceeding" can have any *force*.

Again some of the offences falling under the second head are such that the accused must have legal proceedings in contemplation and the offence now in question (fabrication of evidence for the purpose of being used in any stage of a judicial proceeding) is obviously one of this nature.

In regard to offences of the last-mentioned kind while it seems to me that the operation of the clause must be restricted to cases where before any charge is brought against the accused, such legal proceedings have already commenced as the prosecution allege to have been in the contemplation of the accused at the

(1) (1908) 12 C.W N., 832. (2) (1902) 4 Bom. L.R, 263.
(3) (1902) 14 C.W.N., 479.

time of the commission of the offence, though I can quite see that by interpreting the section in a very strict way when the offence is complete prior to there being any legal proceedings there may appear no necessity for sanction. For it may be said that no act can be done and no offence committed in or in relation to any non-existent proceeding. But, as my learned brother points out, the object of the section is to prevent rash, baseless or vexatious prosecutions in regard to offences for which a safe guard is available. Hence when the offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind, and prior to his being charged with the commission of the offence, legal proceedings of the same nature have already commenced in any Court, it seems to me that it is most in consonance with the intention of the legislature to require that the sanction of the Court should be obtained. This decision is not opposed to that given in *Noor Mahomad* v. *Kaikhosru*(1). For there the offence was under section 471—the use of a forged document—not an offence in which the accused has necessarily any legal proceedings in mind at the time of committing the offence and the actual offence charged had no reference to any legal proceedings. In my opinion, therefore, the Court cannot in this case take cognizance of the offence.

S.V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Srinivasa Ayyangar.

1915. July 27 and 28.

G. NARAYANASWAMI NAYUDU, RECEIVER OF NIDADAVOLE AND MEDUR ESTATES (PLAINTIFF), APPELLANT,

v.

N. SUBRAMANYAM (DEFENDANT), RESPONDENT.*

(Madras) Estates Land Act (I of 1908), sec. 3, cl (d) and sec. 6—Whole inam village—Minor inams therein—Sarva inam of the temple, whole village described as—Landholder, meaning of, in section 6 of the Act

Section 3, sub-section (2), clause (d) of the Estates Land Act excludes from the definition of "estate," minor inams, i e, particular extents of lands in a particular village as contrasted with the grant of the whole village by its

(1) (1902) 4 Bom L R., 268

* Appeal No 75 of 1914.

NARAYANA-SWAMI NAYUDU v. SUBRAMANYAM.

boundaries. A whole inam village, though containing such minor inams is an estate within the meaning of clause (*d*) of the above section.

Where a village is described as *sarva* or rent free agraharam of a deity, it means that the whole village has been granted to the deity as inam.

The term "landholder" in section 6 of the Act includes a receiver appointed to manage the estate.

APPEAL against the decree of T. S. TYAGARAJA AYYAR, the Temporary Subordinate Judge of Ellore, in Original Suit No. 33 of 1913.

The facts of the case appear from the judgment.

P Nagabushanam Pantulu for the appellant.

P. Narayana Murti for the respondent.

WALLIS, C.J. AND SRINIVASA AYYANGAR, J.

The following judgment of the Court was delivered by SRINIVASA AYYANGAR, J.—Plaintiff, the receiver of the Nidadavole estate sues to recover possession of certain lands let to the defendant in fasli 1320 together with mesne profits. His case is that the letting was for one year, and that the defendant is holding over after the expiry of the term. The defendant pleads that he has acquired the occupancy right to these lands under section 6 of the Estates Land Act. The lower Court has dismissed the suit and the plaintiff appeals.

The principal question which arises for determination in the appeal is whether Venkatapuram agraharam in which the suit lands are situate is an estate within the meaning of section 3, sub-section 2, clause (*d*) of the Estates Land Act. Venkatapuram agraharam is an inam village belonging to Bala Venkateswara Swami and the grant seems to have been made by a former Zamindar of Nuzvid. The plaintiff sues as trustee of the temple. The Venkatapuram agraharam is described in the various documents filed in the case as the sarva or rent-free agraharam of Sri Bala Venkateswara Swami, and this description occurs from the earliest times. (See Exhibit H, the Jamabandi Account for fasli 1268.) This would obviously mean that the whole village of Venkatapuram belonged to the temple as inam. However, there are certain minor inams in this village which appear to be of three classes; one class of inams being archaka service inams, another class being village service inams and the third dharma dhaya inams. It does not appear whether the grant to the temple of the village was made first or whether the minor inams were granted first.

NARAYANA-SWAMI NAYUDU v. SUBBA-MANYAM.

WALLIS, C.J. AND SRINIVASA AYYANGAR, J.

The appellant contends that inasmuch as there are these minor inams in the same village, it would not be said that the Venkatapuram agraharam is a village of which the land revenue has been granted as inam within the meaning of section 3, clause 2 (*d*) of the Act, his contention being that inasmuch as the land revenue on some of the lands in the village had been granted as inam to third parties, it cannot be said that the temple is the grantee of the revenue of that village. We are unable to agree in this contention. The definition in sub-section 2, clause (*d*) was obviously intended to exclude from the definition of "Estate" what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as "whole inam villages." The existence of "minor inams" in whole inam villages is very common and if these inam villages do not come within the definition of "Estate" almost all the agraharam, shrotriyam and mokhasa villages will be excluded. This certainly cannot have been the intention of the legislature. These minor inams are generally granted for services to be rendered to the village or to the owner and that seems to be the nature of the minor inams in this case. In all the documents the temple is described as the owner of the whole village and in these circumstances the burden is upon the plaintiff to show that the grant was only of the revenue of a portion of the lands in the village and he has not put in evidence the inam register which would have supported his case if true. We therefore disallow this contention.

It is next contended that it is not shown that the inamdar, that is, the temple, was not the owner of the kudivaram at the time of the grant which again would take the case out of the definition of an estate. The evidence which is discussed in paragraphs 15 to 17 of the lower Court's judgment shows clearly that the inamdar, namely, the temple was not the owner of the kudivaram at the time of the grant. We therefore hold that the Venkatapuram agraharam of which Sri Bala Venkateswara Swami is the inamdar or the agraharamdar is an estate within the meaning of clause (*d*) of sub-section (2) of section 3 of the Estates Land Act. Mr. Nagabhushanam for the appellant also argued that the suit lands are not "ryoti lands," but are "old waste." In the muchilika, Exhibit B, executed by the

NARAYANA-SWAMI NAYUDU v. SUBRAMANYAM.

WALLIS, C.J. AND SRINIVASA AYYANGAR, J.

defendant, these lands are described as "jeroyati lands," and in Exhibit IX, a previous lease of the same lands, they are described as "mamul wet." We hold therefore that these lands are not proved to be "old waste"; but are "ryoti lands."

The appellant finally contended that the receiver is not a landholder within the meaning of section 6 of the Act. It is admitted that the definition of "landholder" in section 3 includes the plaintiff. But it is said that unless the landholder is also a beneficial owner of the estate, he is not a landholder within the meaning of section 6. We do not see any reason to put any such restricted construction on the word "landholder," in that section. A receiver must have the same powers of management as an owner, and letting a tenant into possession of cultivable lands in the estate would ordinarily be included in the power of management We agree in the conclusions of the lower Court and dismiss the appeal with costs.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1915 July 3.

Re HAWKINS, GENERAL MANAGER, THE INDIAN ALUMINIUM COMPANY, LIMITED, ACCUSED.*

Criminal Procedure Code (Act V of 1898), sec. 432, reference under—Indian Electricity Act (IX of 1910), sec. 33, scope of—"Every person", meaning of.

The term "every person" in section 33 of the Indian Electricity Act are not confined to persons licensed under Parts II and III of the Act.

Section 33 of the Act is not confined to cases in which the accident actually results in personal injury or death but also extends to cases likely to have resulted in loss of life or personal injury.

CASE referred for the orders of the High Court under section 432 of the Code of Criminal Procedure (Act V of 1898) by L. A. CAMMIADE, the Fourth Presidency Magistrate, Madras.

The facts appear from the letter of reference which is as follows:—

"Under the provisions of section 432 of the Criminal Procedure Code, I have the honour to submit the following case for the opinion of the High Court on the points of law raised

* Criminal Revision Case No. 356 of 1915 (Referred Case No. 39 of 1915).

"Mr. Hawkins, General Manager of the Indian Aluminium Company, Limited, has been charged under section 33 (1) of the Indian Electricity Act, 1910, for not having notified to the Electric Inspector to the Government of Madras an accident which occurred in his works on or about the 17th March last.

"In his written complaint, the Electric Inspector states that he came to hear of the accident on the 9th of April and that on interviewing the General Manager he learnt from him that one of the two bolts of the large end of the connecting rod of a 66 B.H.P. gas engine driving an electric generator broke and set loose the connecting rod and piston with the result that the major portion of the engine was wrecked, the crank guard was broken and flying piece narrowly missed a man at work close by.

"It is admitted for the defence that an accident did happen as described by the Electric Inspector and that it was not reported. But, it is denied that a flying piece narrowly missed a man at work.

"This, however, is not the main defence. Firstly, it is argued that there was no objection on the part of the accused to report the accident and secondly that the accident is not of the character described in section 33 of the Act.

"The first point is based on the contention that the Act was not intended and does not apply indiscriminately to all persons using electric energy but only to such as are licensed under Parts II or III of the Act. The Indian Aluminium Company is not a licensee under Part II and had not a license under section 30 of Part III But I can see no reason why section 33 of the Act, for the infringement of which this prosecution has been instituted, should be thus limited. It requires that 'every person shall send . . . a notice . . . of any accident in connection with the generation . . of the energy resulting or likely to have resulted in loss of life or personal injury in any part of such person's works . . . .' It seems clear from this that the quantity of electric energy used is immaterial in regard to the question whether an accident in the generation or use of electricity should be reported and that if an accident is such as resulted in, or was likely to have resulted in, loss of life or personal injury in any part of a person's works and is in connection with the generation or use of electric energy the accident must be reported to the Electric Inspector whatever the quantity of energy used and this, although an obligation may also lie under the Indian Factories Act to report the accident to the Factories Inspector The points however are not quite free from doubt.

"The second plea turns on the interpretation of the words 'accident . . . likely to have resulted in personal injury.' It is

Re HAWKINS. admitted for the defence that somebody in the factory might have been injured and even killed But it is argued that until and unless somebody was injured it is almost impossible to say that an accident is likely to have resulted in personal injury. It is pointed out that section 34 of the Indian Factories Act which was passed a year after the Electricity Act requires a report only in case an accident has actually resulted in personal injury. Also it is argued that almost any machine accident, even the most trivial, is capable of causing personal injury of some kind to people around and that the section is certainly not intended to apply to all such accidents It is therefore contended that 'accident', as used in this section, means only an accident resulting in personal injury or death. These arguments for the defence would, if accepted, delete altogether the words 'likely to have resulted' from section 33 and further the limitation of word 'accident' to personal injuries is opposed to the context. But there is some difficulty in interpreting the word 'likely.' In ordinary parlance, an accident or injury is spoken of as likely to happen when in the given circumstances of the case the probabilities are that it will happen In the case of a machine accident in a factory the elements that have to be taken into consideration in order to determine the chances that an accident will or will not result in injury to people employed near at hand are so numerous and complicated that even experts might differ. In the present case, the Inspector of Electricity could not say that the chances were in favour of an accident happening, and unless the probabilities are in favour of accident resulting in the given circumstances in personal injuries, I think it could not be said that the accident was likely to cause personal injury. But such an interpretation places the prosecution in a very different position and will lead to the introduction in cases of this kind of the most hopelessly conflicting expert evidences."

Partridge for the accused.

J. C. Adam, the Crown Prosecutor, for the Crown.

The following order of the Court was delivered by AYLING, J.—

AYLING AND TYABJI, JJ. In making this reference the Presidency Magistrate should have distinctly formulated the questions of law which he referred for our opinion.

As far as we can deduce them from his letter of reference they are two in number—

(1) Whether the term "every person" in section 33 of Act IX of 1910 is confined to persons licensed under Parts II and III of the Act?

(2) Whether section 33 is confined to cases in which the accident actually results in personal injury or death?

Our answer to both questions is "No." As regards the second we may add that the wording of the section is perfectly clear and specifies cases *likely* to have resulted in loss of life or personal injury as well as those which actually so resulted. Whether such a result was likely in any case in which it did not actually ensue is a question of fact to be determined with reference to the surrounding circumstances

Attorneys for the accused—*Messrs King and Partridge*

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr Justice Napier.

1915. September 3

C. A. EASWARA IYER (PLAINTIFF), APPELLANT,

v

K. GOVINDARAJULU NAIDU (DEFENDANT) RESPONDENT.*

Presidency-Towns Insolvency Act (*III of* 1909), *sec* 17—*Decree of Presidency Small Cause Court—Judgment-debtor, adjudicated insolvent subsequent to decree—Adjudication by the High Court—Application for execution by arrest in the Presidency Small Cause Court—Leave of the High Court, not obtained—Release of Judgment-debtor on security—Non-appearance, effect of—Security bond, validity of—Jurisdiction—Waiver—Presidency Small Cause Courts Act* (*XV of* 1882), *sec.* 69

Where a decree was passed by the Presidency Small Cause Court against a person who was subsequently adjudicated an insolvent by the High Court in the exercise of its insolvency jurisdiction, the former Court had no jurisdiction without the leave of the High Court to entertain any application for execution of the decree against the insolvent under section 17 of the Insolvency Act III of 1909. Consequently a security bond, executed to the former Court by a third party for the appearance of the judgment-debtor in the course of the execution proceedings carried on without the leave of the High Court, was obtained without jurisdiction and was void in law

A reference to the High Court under section 69 of the Presidency Small Cause Courts Act should state clearly the points on which there is a difference of opinion among the Judges of the Small Cause Court

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* Referred No 3 of 1914.

EASWARA IYER v. GOVINDA-RAJULU NAIDU.

CASE stated under section 69 of the Presidency Small Cause Courts Act (XV of 1882), by C. KRISHNAN, the Chief Judge and V. C. DESIKA ACHARIYAR and S. RAMASWAMI AYYANGAR, the Judges of the Presidency Court of Small Causes, Madras, in Full Bench Application No. 589 of 1913 in Small Cause Suit No. 6809 of 1913.

The facts of the case appear from the judgment of NAPIER, J.

Venkatasubba Rao and *Radhakrishnayya* for the appellant.

W. V. Rangaswami Ayyangar for the respondent.

NAPIER, J.

NAPIER, J.—This is a reference under section 69 of the Presidency Small Cause Courts Act (XV of 1882). It is much to be regretted that the Judges of that Court did not adhere more closely to the directions of the section in making their reference. *They do not state clearly the points on* which there is a difference of opinion. They practically refer the whole case to this Court saying that they are not agreed on the question whether "under the circumstances of the case, the bond should be enforced against the surety, the defendant." In my opinion this is not a proper reference and were it not that one of the Judges of that Court has now retired, I would, speaking for myself, return the reference for resubmission in strict accordance with law. As that course is now impossible, I will deal with it as if the reference was on three points:—(1) whether there was any jurisdiction in the Court to take the bond, (2) whether the protection order granted by the High Court in the exercise of its insolvency jurisdiction operated to make the bond void and (3) whether the sum mentioned in the bond was penal. These three points have been elaborately argued before us, on the second point, the principal question to be considered are:—whether the continuance order did in fact relate back to cover the date when the bond was taken and also whether the protection order continued after he had entered this debt in his schedule could be read as covering this debt when no specific reference was made to the fact in the continuance order. From what we learn from the Registrar, it is clear that these orders for continuance of protection are made in rather a routine manner after once the protection has been given and I am inclined to think that [illegible]y continuation of protection would cover all debts contained

an[illegible]

in the schedule at the date of each such continuation order unless the order is made exempting from protection with respect to any particular debt. The point however is not under the present procedure of much importance, for I am of opinion that the first question must be answered in the negative. I hold that the Small Cause Court had after the 2nd of December, the date of his adjudication, no jurisdiction over the debtor to make any order against him without the sanction of the High Court. Section 17 of Act III of 1909 is far wider in its terms than the corresponding provisions in the old Insolvency Act of 1848 on which the present protection system is based. Section 17 covers the same ground as section 7 and section 49 of the old Act, but provides an entirely different procedure. Under section 49 a suit or action or execution proceeding pending in a Court at the time when the insolvent filed his schedule *could* be stayed, set aside or suspended by that Court, the Insolvency Court having power under another section to protect the insolvent from arrest on account of either all or any of the debts mentioned in the schedule. Section 17 of the present Act goes a great deal further. It provides that no creditor to whom the insolvent is indebted in respect of any debt *provable* in insolvency shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent or commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. It is argued before us that applying for a warrant in execution proceedings is not commencing other legal proceedings within the meaning of the section and *Emperor* v. *Mulshankar Harinand Bhat*(1), is relied on as an authority for that position, the words used by one of the learned Judges being "by other legal proceedings is meant particularly other proceedings of a civil nature connected with the insolvency debts."

The question before the Court was however whether the proceedings in a Criminal Court were without jurisdiction under this section, and it is with reference to that contention that the observation is made. That case is therefore no authority for the position. Reliance is also placed on the difference in

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(1) (1911) I.L.R., 35 Bom., 63

EASWARA IYER v. GOVINDA-RAJULU NAIDU.

NAPIER, J.

language of the Provincial Insolvency Act which "have any remedy against the property or the *person* of the insolvent or commence any suit or other legal proceeding." I do not however think that this difference in wording detracts from the meaning to be given to the words "other legal proceedings." Execution proceedings were specifically mentioned in section 49 of the old Act and were clearly intended to cover applications for arrest as the proviso to the section enacts that if a person was already in custody, he should not be discharged out of it otherwise than by a protection order which could be made under section 13. It is further argued that if section 13 of the Act is to be held to include proceedings by way of application for warrant or arrest in execution, there is no necessity for a protection order. The answer is that the words in section 17 will not avail to discharge an insolvent from arrest any more than the words of section 49 of the old Act and that the order of the High Court is still necessary in such circumstances and may be granted or refused by the Court as it thinks fit. I am therefore not prepared to cut down the broad principle on which the section is based, namely, that when once a person is adjudicated an insolvent creditors seeking any remedy against him must just come to the High Court, on its insolvency side to get leave for that purpose. Applying this view of the law to the facts of the case, I am of opinion that after the 2nd of December, the date when the order of adjudication was made, the Court of Small Causes has no jurisdiction without the leave of the High Court to entertain any application in execution against the insolvent: and that leave admittedly not having been procured taking of security in execution proceedings was *ultra vires* of the Court. The matter being one of jurisdiction, it is immaterial whether the insolvent claimed the benefit of the section or not, though as a matter of fact it is clear that the Court was aware of the adjudication. In this view it becomes unnecessary to consider any other question and I would answer the reference by the learned Judges as indicated above. I would add that it is not at all clear to me under what provision of the Small Cause Court Act this bond was taken.

Section 55 (4) of the Civil Procedure Code provides that where a judgment-debtor who has been arrested expresses his intention to apply to be declared an insolvent he can be

released on furnishing security; but the High Court in making rules for the Presidency Small Cause Courts under section 9 of that Act has not embodied this provision in the rules and I have great doubt whether either section 30 of the latter Act or Order 21, rule 27 empowers the Court to take a bond of the nature.

EASWARA IYER v. GOVINDARAJULU NAIDU.

NAPIER, J.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree that the first question should be answered in the negative. The decree debt of the plaintiff against the insolvent was provable in the insolvency. Hence section 17 of Act III of 1909 took away the jurisdiction of the Small Cause Court to pass any orders in execution without the leave of the High Court after the judgment-debtor had been adjudicated an insolvent. The bond sued on was therefore obtained without jurisdiction and was void. I do not answer the other questions as the answer to the first question is sufficient for the decision of the suit.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Phillips.

1914. November 13, 16 and 17 and 1915 September 9, 10 and 14

KALIANJI SINGJI BHAI (SOLE PARTNER OF THE FIRM OF RAYSEE AMARCHAND)—(COUNTER-PETITIONER), APPELLANT,

v.

THE BANK OF MADRAS (PETITIONER), RESPONDENT.*

Provincial Insolvency Act (III of 1907), ss 16, 47, 12, cl. (3), and 51—Insolvency Rules XXI, cl. (3) and V, cll. 2 and 3—Civil Procedure Code (V of 1908), O. III, r 3 and O V, r 12—Petition by creditor to adjudicate debtor an insolvent—Service of notice on agent, if sufficient—No notice sent by Court through registered post, effect of—Acts of insolvency committed by agent, if sufficient—Difference between English and Indian Law

Where a petition was filed in a District Court by a creditor praying for an order to adjudicate his debtor an insolvent under section 16 of the Provincial Insolvency Act and a notice of such petition was served on his local agent with a general power of attorney from the debtor who was residing outside the jurisdiction of the Court

Held, that the service of notice on the agent was in law sufficient though no notice was sent by the Court to the debtor through registered post.

* Appeal Against Order No 62 of 1914.

KALIANJI v. THE BANK OF MADRAS.

consequently in the affirmative. With reference to the latter part of the third issue, the muktiarnama (Exhibit J) under which the agent acts gives him sufficient authority to represent the debtor and the vakalath executed by him for the petition was in pursuance of it The service of the notice already referred to on the agent was service sufficient under Order III, rule 3, Civil Procedure Code and Order V, rule 12, Civil Procedure Code and with reference to rule V (2) of the Madras Insolvency Rules. I find therefore that in the circumstances stated valid service was effected on Visram.

SPENCER AND PHILLIPS, J.J.

This Appeal Against Order coming on for final hearing, the following Judgment of the Court was delivered by SPENCER, J. The appellant is the sole partner of the firm of Rayseo Amarchand carrying on a money lending business at Calicut with a head office at Bombay. On December 3rd, 1912 the Agent of the Bank of Madras, the respondent in the case, presented a petition to the District Judge to adjudicate the appellant insolvent and to appoint an *ad interim* receiver. On December 6 a notice signed by the Sarishtadar of the District Court (by order) went to the local agent to inform him that a petition to declare the appellant insolvent was posted for January 21 and that he might appear and show cause against it. The agent, Visram Sait, refused to receive the notice on the ground that his master should be made a party, and it was served on him by affixture. On December 7, a notice of the hearing together with a copy of the petition was sent by the respondent's pleader through registered post to the appellant at Mandavi in Cutch, where he was thought to be residing, but it was returned to the sender as the addressee had "Left, Particulars not known." At the hearing on January 21, notice was ordered by the Court to go to the principal debtor for March 11, but admittedly no further attempt was made to serve a notice of the date of hearing on the debtor in person as it was found impossible to do so. On March 11, the notice given to the local agent was declared by the Court to be sufficient, and on the same date the said agent filed in Court a counter-petition on behalf of the appellant describing himself as his muktiar. The proceedings were fully contested and ended on December 19, 1913, in an adjudication of the debtor under section 16 of the Provincial Insolvency Act as insolvent.

A number of objections have been raised to the sufficiency of the service of the notice on the agent and our attention has been called to the fact that the agent did from the first object to receiving notice for his principal.

These objections may be briefly answered by a reference to the provisions of the Provincial Insolvency Act and the rules framed under the authority of section 51. Section 12 (3) provides that in cases where the petition is by the creditors notice of the date of hearing shall after admission of the petition be served on the debtor in the manner provided for service of summons. Section 47 directs that Courts of Insolvency shall subject to the provisions of this Act follow the procedure followed in regard to original civil suits. Order V, rule 12 of the Civil Procedure Code, declares that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Rule 13 allows service to be made on any agent who at the time personally carries on business or work for a person, who does not reside within the Court's jurisdiction, *in any suit relating to business or work*. Order III, rule 3 (i), makes service on a recognized agent as effectual as if it was on the party in person unless the Court directs otherwise. A recognized agent includes a person holding a power of attorney authorizing him to make and do such appearances, applications and acts on behalf of such parties (Order III, rule 2) Exhibit J, the power of attorney held by Visram Sait from the appellant, authorizes him "to defend all suits, appeals and actions" in the Courts of this Presidency to which the appellant may be a party and "*generally to act for* him and to do all things and acts that may be necessary and that the attorney may think fit for the complete discharge of his business effectually, completely and to his benefit"; thus there can be no question that there was a valid service under the Civil Procedure Code on the appellant's agent, and that the Court declared it to be sufficient.

Turning to the rules framed by the High Court under section 51 of the Insolvency Act, we find that clause 3 of rule XXI provides that notice of the date of hearing of an insolvency petition, shall, if the petition is by the debtor, be sent by the Court by registered post to all creditors and if the petition is by a creditor, shall be sent to the debtor, not less than fourteen days

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before the date of hearing. Notice was not sent to the debtor in this case by the Court through registered post, although the Bank's Vakil attempted vainly, as already mentioned, to communicate a notice and a copy of the petition to the appellant in a registered letter As we read the rules, however, the sending of a notice by registered post is chiefly intended to provide for the information to be given to creditors on a petition by a debtor and to particularize the words "such other manner as may be prescribed" in section 12, clause (2). We are not aware of any practice of sending notices of the hearing to debtors through the post in the first instance upon creditors' petitions. Notice to debtors is otherwise provided for by rule V, clause (2), and by the rules under the Civil Procedure Code. If a debtor gets notice of the hearing served on his authorized agent like a summons, he cannot reasonably complain that he did not also receive a similar notice from the Court through the post, and his objection might be answered by a reference to section 99, Civil Procedure Code. Rule V, clause 2 of these rules, directs that a copy of an insolvency petition presented by a creditor shall be served together with the notice of the date of hearing "on the debtor or the person on whom the Court orders notice to be served." It is not required that such an order should be in writing. In this case the notice was addressed to the agent and was signed by the District Court Sheristadar (by order). It was served under Order V, rule 17, Civil Procedure Code, more than 14 days before the hearing on January 21. Presumably this was a good notice to the agent, and as the agent appeared and filed a counter-petition on March 11 in which he did not raise any objection to the manner or time of service, he must be deemed to have waived any objection that he might have had to any supposed irregularities in the giving of notice.

So much for the question of notice. More substantial objections have been raised to the capacity in law of an agent to represent a debtor in insolvency proceedings, and to the capacity of a debtor to be adjudicated insolvent upon an act of insolvency committed by his agent. It is argued that as orders of adjudication relate back to and take effect from the date of the presentation of the petition on which they are made [vide section 16, clause (6)], and as the agency of Visram Sait terminated under section 201 of the Contract Act by his principal being

adjudicated an insolvent, therefore the agency must be taken to have ceased on the presentation of the petition; and that by the appointment on December 3 of a Receiver, in whom the property of the debtor vested, the business of the firm could no longer be carried on by the agent and *ipso facto* his power of attorney became void. But it is evident from a reading of the whole of this section from clauses 2 to 6 that they all deal with the property of the insolvent. This was made clear in *In re Pollitt*(1) where in treating of the corresponding section of the English Bankruptcy Act, Lord ESHER observed. "The result of the relation back is that all subsequent dealings with debtor's *property* must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed." The agent's power of attorney in this case empowered him to do other acts besides carrying on the trade and dealing with his property and one of those acts must be taken to be to stave off bankruptcy orders against the firm.

As regards the jurisdiction of the Courts to adjudicate persons insolvent upon acts of insolvency committed by their agents there appears to be a difference in the law as it stands in England and in India.

In *Exparte Blain*(2) it was held that an act of bankruptcy must be a personal act or default and could not be committed through an agent. This principle was followed in *Cooke* v. *Vogeler*(3), another case of a foreigner domiciled and resident abroad having business in England, but in both of these decisions it was conceded that if the law had been different the Courts would have had to take a different view.

In India it has been expressly enacted as an explanation to section 4 of the Provincial Insolvency Act that for the purposes of that section which deals with acts of insolvency committed by a debtor the act of an agent may be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobay*(4) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal.

(1) (1893) 1 Q.B., 455.
(2) (1879) 12 Ch. D., 522.
(3) (1901) A.C., 102.
(4) (1897) 2 C.W.N., 300.

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In this case if the fact that the firm at Bombay of which appellant was partner had suspended payment, of which Mr. Lamb states that the agent gave him notice, be taken as the act of insolvency giving rise to these proceedings, there is no need to consider the effect of the agent's act as agent, as the suspension of payment at Bombay was the act of the principal, but if the suspension of payment by the branch at Calicut and the inability of the agent there to meet his bills in Calicut, to which Mr. Deane has testified, be taken into account, then we have no hesitation in applying section 4 of the Act and in holding that the order of adjudication based on such an act of insolvency was a perfectly valid order. We agree in holding that an act of insolvency has been proved. We dismiss the appeal with costs.

Solicitors for respondent.—*Messrs. David, Brightwell and Moresby.*

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1915. October 1, 4, 5, 6, 7 and 15 and November 19.

T SITHARAMA CHETTY AND FIVE OTHERS (SECOND PLAINTIFF AND DEFENDANTS Nos 1 TO 5), APPELLANTS,

v.

SIR S. SUBRAMANIA IYER, K.C.I.E., AND THIRTY-TWO OTHERS* (FIRST PLAINTIFF, DEFENDANTS, MEMBERS OF THE BOARD OF CONTROL, NEW TRUSTEES, AND NEW TREASURER APPOINTED BY THE SUBORDINATE JUDGE OF TRICHINOPOLY AND SUPPLEMENTAL RESPONDENTS), RESPONDENTS *

Religious Endowments Act (XX of 1863), sec. 3—Suit for scheme for a temple falling under section 3—Civil Procedure Code (Act V of 1908), sec. 92, jurisdiction of Courts to frame a scheme under—Temple Committee, powers of

Ever since 1842 when the Board of Revenue handed over the management of the temple of *Srirangam to certain trustees, one trustee* was chosen hereditarily every year from a certain family in the locality called the "Sthalathars" and two other trustees were appointed till 1863 by the Board and later on by the temple committee formed under the Religious Endowments Act (*XX of 1863*). In several litigations *connected with the temple, the temple* was treated as one falling under se[illegible]

Held, that th[illegible]

and was thus su[illegible]

* Appeals Nos. 328 and 355 of 1913

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Though the Courts cannot interfere with the statutory powers conferred upon the members of the temple committee so as to deprive them of their statutory functions, yet the Court has jurisdiction to frame a scheme under section 92, Civil Procedure Code (Act V of 1908), in respect even of a temple subject to the control of the temple committee, and introduce changes in its administration which the committee is not legally competent to introduce and which are desirable and necessary to meet the altered circumstances of the time. Considering that the actual management of the temple must vest in the trustees subject to the statutory control of the committee, their Lordships held it undesirable in framing a scheme to introduce, as the lower Court did, a new body of people called a Board of Control over the trustees and hence abolished the same.

In the result their Lordships framed a scheme for the temple providing among other things, for (*a*) the appointment of two additional trustees for the better management of the temple, (*b*) the tenure of office of the trustees appointed being only for five years, (*c*) the preparation of annual budget and audit of temple accounts and (*d*) the appointment of a cashier under the trustees.

Per curiam —The powers of the Committee or any other statutory body do not become suspended by the occurence of a vacancy among its members.

Powers of a temple Committee considered.

Santhalva v Manjanna Shetty (1911) I.L.R., 34 Mad., 1, dissented from. English and Indian cases reviewed.

APPEAL against the decree of C. KRISHNASWAMI RAO, the Subordinate Judge of Trichinopoly, in Original Suit No. 25 of *1912*.

The following facts of the case are taken from the judgment of the lower Court :—

WALLIS, C.J.

" This is a suit filed under section 92 of Act V of 1908 for the settlement of a scheme for the better management of the Srirangam devasthanam. Defendants 1 to 5 are members of the Trichinopoly taluk devasthanam committee, while defendants 6 and 7 are trustees appointed by the said committee, defendants 8 to 14 are sthalathars acting as trustees by rotation. These defendants (8 to 14) claim a hereditary right to the office of Trusteeship. Plaintiff does not dispute their hereditary right.

" Mismanagement of the affairs of this temple is generally admitted though individual responsibility is denied by some. There is no need to enter into an enquiry into the specific charges of misconduct set forth in the plaint for purposes of preparing a scheme. The necessity for a scheme is conceded by all defendants. Defendants 1 to 7 have no objection to the settlement of a scheme, nor have defendants 8 to 14 any objection provided their hereditary right to trusteeship is recognized and protected. Subject to this condition which is justified by the admitted right of these defendants to hereditary trusteeship I would call upon

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the parties to prepare and file in Court within one month from this date draft schemes for the administration of the devasthanam." On the submission of draft schemes the lower Court framed a scheme in which among other matters it provided for (*a*) the creation of Board of Control over the trustees whose number was fixed at five, (*b*) annual budget and audit, (*c*) a treasurer independent of the trustees but subject to the Board of Control. The scheme provided at the same time that it "shall not affect the powers of the temple committee."

Against the said decree the second plaintiff and defendants Nos. 1 to 5 preferred Appeal No. 328 of 1912 to the High Court.

Appeal No. 328 *of* 1912.

T Ranga Achariyar for the appellant (second plaintiff).

P. R. Ganapathi Ayyar and *K. S Ramabhadra Ayyar* for the first respondent (first plaintiff).

C Rajagopala Ayyangar for the second respondent (first defendant).

S. T. Srinivasagopala Achariyar for the respondents Nos. 3 to 6 (defendants Nos. 3 to 6).

V. Visvanadha Sastri and *C. Srinivasamurthi Ayyar* for fourth respondent (defendant No. 4).

V Venkatarama Ayyar for the fifth respondent (defendant No. 5).

C. Padmanabha Ayyangar for seventh respondent (Trustee newly appointed).

T Narasimha Ayyangar for respondents Nos. 7, 17 and 21 (new Trustee and members of the Board of Control).

N. S. Rangaswami Ayyangar for the respondents Nos. 17 and 21

V. C. Sesha Achariyar for the respondents Nos. 18 and 19.

Defendants Nos. 1 to 5 preferred Appeal No. 355 of 1913.

S. T. Srinivasagopala Achariyar for the appellants (defendants Nos. 1 to 5).

T. V. Venkatarama Ayyar for the fourth appellant (defendant No. 4).

P. R. Ganapathi Ayyar for the first respondent (first plaintiff.

C Padmanabha Ayyangar for the third respondent (defendant No. 6)

WALLIS, C.J.

WALLIS, C.J.—These are appeals from a decree of the Subordinate Judge of Trichinopoly framing a scheme for the

management of the temples at Srirangam. The case is one of great importance because this is admittedly the first time a scheme has been framed under what is now section 92 of the Civil Procedure Code for a temple subject to a temple committee under Act XX of 1863. In the lower Court all parties appear to have been willing that a scheme should be framed, but on appeal objection has been taken on behalf of the committee to the scheme approved by the Court on the ground that it is not open to the Court to frame a scheme of this sort interfering with the statutory management of the temple committee. It will be convenient in the first place to consider the position of the temple committee under the statute more especially as the Subordinate Judge in approving of the introduction of a new governing body known as the Board of Control has been influenced by the fact that in his view the powers of the temple committee are of a very restricted character. Prior to Regulation VII of 1817 the British Government and the Hindu rulers before them had exercised powers of a visitatorial character over such foundations. See *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*(1). Under that Regulation which was framed for the due appropriation of the rents and produce of lands granted for the support of Hindu temples, etc., certain statutory powers and duties were conferred upon the Board of Revenue. Under section 2 they were charged with a general superintendence of all endowments in land or money granted for the support of Hindu temples. Under sections 3 and 5 a duty was imposed on them of seeing that the endowments are appropriated to the purposes for which they were granted and to the repairs of the buildings, and under section 4 they were empowered to dispose of buildings which could not be repaired. Sections 7 to 11 provide for enquiries and reports to the Board by its local agents. Sections 11 to 14 are important Under section 11 the local agents are to report to the Board all vacancies in the office of trustees, managers or superintendents, whether these officers are hereditary or have been in the nomination of Government, and in the latter case to recommend fit and proper persons for the approval and confirmation of the Board On the receipt of the report under section 12, section 13 requires the Board either to

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(1) (1874) 11 I.A., 209 at p. 234.

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appoint the persons so nominated or "to make such other provision for the trust, management or superintendence as may seem to them right and fit with reference to the nature and conditions of the endowment" after obtaining any further information they may require. The Board actively exercised all these powers until the year 1841 or 1842 when, in deference to strong objections which were taken to this course by certain persons in England, the Board were ordered to withdraw as far as possible from the active management of Hindu temples No alteration however was made at the time in their statutory powers and duties under the Regulation and it was not until the passing of Act XX of 1863 that the situation was regularized and the powers exercised by the Board under the Regulation were transferred to temple committee constituted under that Act in the case of temples in which the nomination of the trustee, manager or superintendent thereof at the time of the passing of this Act (1863) was vested in or subject to the confirmation of Government. This is the effect of section 3 and sections 7 to 12 of the Act, sections 4 to 6 dealing with cases in which the right of appointment was not vested in Government. Section 13 imposes upon all trustees, managers, and superintendents the duty of keeping accounts and empowers and requires the temple committees to require the production of such accounts at least once a year. Lastly sections 14 and 18 provide for the institution with the preliminary leave of the Court of suits by persons interested, against trustees, managers or superintendents or members of the temple committees for any misfeasance, breach of trust or neglect of duty, and empower the Courts to direct specific performance of any act and to award damages, and to remove the trustee, manager or superintendent. These sections do not empower the Court to frame a scheme for the management of the temple affairs: *Karedla. Vijayaraghava Perumalayya Naidu* v. *Vemavarapu Sitaramayya*(1).

It was in my opinion clearly the intention of the legislature that the extensive powers conferred on the Board of Revenue should be exercised thereafter by the temple committees and I think the Court should be very slow to construe the Act in such a manner as to impede the due exercise of these powers. I am therefore with great respect unable to agree with the decision

(1) (1903) I.L.R., 26 Mad., 361.

in *Santhalva* v. *Manjanna Shetty*(1) which was cited as showing the necessity for a scheme and which decides, if I rightly understand it, that the powers of the committee are suspended by the occurrence of a vacancy among its members. No authority is cited in the judgments in support of this view and the decision has been dissented from in *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukerjee*(2), on the authority of an English case—*Doe* v. *Godwin*(3)—which is directly in point. This also appears to me not to be in accordance with the principles laid down in *Anantanarayana Ayyar* v. *Kuttalam Pillai*(4) as to the committee being governed by the rules applicable to corporations. The term "Committee", said POLLOCK, C.B., in *Reynell* v. *Lewis*(5) means "an individual or body to which others have delegated a particular duty," and I can see no reason why the remaining members constituting a majority should not be able to act during a vacancy. In the absence of any decisive authority the other way the argument *ab inconvenienti* is in my opinion sufficient to show that such must have been the intention of the legislature.

Further with reference to the numerous decisions of this Court relating to the powers of the committee to which Mr. Ganapathi Ayyar has called our attention in the course of his exhaustive argument as showing the necessity for the scheme, I cannot help saying with great respect that some of these decisions appear to me to fetter the committee unduly, and I think that the able judgment of DAVIES, J., in *Seshadri Ayyangar* v. *Nataraja Ayyar*(6) with which COLLINS, C.J., agreed in the main and the recent decisions in *Venkatachala Pillai* v. *The Taluq Board, Saidapet*(7) and *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar*(8) are more in conformity with the terms of the Act and the intention of the legislature.

It is necessary to consider one of these decisions more particularly, as the contention has been raised for the first plaintiff that the temple committee has no power over the Srirangam Devasthanam, because at the coming into force of the Act of 1863 one of the trustees under an arrangement made by the Board of Revenue had become hereditary as held in *Ganapathi*

(1) (1911) I.L.R., 34 Mad., 1.
(2) (1912) I.L.R., 39 Calc., 304.
(3) (1822) 1 Dowl. and Ry. 259.
(4) (1899) I.L.R., 22 Mad., 481.
(5) (1846) 15 M. & W., 517 at p. 526.
(6) (1898) I.L.R., 21 Mad., 179.
(7) (1911) I.L.R., 34 Mad., 375.
(8) (1914) I.L.R. 38 Mad., 1176, s.c. 28 M.L.J., 203.

Ayyar v. *Sri Vedavyasa Alasinga Bhattar*(1). That one trusteeship is hereditary is no doubt *res judicata* as between the committee and the hereditary trustee by reason of that decision. Mr. T. V Venkatrama Ayyar who appeared for the Committee stated that there is evidence to show that the Board never appointed any hereditary trustee, and alleged that they had no power to do so in the exercise of the statutory authority under section 13 of the Regulation. This was apparently the opinion of SIR CHARLES TURNER in *Appasami* v. *Nagappa*(2) though the opposite view was taken in *Venkatesa Nayudu* v. *Sri Shadagopaswami*(3) and followed in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(1) As to this I will merely observe that *Sheik Davud Saiba* v. *Hussein Saiba*(4) is no authority for the proposition for which it is cited in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(1) and *Santhalva* v. *Manjanna Shetty*(5) that where the Board made one of the trusteeships hereditary, it deprived itself of authority to appoint additional trustees. The immediate question here is whether this devasthanam is subject to the temple committee. It was not questioned in *Seshadri Ayyangar* v. *Nataraja Ayyar*(6) and *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(1) that it is so subject, and it is admitted by the first plaintiff in his plaint in the present case. Further, it is, I think, clear that sections 3 and 4 of the Act of 1863 were introduced to cover all classes of cases, and even assuming that in 1863 one of the trustees was hereditary and the other two were nominated by the temple committee, I think the case comes under clause 3 rather than under clause 4 In any other view I should feel bound to consider whether the decision in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(1) can be supported.

This objection being overruled, we have next to consider whether it is competent and desirable that the scheme framed by the Subordinate Judge should be approved with or without modifications. Now as to this I take it the Court cannot interfere with the statutory powers conferred upon the members of the committee so as to deprive them of their statutory functions

(1) (1906) I L.R., 29 Mad., 534

(2) (1884) I.L.R., 7 Mad., 499 at p 503 (3) (1872) 7 M H C.R., 77

(4) (1894) I.L.R., 17 Mad., 212 (5) (1911) I.L.R., 34 Mad., 1.

(6) (1898) I.L.R., 21 Mad., 179.

See *Attorney-General* v. *Governors of the Foundling Hospital*(1), although following the practice of the Court of Chancery it might frame a scheme conditional on legislative sanction being obtained for it, as to which, see *In re Shrewsbury Grammar School*(2). The decision in *Attorney-General* v. *Wyggeston Hospital*(3) which appeared to go further was disapproved in *Attorney-General* v. *Payne*(4). In my opinion the most helpful authority cited before us was the judgment of CHITTY, J., in *Attorney-General* v. *Governors of Christ's Hospital*(5); at page 888 the learned Judge observed: "I prefer to state my own opinion broadly. I hold that it is beyond the jurisdiction of the Court to sanction the Attorney-General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter and is established by Act of Parliament. To whatever lengths the Court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing governing body of their right of control over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word, I cannot, under guise of executing the trusts *cypres*, upset the constitution of the present governing body, or, by transferring their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than Act of Parliament will suffice."

That case however does not go so far as to decide that the Court cannot frame any scheme at all for a charity under

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(1) (1793) 2 Ves. J., 41 (2) (1849) 1 Mac and G., 324.
(3) (1849) 12 Beav., 113, s.c., 50 E.R., 1003
(4) (1859) 27 Beav. 168; s.c. 54 E.R., 65. (5) (1896) 1 Ch., 879.

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statutory management. On the contrary, although as observed *in the judgment, no case of breach of trust* or maladministration of any kind was suggested by the Attorney-General against the governing body, and there was no case of failure of the trusts or of the charitable objects of the endowments, the learned Judge, whilst rejecting the Attorney-General's scheme, still held himself *at liberty to sanction the scheme submitted by the Governors* themselves proposing certain alterations to meet the altered circumstances of the time. Following that decision, I think we *are entitled in the present case to come to the assistance of* the committee and to introduce certain changes which, under the decisions it is not now open to the committee to introduce, or which are admitted by them to be desirable. Further than this I do not feel justified in going.

The result is that the management will remain in *the* trustees subject to the statutory superintendence of the temple committee and the proposed Board of Control must go. As regards the number of the trustees we think we may enable the committee to do that which under the decision in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(1) they can no longer do of themselves, viz., to appoint two additional trustees, but the nomination must be in the committee pursuant to the statute. We may also provide that in future trustees shall hold office for only five years. This, it is admitted, is one of the most urgent reforms, and the competency of the committee to introduce it of themselves has been questioned. The proposed treasurer must also be disallowed as an independ*ent officer, but we think it desirable that* a paid officer of the trustees should be appointed to perform duties similar to those assigned to the treasurer but under the trustees. As regards finance we think it should be the duty of the trustees to prepare a budget annually and submit it to the committee under whose superintendence they are. We also think an audit should be insisted on. It has been arranged that the first plaintiff should submit a revised scheme or schemes on these *lines in one month*. There will be no order as to costs in this Court.

SESHAGIRI AYYAR, J

SESHAGIRI AYYAR, J.—I agree. If I travel over the same ground in my judgment, it is because the points raised in appeal are of far reaching consequences.

(1) (1906) I.L.R., 29 Mad., 534.

Two questions have been raised affecting, to a great extent, the jurisdiction of the Civil Courts. Mr. Venkatrama Ayyar on behalf of the committee broadly contended at the outset that the scheme sanctioned by the Subordinate Judge was within the powers of the Trichinopoly Temple Committee and that consequently it is *ultra vires* of the Civil Courts to frame a scheme. A somewhat modified contention was advanced at a later stage that all the provisions in the scheme which interfered with the statutory powers of the committee should be deleted. Mr. Rangachariar was prepared to support the committee's contentions only to this extent. On the other hand, Mr. Ganapathi Aiyar on behalf of the Dharma Rakshana Sabha argued that the Trichinopoly Temple Committee had no jurisdiction over the Srirangam Temple, as at the time of the passing of Act XX of 1863, there was a hereditary trustee. This contention, if accepted, would leave the Courts unfettered regarding the settlement of a scheme. It is necessary to give a ruling on these preliminary points before considering the merits of the case.

I shall first deal with Mr. Ganapathi Aiyar's contention. I agree with him that the expression "the nomination of the trustee, manager or superintendent thereof" in section 3 includes the entire body of trustees, managers or superintendents. See *Perry* v. *Jackson*(1). But it is doubtful whether it was competent to the Board of Revenue under Regulation VII of 1817 to divest themselves of all responsibility for management by handing over the affairs of a *devasthanam* to hereditary trustees. The language of section 13 of the Regulation which confers general powers to adopt measures for carrying out the objects of the trust must be restricted to the cases for which a report is to be called for under the preceding sections. However that may be, I feel no doubt that the committee has jurisdiction over this temple. There have been numerous suits to which the committee and the trustees were parties in which it was held that the temple was under the jurisdiction of the temple committee, e.g., *Seshadri Ayyangar* v. *Nataraja Ayyar*(2) and *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(3).

(1) (1792) 4 T.R., 516.
(2) (1898) I.L.R., 21 Mad., 179. (3) (1906) I.L.R., 29 Mad., 331.

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SESHAGIRI AYYAR, J.

These decisions are binding on the committee and the trustees. The plaintiffs in the present case admit that the temple falls under section 3 of Act XX of 1863. They are not entitled to recede from that position. Morever the documents to which our attention was drawn show that only the right to select a trustee was given to the family of the Sthalathars, and that the selection was subject to the approval of the Board of Revenue. It cannot, therefore, be contended that the Board of Revenue created a hereditary trustee over whose appointment they had *no control*. If this question had been raised in proper time, evidence might have been forthcoming to show that the term *heriditary* has been loosely applied in this case. I agree with the learned Chief Justice that this temple comes under section 3 of Act XX of 1863 and that the committee has jurisdiction over it.

The question whether the aid of the Civil Courts can be invoked to frame a scheme when a statutory body like the temple committee has the right of superintendence is a far more difficult one.

There are no reliable data regarding the exercise of supervision by the ancient kings of the land over temples. The text of Narada which says "राज्ञ एव हि दास: स्यात् प्रव्रज्यावसितो नर:" "that a king can reduce to slavery a sanyasin who is guilty of incontinence," seems to suggest that over religious bodies and institutions, the king had a general power of supervision. Beyond this cryptical saying, there seems to be no authority regarding the jurisdiction of the ancient sovereigns over Hindu temples. When and at what stage the ancient sovereigns exercised superintendence over religious institutions, it is not necessary to consider. In *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*(1) the Judicial Committee say that such jurisdiction existed in ancient times. Consequently they very early came to the conclusion that the king as *parens patria* should protect the religious institutions from malversation in the same way that he looked after the rights of his lay subjects. Lord BROUGHAM in *Mayor of Lyons* v. *East India Company*(2) says: "The jurisdiction of the Court, moreover, extends over all British subjects residing within the limits of the Charter, whether in the

(1) (1874) 11 I.A., 209. (2) (1836) 1 M I A., 175

British or native dominions, and this affords facilities for the execution of the charity under the Courts' superintendence, which could not exist in any of the cases cited." In *Attorney-General* v. *Bodie*(1) Lord LANGDALE pointed out that the Supreme Court had an equitable jurisdiction similar to and corresponding with the equitable jurisdiction exercised by the Court of Chancery in England over charities. There is no doubt that the mufassal Courts had similar powers. In *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*(2), which was an appeal from a mufassal Court, their Lordships of the Judicial Committee proceeded on the footing that Civil Courts had jurisdiction to see that temple funds were properly applied It is clear from the Charter granted to the East India Company that they were authorized " to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal according to the laws of the *kingdom* and to execute justice accordingly " (Charter of Charles II in 1661). This authority was confirmed by the subsequent Charters. Their history is fully set out in Cowell's Courts and Legislative Authorities in India, and in Ilbert's Government of India. I do not propose to attempt a summary of the various regulations here. Their purport is best expressed by section 16 (c) of the Madras Civil Courts Act: " In case where no specific rule exists, the Courts shall act according to justice, equity and good conscience." This clause only em-bodies the principle which has been recognized by the British Government from the beginning of its administration of civil and criminal justice in India. It is not necessary to cite authorities for the position that the rule of equity and justice had largely to be found in the decisions of the English Courts. My conclusion is that the mufassal Courts in India were Courts of both law and equity and that they exercised jurisdiction over religious and charitable institutions in the same way as Courts of Chancery did in England.

I shall next consider whether the Court of Chancery in England would have had jurisdiction to frame a scheme like the one we are now considering, with special reference to the fact that the temple committees as statutory bodies had certain

(1) (1846) 4 M.I.A., 160 (2) (1869) 13 M.I.A., 270

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powers delegated to them. It was pointed out in *Rajah Muttu Ramalinga Setupati* v. *Perianayagam Pillai*(1) that the powers delegated to the Board were analogous to the powers conferred on *visitors* in England. The nature of the powers possessed by visitors is not easily ascertainable. In *Philips* v. *Bury*(2), HOLT, C.J., thus describes the functions of a visitor: "An authority to inspect the actions and regulate the behaviour of the members that partake of the charity, ... to prevent all perverting of the charity, or to compose differences." In Tudor on Charities, the visitatorial tribunal is described as "a domestic forum, the Court of the founder." It was pointed out in *Green* v. *Rutherforth*(3) that the visitor's powers are circumscribed by those given him by the statute. He should not exceed or depart from them.

Having ascertained to some extent the nature of the duties cast on the visitor, I shall now consider whether the contention that the Courts are powerless when a statutory body is created whose powers are analogous to those of the visitor in England is well founded. The decision in *Attorney-General* v. *Governors of Christ's Hospital*(4) was strongly relied on by the appellant. The observations of CHITTY, J., do not deny jurisdiction to Civil Courts although they fetter its exercise a great deal. The language of the Charter and of the Act of Parliament commented on in that case are not before us. Moreover certain facts are mentioned in the judgment which rendered it inequitable for the Court to interfere. His Lordship says: "To whatever lengths the Court may have gone, it has never assumed legislative authority." *From the subsequent reference to the provision of the Attorney-*General's scheme, it is apparent that the learned Judge held on the merits that that scheme should not be accepted. I do not think this case is authority for denying jurisdiction to the Courts altogether. *In re Endowed Schools Act*, 1869; and *In re Christ's Hospital*(5) does not carry the matter any further. *Clephane* v. *The Lord Provost, etc., of Edinburgh*(6) only lays down that the purposes of the trust cannot be altered by the Courts. In *Attorney-General* v. *The Dedham School*(7), the Master of the Rolls

(1) (1874) 1 I.A., 209. (2) (1788) 2 T.R., 346 at p 352.
(3) (1750) 1 Ves. Sen., 462. (4) (1896) 1 Ch., 879.
(5) (1889) 15 A.C., 172. (6) (1869) L.R., 1, Sc A. 417.
(7) (1857) 23 Beav., 350; s.c., 53 E.R. 138.

ruled that where the founder had conferred specific powers on a visitor regarding internal management, the Court should not interfere with such powers. In *Attorney-General* v. *Dixie*(1), the Lord Chancellor says: "I have long been perfectly satisfied that this Court has jurisdiction." The above cases do not sustain the proposition contended for by the appellant that the Court is deprived of jurisdiction by reason of the existence of a visitor or of a statutory body to control the affairs of a trust.

On the other hand, it seems well established that the power is in the Court to administer a charitable or religious trust provided it does not unduly interfere with the visitor or the statutory body. In *Stevens* v *Chown* and *Stevens* v. *Clark*(2), FAREWELL, J., quotes with approval WILLES, J.'s classification of liabilities relating to trusts "There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy, there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it." In my opinion, the temple committees come under the first of these classes. I have already referred to the right possessed by the Crown over all religious institutions The general right possessed by the subject to ask the Court's assistance to set right abuses and to have a scheme framed independent of the statute has been recognized in numerous decisions. See *Karuppa* v. *Arumuga*(3), *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(4), *Subbayya* v. *Krishna*(5), *Rangasami Naickan* v *Varadappa Naickan*(6), *Srinivasa Chariar* v *Raghava Chariar*(7) and *Radhabai* v. *Chimnaji bin Ramji Sah*(8) Therefore the powers

(1) (1807) 13 Ves Jun., 519
(2) (1901) 1 Ch., 894
(3) (1882) I.L.R., 5 Mad., 383.
(4) (1887) I.L.R., 10 Mad., 375
(5) (1891) I.L.R., 14 Mad., 186
(6) (1893) I.L.R., 17 Mad., 462 at p. 416
(7) (1900) I.L.R., 23 Mad., 28; s.c., 9 M.L.J., 239
(8) (1878) I.L.R., 3 Bom., 27

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of the Committee are not exclusive. The observations of FAREWELL, J., are very apposite to this class of cases: "Now, if I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless the Act in terms says so." In *Attorney-General* v. *Wyggeston Hospital*(1), Lord LANGDALE, the Master of the Rolls, had to consider the rights of a governor of a hospital. His Lordship held that greater powers were given to him than was warranted by the original Charter. Then he proceeds: "Even if it should appear to be otherwise, and that this was within the power, nevertheless, if in the course of the 200 or 300 years, by acting upon the power, it has turned out, and is shown by experience, to be prejudicial to the objects of the charity, to the extent of giving an equal benefit to persons who are not objects of the charity—namely, to the lessees, for it comes to that—then I think that this Court could not avoid saying, that the circumstances were so changed, that the interests of the charity and of the hospital required a new mode of conducting the business and affairs of the charity." These observations apply *mutatis mutandis* to the present case. If after fifty years of administration by the Committee, the Court finds that circumstances have taken place which demand a remodelling of the machinery originally employed, I do not think we are powerless simply because a statutory body had certain powers conferred on it suited to the exigencies of the situation as it then existed.

In *The Attorney-General* v. *St. Cross Hospital*(2), Sir JOHN ROMILLY says: "The only remaining point, then, on this part of the case, is, whether the jurisdiction of this Court is taken away by reason of the visitorship of the Bishop of Winchester. If this were the law, it would be very unfortunate, for it does not require the history of this case to teach us that the visitorship, vested in any one, whether a corporation sole or aggregate, or the heir of the founder, is a mere nominal office, *the duties and*

(1) (1849) 12 Beav., 113, s.c., 50 E.R., 1003.
(2) (1853) 17 Beav., 435, s.c., 51 E.R., 1103.

functions of which are rarely, if ever, spontaneously performed. But the law is not so. Where there is a clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belong to the various officers, which he may take care to see are properly kept up and appointed. *Green* v. *Rutherforth*(1), *Ex-parte Berkhampstead Free School*(2), and several other cases, expressly establish the authority of this Court in cases of trusts, and the duty of this Court to see that they are properly performed, notwithstanding that there may be a special or a general visitor." I have made this lengthy extract because it seems to me that in India under the superintendence of temple committees we have reached a position where "the duties and functions are rarely if ever spontaneously performed." The written statement of the committee in this case shows how powerless the committee were in carrying out their duties, and how little they did or endeavoured to do. It would be disastrous in this country if Courts were to refuse to intervene on the ground that a statutory body has been created to exercise supervision over the trusts.

At the same time, I concede that in formulating a scheme, the Courts should not unduly interfere with the powers entrusted to committees. The cases quoted by the learned vakil for the committee establish that position. *In re Shrewsbury Grammar School*(3), *The Attorney-General* v. *Aspinall*(4), *Attorney-General* v. *The Mayor, etc., of Dublin*(5) and *Attorney-General* v. *Governors of the Foundling Hospital*(6). The learned vakil for the Sabha did not seriously contest this position. His argument was directed to showing that the Board of Revenue and their successor, the committee, had only certain limited powers, and that neither the Regulation nor the Act took away the plenary jurisdiction possessed by the Courts. I shall now very briefly examine the provisions of these two statutes mainly

(1) (1750) 1 Ves. Sen., 462.
(2) (1813) 2 Ves. & Beam., 134.
(3) (1849) 1 Mac. & G., 324.
(4) (1837) 2 Mylne & Craig, 613.
(5) (1827) 1 Bligh (N.S.), 312.
(6) (1793) 2 Ves. Jun., 41.

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with a view to see how much of the scheme of the Subordinate Judge should be accepted.

The preamble to the Regulation refers to the ground for believing that the produce of the endowments "is in many instances appropriated contrary to the intentions of the donors," and speaks of the duty of the Government to see to its proper application. The *duty*, I take it, is that of the *parens patriae*. In *Duke of Beaufort* v. *Berty*(1), Lord MACCLESFIELD, Lord Chancellor, says that the protection of children was assumed by the Court of Chancery in analogy of its powers over trusts. Consequently, the care of trusts seems to have been regarded as the first duty of the King. It was therefore very early held in Madras that the remedies under the Regulation were not exhaustive but only supplementary of the ordinary remedies. *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar*(2). See also *Kassyvassy Kristna Putter* v. *Vangala Shangaranat Josser*(3). I do not think that the view to the contrary held in *Bhima Rout* v. *Dasarathi Dass*(4), is consistent with the history of the temple legislation in this country. I shall now deal with the other sections of the Regulation. Section 2 is the most important of them. The right of general superintendence is wide enough to include the power to appoint additional trustees I am in agreement with the decision in *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar*(5). In *Ganapathy Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(6), Sir S. SUBRAHMANYA AYYAR, J., says that such appointments can be made for good and sufficient cause. I infer the power to appoint additional trustees from sections 12 and 13 read with section 2. It is not necessary in this case to consider the exact nature of the rights conferred on the Committees by section 2: whatever may be involved in the term *superintendence*, I am of opinion that some of the decisions of this Court to which I shall refer later on have not been shown to be wrong in placing a limit on its import. Further the right of superintendence must be limited to the exercise of the powers conferred on the Board or on the

(1) (1721) 1 Peere Williams, 702 at pp. 703 and 704.
(2) (1872) 7 M.H.C.R., 117. (3) (1858) S.D.A., 38.
(4) (1913) I.L.R., 40 Calc., 323.
(5) (1914) I.L.R., 38 Mad., 1176, s.c., 24 M.L.J., 204.
(6) (1906) I.L.R., 29 Mad., 534.

Committee whose jurisdiction is analogous to that of the visitor in England. Sections 3 to 10 do not call for special notice. Sections 11 to 13 are important. Section 11 requires local agents to report to the Board vacancies and casualties, the names of the persons claiming to be trustees and the mode in which previous appointments were made. Section 12 deals with cases in which the Government had the exclusive power of appointment and requires the local agent to suggest names. Section 13 deals with the duties of the Board on the receipt of such reports. It seems to me that the clause "or make such other provision for the trust, etc.," should be confined to the appointment contemplated in sections 11 and 12. As I said before, they do not seem to warrant the construction that the Board can appoint hereditary trustees by virtue of this clause so as to deprive themselves of all control over them. Section 14 gives a right of suit to persons aggrieved by the exercise of the powers vested in the Board.

Coming to the Act, it must be premised that it was not the intention of the legislature to give larger powers to the Committee than was possessed by the Board. Sections 3 and 7 entrust to the care of the Committees all the institutions which were unde the control of the Board of Revenue A feeble attempt was made to show that the Committee could hold possession of the trust property. Section 12 which refers to the transfer of the possession of properties does not provide for the vesting of the properties in the Committee. On the other hand sections 11 and 13 which speak of the duties of the trustees to keep accounts make it clear that the Committee were not to hold properties.

The course of decisions on this subject is well established in this Presidency Speaking for myself, I feel no hesitation in saying respectfully that they are perfectly sound. See *Venkatesa Nayudu* v. *Sri Shadagopaswami*(1), *Pandarangа* v. *Nagappa*(2), *Sankara Murti Mudaliar* v. *Chidambara Nadan* (3), *Seshadri Ayyangar* v. *Nataraja Ayyar*(4), *Pattikadan Ummaru* v *Emperor*(5), *The Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateswarlu*(6) and *Ramanathan*

(1) (1872) 7 M H C R, 77
(2) (1889) I L R, 12 Mad, 366
(3) (1894) I L R, 17 Mad, 143
(4) (1898) I L R., 21 Mad., 179
(5) (1900) I L.R, 26 Mad., 243.
(6) (1908) I L R., 31 Mad., 111.

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Chettiar v. *Swaminatha Aiyar*(1). It has also been held that the Committee should not concern itself with the internal management of the institution; *Mayandi Chetti* v. *Oliver*(2) and *Subba Naidu* v. *Gopalaswamy Naidu*(3). It stands to reason that when there is a trustee who is responsible for the management of the properties and for their application, his control over the servants of the establishment should not be interfered with by the Committee. The very limited power as to accounts given by the second clause of section 13 to the Committee bears out this position. It is doubtful whether the decisions which lay down that no accounts should be called for from hereditary trustees are right. See *Venkatabalakrishna Chettiyar* v. *Kaliyanaramaiyangar*(4) and *Fakurudin Sahib* v. *Ackeni Sahib* (5). Section 13, clause 2, refers to all trustees whether hereditary or otherwise. Section 14 has been much debated during the argument. It is a limited remedy that is given by this section to the public. It only empowers the Court to direct the specific performance of duties which have been neglected. Such duties have also been specified. To my mind, the right of suit under the Act has been purposely restricted because the general right of the subject under the Code of Civil Procedure was not intended to be interfered with. The remedies are cumulative and not exhaustive. See *Venkata Ranga Charlu* v. *Krishnama Charlu*(6).

The above examination of the sections of the Regulation and of the Act shows that the power of settling a scheme is not within the competence of the Committee. It is only by virtue of the section 92 of the Code that this remedy can be invoked. In considering the details of the scheme Mr. Ganapathi Ayyar contended that as the body of trustees will be *functus officio*, if one member of it dies, there should be a Board of Control to avoid an *inter regnum*. *Santhalva* v *Manjanna Shetty*(7) no doubt lays down that the death or removal of one of the members incapacitates the others from carrying on the duties of the Committee. With great deference, I am unable to accept this conclusion. The decision in *Doe* v. *Godwin*(8),

(1) (1912) 23 M.L.J., 278. (2) (1899) I.L.R., 22 Mad., 261.
(3) (1905) 15 M.L.J., 185 (4) (1868) 5 M.H.C.R., 48.
(5) (1879) I.L.R., 2 Mad., 197. (6) (1914) I.L.R., 37 Mad., 15A
(7) (1911) I.L.R., 34 Mad., 1. (8) (1822) 1 Dow & R., 259.

quoted in *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukerjee*(1), was apparently not brought to the notice of the learned Judges who decided *Santhalva* v. *Manjanna Shetty*(2). In my opinion the statutory body does not become extinct by reason of changes in its constitution.

As, in my opinion, the Civil Court alone has power to frame a scheme, and its jurisdiction is not taken away by the creation of the Temple Committee, I shall now proceed to examine the details of the scheme.

The first question for consideration is whether there should be a Board of Control. In my view the powers intended to be conferred on the Board of Control would unduly interfere with the rights of the Temple Committee. In the Conjeeveram scheme the Board of Control was held necessary because the institution was not subject to the control of the Temple Committee. I am clearly of opinion that all provisions in the scheme relating to the Board of Control should be omitted. For the same reason I am of opinion that no right of management should vest in the treasurer. This would be virtually adding to the number of trustees. I would therefore recast clause 3 thus: "that the administration of the Devasthanam shall vest in a Board of Trustees subject to the control of the Committee." Clauses 4 to 7 should be omitted in this view. A great deal of discussion centered on the question whether there should be a Vadagalai trustee for this temple. It is true as pointed out by Mr. Rangachariar that the Vadagalai trustee whenever he had an opportunity endeavoured to subvert the uses of the institution by showing his partiality towards the usages of his own sect. But ever since 1893 when the present Vadagalai trustee was appointed, no serious complaints of such a nature have been made against him. Moreover although the temple is mainly Thengalai, the *archakas* and *paricharakas* are Vadagalais and there are a large number of Vadagalai mirasi offices in this temple. In order that their interests might be safeguarded there should be a Vadagalai trustee. We see no reason for disagreeing with the Subordinate Judge on this question.

As a counterblast to the argument of Mr. Rangachariyar Mr. Narasimha Aiyangar contended that as there is a hereditary

(1) (1912) I.L.R., 39 Calc., 504. (2) (1911) I.L.R., 34 Mad., 1.

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Thengalai trustee there is no necessity for the appointment of another Thengalai trustee. The history of this institution shows that the hereditary Thengalai trustee is not a person on whom the Thengalais can rely to protect their interests. Undoubtedly the Thengalai rights are predominant in this temple; the Subordinate Judge was therefore right in providing for the appointment of an additional Thengalai trustee. No serious objection is taken by any of the contending parties for the inclusion in the Board of Trustees of a Smartha and a Madhva. It is to be hoped that their presence would tend to compose the differences between the two rival sects of Vaishnavas. We do not think that the provision for the appointment of the Saivite and Madhva trustees by the Court is necessary. The Committee should have the same power with regard to them as they have with reference to the other three trustees. As regards clause 12, in the view that we have taken about the office of the treasurer and having regard to the representations that have been made regarding the funds of the Devasthanam we are of opinion that, instead of a treasurer, the trustees should be directed to appoint a cashier on a salary of Rs. 75 per mensem. Clause 4 which confers certain powers of supervision and control on the treasurer should be modified by investing the Board of Trustees with those powers. Clause 16 should be modified in a similar manner. In addition to the provisions contained in the scheme we think it necessary that the Board of Trustees should once a year prepare a balance sheet of the accounts of the Devasthanam and publish it for the information of the public in the local Gazette. The scheme should be modified as above indicated. As was done with reference to the Conjeeveram scheme we think liberty should be given to any of the trustees or any member of the Committee or to the first plaintiff in this case to move the Court for such alterations in the scheme as seem desirable in the light of the experience that may have been gained of its working.

These appeals and the Memoranda of Objections coming on for final hearing after the submission of the revised scheme by the first plaintiff.

The following final Judgment of the Court was delivered by

WALLIS, C.J. AND SESHAGIRI AYYAR, J.

WALLIS, C.J.—The scheme brought in by the first plaintiff is accepted by us subject to certain modifications.

The scheme as finally approved :—

General.

1. The temple of Sri Ranganadhaswami at Srirangam and the minor temples and shrines attached thereto (inclusive of the temple of Sri Pundarikaksha Perumal at Tiruvallarai) and constituting with the said temple the Srirangam Devasthanam and all the properties, moveable and immoveable, which have been or may hereafter be dedicated to the said deity are and shall be vested in the Sri Ranganadhaswami deity.

2. (*a*) The word "Court" in this scheme and in the rules that may be framed under this scheme shall mean the Subordinate Judge's Court at Trichinopoly or such other Court of Original Civil Jurisdiction of the lowest grade as may have jurisdiction under section 92 of Act V of 1908.

(*b*) The word "Committee" shall mean Trichinopoly Taluk Devasthanam Committee formed under Act XX of 1863.

(*c*) The expression "Sri Ranganadhaswami Devasthanam" hereinafter referred as "the Devasthanam" shall mean and include the shrine of Sri Ranganadhaswami at Srirangam and all the subordinate shrines attached thereto both in Srirangam and outside (inclusive of Sri Pundarikaksha Perumal Temple at Tiruvallarai).

3. The administration of the Devasthanam shall vest in a Board of Trustees subject to the control and superintendence of the committee.

Board of Trustees.

4. The Board of Trustees shall consist of five members, viz.,

(1) A hereditary *Stalathar* trustee by rotation as at present,

(2) A Thengalai trustee,

(3) A Vadagalai trustee,

(4) A Saivite (including a Smartha),

(5) A Madhva.

Trustees Nos. (2) to (5) shall be appointed by the committee.

5. (*a*) The term of the office of the Trustees appointed by the Temple Committee shall be five years but the said trustees shall be eligible for re-appointment

(*b*) The *Stalathar* trustees shall hold office by rotation each for one year commencing with the 1st Chitrai.

6. No office holder of the temple or a member of the Temple Committee shall be appointed by the committee as a member of the Board of Trustees.

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7. (a) No one shall be eligible to be appointed by the committee as a Trustee of the Devasthanam—

(1) Who is under 25 years of age,

(2) Who is an uncertificated bankrupt or an undischarged insolvent,

(3) Who is suffering from unsoundness of mind, total blindness, total deafness, total dumbness, leprosy, or paralysis of such a nature which unfits him for work,

(4) Who is a member of a joint family of which some other member is at the time a member of either the committee or of the Board of Trustees, and

(5) Who has been convicted of any offence involving moral turpitude, or against whom orders under sections 109 and 110, Criminal Procedure Code, have been passed.

(b) In the case of a rotation trustee who is a minor or who is subject to any of the disqualifications stated in 2, 3 and 5, the committee may appoint from among the *Stalathars* a competent person in his place.

Cashier.

8. A Cashier shall be appointed by the Board of Trustees on a salary of Rs 75 per mensem and shall furnish such security as may be determined by the rules framed hereunder.

9. The Board of Trustees shall have powers of supervision and control over the Cashier, but shall not suspend or dismiss him unless four out of the five trustees are in favour of such a course An appeal shall lie to the committee from an order of dismissal, whose decision shall be final.

Budget.

10. (a) The Board of Trustees shall, three months prior to the commencement of the fasli, prepare and submit to the committee a Budget of the estimated receipts and expenditure for the ensuing year.

(b) The committee shall, with such modification as it may deem necessary, pass the Budget and send it back to the Board of Trustees at least a month before the beginning of the fasli.

(c) If the budget be not sent by the Board of Trustees as aforesaid, the committee may, after giving 14 days' notice to the Board of Trustees, themselves frame and prepare the Budget and send it to the Board of Trustees.

(d) If the committee fail to send the budget within the time fixed above, it shall be competent to the Board of Trustees to act upon the budget sent by them until the committee send the same approved.

(e) The Board of Trustees shall have a permanent advance for urgent expenses of such amount as may be fixed in the rules to be framed in this scheme. But the expenditure which may be incurred by them shall not exceed the provision of the budget nor shall any extraordinary expenditure be incurred without the special sanction of the committee.

Accounts and Audit.

11. (a) The accounts shall be audited by an auditor appointed by the committee upon such remuneration as may be fixed by the committee, to be paid from the Devasthanam funds. An abstract of the said accounts prepared and certified together with his report shall be sent to the Board of Trustees, who shall submit the same to the committee with their remarks, if any.

(b) It shall be the duty of the Board of Trustees to give the auditor all facilities for carrying on the audit and to produce all accounts, vouchers and other papers required by him.

(c) It shall also be the duty of the Board of Trustees to carry out the suggestions made by the auditor in his report and approved by the committee.

(d) The Board of Trustees shall prepare every year a balance sheet of the assets and liabilities of the Devasthanam and publish it after verification by the auditor in the local Gazette and in such other papers as they shall think fit.

(e) The accounts of each fasli, together with the report of the auditor and the abstract of the accounts and the balance sheet, shall be exhibited at the Devasthanam office from the 15th October to 15th January following and also at the time of the Mukkoti festival at the temple premises and all worshippers of the temple shall be entitled to inspect the same at all reasonable times.

12. All surplus income shall be invested for the benefit of the temple by the Board of Trustees in accordance with the rules to be framed for the purpose.

13. (a) No immoveable property of the temple shall be leased for more than three years without the sanction of the committee.

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of appeal is the same when the subject-matter of the appeal is the same as in the plaint. The value of the subject-matter is capable of valuation in all cases except in cases under clause (iv), section 7. In section 7, clause (v), in suits for pre-emption the valuation in appeal is the entire value in the lower Court though the appellant succeeded in a portion of his claim. In section 7, clause (vi), also the appeal must be valued in the same way as the suit. So also in suits between landlord and tenant, the memorandum of appeal bears the same stamp as in the plaint; so that in all cases except clause (iv) the value is the same in appeal and in suit when the subject-matter is the same. Section 9 enables the Court to correct the valuation in certain cases but not in a case falling under section 7, clause (iv). The plaintiff's valuation is final. *Valambal Ammal* v. *Vythilinga Mudaliar*(1) does not touch the question. Suppose the plaintiff prefers an appeal, is it open to him to alter the valuation? if not, how can a defendant alter? *Balvant Ganesh* v. *Nana Chintamon*(2) refers to the practice in Bombay. Reference was made to the following cases also:—*Ramsarup* v. *Dasrat Tiwari*(3), *Mohamed Masik* v. *Malkhai Mukhadrai Uzwa Badsha Mehal Saheba*(4), *Bunwari Lal* v. *Daya Sunker Misser*(5) and *Bhagat Ram* v. *Gokal Chand*(6). The Law in Madras has been what is laid down in *Samiya Mavali* v. *Minammal*(7); see also *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*(8).

K. Bhashyam Ayyangar for the respondents.—This is a fiscal enactment and must be strictly construed. The subject-matter in appeal must determine the valuation. The relief which is claimed is to get rid of a direction to account and this is different from the relief in the plaint. In the appeal from the preliminary decree it is open to the defendant to fix his own value. *Reference under Court Fees Act, 1870*(9), was referred to.

T. V. Venkatarama Ayyar was not heard in reply.

This appeal coming on for hearing, the following opinion of the Court was delivered by

WALLIS, C.J.—The decision in *Samiya Mavali* v. *Minammal*(7) has been consistently acted on and is in accordance with

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(1) (1901) I.L.R., 24 Mad., 311.
(2) (1894) I.L.R., 18 Bom., 209.
(3) (1911) I.L.R., 33 All., 517.
(4) (1884) I.L.R., 10 Calc., 580.
(5) (1909) 13 C.W.N., 815 at p. 820.
(6) (1908) Punj. Rec. (No. 150) 681.
(7) (1900) I.L.R., 23 Mad., 490 at p. 495.
(8) (1875) 15 B.L.R., 162 at p. 173.
(9) (1906) I.L.R., 29 Mad., 367.

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the decision in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*(1) and *Bunwari Lal* v. *Daya Sunker Misser*(2).

We are not prepared to differ from it, and are of opinion accordingly that the appellant is bound by the valuation in the plaint.

C.M.N.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Ayyar.

1915. August 16, 17 and October 18.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

v.

ILLIKKAL ASSAN (DIED) AND NINE OTHERS (PLAINTIFF AND DEFENDANTS Nos. 2—4 AND LEGAL REPRESENTATIVES OF THE PLAINTIFF), RESPONDENTS.*

Madras Land Encroachment Act (III of 1905), ss. 5, 6, 7 and 14—Notice under section 7—Levy of penal assessment—Suit for declaration—Cause of action—Limitation.

A notice under section 7 of the Madras Land Encroachment Act (III of 1905) was issued to the plaintiff and penal assessment was thereafter levied from him. More than six months after such levy the plaintiff brought this suit for a declaration of his title to the land, injunction and for the refund of the assessment levied;

Held, that the notice under section 7 of the Madras Land Encroachment Act calling on the person in occupation of the land to show cause why he should not be proceeded against under section 5 or 6 of the Act does not give rise to a cause of action, but that the suit was barred having been filed more than six months after the levy of assessment.

Narayana Pillai v. *Secretary of State* (1912) 23 M.L.J., 152, approved.

Bhaskarudu v. *Subbarayudu* (1915) I.L.R., 38 Mad., 674, considered.

SECOND APPEAL against the decree of A. NARAYANAN NAMBIAR, Temporary Subordinate Judge of Palghat, in Appeal No. 347 of 1913, preferred against the decree of A. VERGHESE, District Munsif of Parapanangadi, in Original Suit No. 650 of 1911.

Suit for declaration of title to land and for an injunction to restain the defendant (Government) from interfering with the plaintiffs' enjoyment thereof and for the refund of the penal assessment levied by the Government from the plaintiff under section 9 of the Madras Land Encroachment Act III of 1905.

* Second Appeal No. 212 of 1914 (F.B.).

(1) (1875) 15 B.L.R., 174. (2) (1909) 13 C.W.N., 815.

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The suit was brought more than six months after the levy of the assessment. The defendant (the Government) pleaded that the plaintiff had no title and that the suit was barred by limitation as provided by section 14 of the Act. The District Munsif dismissed the suit on the merits. The lower Appellate Court held that the suit was barred under section 14 of the Act so far as the refund of the assessment was concerned as it was brought more than six months after the levy thereof; but declared the claim of the plaintiff in other respects holding that the special period of limitation of six months provided by the Act was not applicable to the same.

The defendant preferred this second appeal.

C. Madhavan Nair for the *Government Pleader* for the Crown.

A. V. K. Krishna Menon for respondents Nos. 2 and 3.

C. V. Ananthakrishna Ayyar for respondents Nos. 5 to 10

This Second Appeal coming on for hearing in the first instance before SPENCER and SESHAGIRI AYYAR, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was delivered by

SPENCER AND SESHAGIRI AYYAR, JJ.

SPENCER, J.—The question that arises for our decision is whether the period of limitation for a suit brought by a person who seeks a declaration of his title as against the Government on account of a notice issued by Government under Madras Act III of 1905 is six months as provided by section 14 of that Act, or some longer period as provided for suits brought under section 42 of the Specific Relief Act.

In the plaint it is stated that the Collector of Malabar sent a notice to the plaintiff in September 1910 stating that a certain piece of land belonged to Government and offering the plaintiff a patta for a portion and requiring him to give up the rest at once. In answer to that notice, it is stated that the Collector was required on 21st December 1910, by a registered notice, to release the claim set up by Government and to refund the penalty levied under the Act. It is quite clear that the plaintiff's suit is barred, so far as the recovery of the sum collected by Government is concerned, and both the lower Courts have held the suit to be barred in this respect. Now, the cause of action is stated in the plaint to have arisen on the 21st December 1910 when a demand was sent to the Collector of Malabar and he did not comply with that demand. But the respondents' vakil concedes that, so far as a cloud was thrown upon his title by the action of

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Government, the cause of action must date from the notice sent by the Government in September 1910.

It was held in *Narayana Pillai* v. *Secretary of State*(1), that there were only two causes of action by which a party might be aggrieved and have a right of suit under section 14 of this Act, and that they were,(1) the levy of penalty and (2) eviction or forfeiture; and the learned Judges who decided that case observed that a person could not be regarded as "aggrieved" by a mere preliminary notice given by Government before exercising their powers under the Act. But in *Bhaskaradu* v. *Subbarayudu*(2) another Bench decided that a mere notice or denial of the plaintiff's title to property, if taken under the provisions of the Act, would give the plaintiff a cause of action upon which he must sue within six months from the date of the act alleged. The learned Judges observed that, if the plaintiff did not feel himself aggrieved by the notice, he must wait until some further action was taken by Government, but if he alleged it to be a proceeding under the Act, he was bound to sue within six months.

We find it difficult to reconcile these two decisions of different Benches of this Court. The later decision does not seem to have taken account of the words in section 14: "such persons, for any such cause of action unless such suit shall be instituted within six months." "Such cause of action" appears to refer to the proceedings mentioned in the first part of the section, by which persons may "deem themselves to be aggrieved"; but the explanation shows that a person can be "aggrieved" within the meaning of this section only by the levy of penalty or by eviction, and this was pointed out in *Narayana Pillai* v. *Secretary of State*(1). No doubt, the service of a notice is a preliminary act before evicting the occupant of the land. [See sections 6 (2) and 7 of the Act.] But if a person possesses a substantive right to establish his title to property as against any other person who denies his title, such substantive right will not be taken away by an Act of the legislature without an express declaration to that effect. But as the decision in *Bhaskaradu* v *Subbarayudu*(2) is against the view we are inclined to take, we refer to a Full Bench the question—

"Whether a suit for a declaration of title to a land in dispute, if brought in consequence of a notice given under Act III of

(1) (1912) 23 M.L.J., 161. (2) (1915) I.L.R., 38 Mad., 674.

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1905 to vacate the land, is governed by the six months' limitation provided in section 14 of the Act?"

The other point argued on behalf of Government is that the suit is barred by limitation under Act XXVIII of 1860. But on this point we consider that the lower Courts were right in deciding that there was no bar, as there is no material for deciding that the plaintiff had notice of the decision of the Survey Officer in 1903 and was concluded by it.

N. Grant, the Acting Government Pleader for the appellant.—The reference turns upon the construction of section 14 of the Madras Land Encroachment Act (III of 1905). Where a person is in unauthorized possession of Government land, the Government can either assess him or levy a penalty or evict him. Under section 7 of the Act, the Government issued a *notice to* the plaintiff to show cause why he should not be proceeded against. At about the same time the Government imposed the penal assessment of Rs. 15 and collected it compulsorily.

[WALLIS, C.J.—Had the Government power to do that before the occupant showed cause?]

Assuming that the imposing of the penalty was illegal, I would submit that the plaintiff's suit was barred under section 14.

On the 21st December 1910 plaintiff served a notice on the Government to release the claim as that was a cloud on his title. The plaintiffs state that their cause of action arose on that date. The cause of action arose either when the Government served the notice on the plaintiff in September 1910 or when the plaintiff served the counter-notice on the Government on 21st December 1910.

[ABDUR RAHIM, J.—Has the Government passed any orders on the notice by the plaintiff?]

Yes, they refused to recognize his claim.

[WALLIS, C.J.—Can the mere service of a notice which the Government was authorized to issue, give a cause of action?]

[SESHAGIRI AYYAR, J., referred to *Bhaskaradu* v. *Subbarayudu*(1).]

[ABDUR RAHIM, J.—What is the date of the order by the Government on the petition by the plaintiff? The refusal by the Government might furnish a cause of action.]

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(1) (1915) I.L.R., 38 Mad., 674.

But that is not the case of the plaintiff here. There is no cause of action apart from the imposition of the penalty. The remedy by recovery of the assessment paid, is now barred under section 14 of the Act.

[WALLIS, C.J.—If a cause of action is barred for one purpose, is it barred for every purpose?]

Yes.

[ABDUR RAHIM, J.—When was the penalty imposed?]

In June 1910.

I have two points to place before your Lordships:—(1) The plaintiff's cause of action, if any, arose when the penal assessment was levied, and (2) that a mere notice to show cause under section 7 does furnish a cause of action.

[WALLIS, C.J.—In *Narayana Pillai* v. *Secretary of State*(1), it is stated that notice is no grievance. Eviction or penal assessment only gives rise to a cause of action.]

Bhaskaradu v *Subbarayudu*(2) holds the other way.

[WALLIS, C J —*Bhaskaradu* v *Subbarayudu*(2) only says *that the cause of action arises only when the Government denies* the title. The judgment refers to a notice to quit.]

Under section 6 (2) there is a notice to quit.

[WALLIS, C J.—In this case there was the penal assessment only.]

A suit in which the levy of the penalty is the cause of action is clearly barred under section 14.

[ABDUR RAHIM, J.—When the Government levies the penalty again, the plaintiff can sue again.]

Yes.

S. Ranganadha Ayyar for *A. V. K. Krishna Menon* for respondents Nos. 2 and 3.

The fourth respondent did not appear in person or by pleader

C. V. Ananthakrishna Ayyar for respondents Nos. 5 to 10.

[ABDUR RAHIM, J.—When do you say your cause of action arose?]

When the notice was sent by the Collector.

[ABDUR RAHIM, J.—Then your suit is six months after that date?]

The six months' limitation applies only to the special act which the Collector is authorized to do under the Act.

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(1) (1912) 23 M L.J., 162. (2) (1915) I.L.R., 38 Mad., 674.

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[WALLIS, C.J.—The six months' limitation applies to all proceedings under the Act and the sending of a notice is a proceeding under the Act.]

[ABDUR RAHIM, J.—The Collector purports to act under the Act and so the limitation provided by it will apply. But if he purports to act outside it, then the ordinary provisions of law will apply.]

[WALLIS, C.J.—The action of the Collector was to ask you to show cause and that is not a cause of action. The Government levied the penalty without waiting for the plaintiff's explanation and a cause of action based on the levy of penal assessment is barred.]

The limitation referred to only applies to a suit to recover the penalty paid and it has no reference to the other relief that the plaintiff may ask for

[ABDUR RAHIM, J.—As regards two of the remedies the dates on which the causes of action arise are specified, but as regards the others, though no dates are specified on which the causes of action arise, the limitation is provided by the Act.]

[ABDUR RAHIM, J.—Upon the terms of the reference the suit is barred.]

WALLIS, C.J., ABDUR RAHIM AND SESHAGIRI AYYAR, JJ.

The following opinion of the Court was delivered by WALLIS, C.J.—We think that a notice under section 7 calling on the person in occupation to show cause why he should not be proceeded against under section 5 or section 6 of the Act, does not give rise to a cause of action. This was pointed out in *Narayana Pillai v. Secretary of State*(1), and if the learned Judges who decided *Bhaskaradu v. Subbarayudu*(2) were of a different opinion we are with respect unable to agree with them. Further, whether the present suit be regarded as based on the notice under section 7, or on the levy of penal assessment in June 1910, more than six months before the date of suit, it is in either view barred under section 14 because it was not instituted within six months from the time at which the cause of action arose.

1916 January 19

This Second Appeal coming on for final hearing before ABDUR RAHIM and SESHAGIRI AYYAR, JJ., the Court delivered the following

ABDUR RAHIM AND SESHAGIRI AYYAR, JJ.

JUDGMENT.—The appeal must be allowed having regard to the opinion of the Full Bench that there was no cause of action based on the notice dated September 1910.

(1) (1912) 23 M.L.J., 162. (2) (1915) I.L.R., 38 Mad., 674.

The decree of the lower Appellate Court will be reversed and that of the Munsif restored with costs in this and in the lower Appellate Courts. The memorandum of objections is dismissed.

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ABDUR RAHIM AND SESHAGIRI AYYAR, JJ.

O.M.N.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

RAMA AYYAR (DIED) AND ANOTHER (PETITIONER AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

KRISHNA PATTER (COUNTER-PETITIONER), RESPONDENT.*

1914 October 14 and 21 and 1915 August 19 and November 23 and 24.

Foreign Court—Appearance by the defendant—Protest against jurisdiction—Defence on the merits—To get refund from the creditor's son to whom the suit debt was repaid and to avoid arrest—Voluntary submission to jurisdiction.

The defendant who was sued in a foreign Court, viz., a Court in the Cochin State, appeared and defended the suit against him on the merits but protested against the jurisdiction of the Court. His reasons for appearing and defending the suit were (1) that the creditor's son to whom he had repaid the suit debt refused to refund the money unless he defended the suit brought by the father and (2) that if a decree were passed against him, he might be arrested when he went to Cochin on business or to see his relations,

Held, that the defendant must be deemed to have submitted to the jurisdiction of the foreign Court voluntarily notwithstanding his protest against its jurisdiction.

Parry & Co. v. Appasami Pillai (1880) I.L.R., 2 Mad., 407, overruled.

APPEAL against the decree of A. EDGINGTON, the acting District Judge of South Malabar, in Appeal No. 169 of 1912, preferred against the order of V. K. DESIKA ACHARI, the Subordinate Judge of Palghat, in Execution Petition No. 1471 of 1911, in Original Suit No. 164 of 1081 on the file of T. M. KRISHNA MENON, the Additional District Judge of Anjikaimal, in Appeal No. 50 of 1085 on the file of V. KELU ERADI, the Chief Judge, K. NARAYANA MARAR and F. J. DEROZARIO, Judges of Cochin.

The facts of the case appear from the ORDER OF REFERENCE of TYABJI, J.

* Appeal Against Appellate Order No. 120 of 1912 (F.B.).

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T. R. Ramachandra Ayyar, T. R. Krishnaswami Ayyar and *N. A. Krishna Ayyar* for the second appellant.

C. V. Ananthakrishna Ayyar and *T. K. Govinda Ayyar* for the respondent.

This Appeal coming on for hearing in the first instance before OLDFIELD and TYABJI, JJ., the following JUDGMENT was delivered by

OLDFIELD
AND
TYABJI, JJ.

OLDFIELD, J.—Since the hearing in the lower Appellate Court some of the questions between the parties have been set at rest by the Full Bench decision in *Veeraraghava Aiyar* v. *Muga Seit*(1).

In consequence of it there is now no suggestion that the Court cannot enquire into the binding nature of a foreign decree, of which execution is sought.

The question is next whether the decree is binding and therefore executable in consequence of the respondent's submission to the foreign Court's jurisdiction. The decision referred to decided at least that a party, who pleads in a foreign Court (although after protest), does not submit to its jurisdiction, if he does so in order to protect his property in that jurisdiction from attachment and perhaps sale. The respondent contends that it further left open the question whether the presence of an intention to avoid any other or lesser inconvenience, such for instance as the possible attachment of property, which the party might bring within the jurisdiction in future would deprive his appearance or pleading of its character as a submission—vide *Parry & Co.* v. *Appasami Pillai*(2). Before dealing with this, we think it advisable to have the facts clearly before us. We therefore call on the lower Appellate Court to find on the issue,

"What were the facts or reasons which led the respondent to appear and plead in the foreign Court?"

Fresh evidence may be taken. The finding is due in six weeks. Seven days will be allowed for filing objections.

In compliance with the above order of this Court, the District Judge of South Malabar submitted the following

FINDING.—A finding is called for on the issue:—"What were the facts or reasons which led the respondent to appear and plead in the foreign Court?" Krishna Patter, the respondent, states in evidence that the money which Rama Ayyar, the

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(1) (1916) I.L.R., 39 Mad., 24.
(2) (1880) I.L.R., 2 Mad., 407.

plaintiff in Original Suit No. 134 of 1084 in the District Court of Anjikaimal in the Cochin State, sued to recover was borrowed by him from Kailasa Ayyar, son of Rama Ayyar. He says that he had borrowed the money from Kailasa Ayyar for his trade in gold and repaid it at the request of the latter in Madras obtaining a receipt (Exhibit I) in acknowledgment of the amount paid and the letter (Exhibit II). When Rama Ayyar brought the suit against him he was asked by Kailasa Ayyar to contest the suit and contend that the money had been paid back at his request. He states that Kailasa Ayyar said to him that unless he so contested the suit he would not refund the money to him in the event of his father obtaining a decree against the respondent. The respondent further explains that if a decree were obtained against him he might have been arrested when he went to Cochin State as he used to do to carry on his trade and to see his relations. The conversation about the suit between Rama Ayyar and the respondent is also mentioned by his second witness, Samu Pattar, a trader of Palghat, who also says that respondent paid back the money borrowed from Rama Ayyar in Madras as requested by Kailasa Ayyar. His brother-in-law the third witness Anantarama Patter speaks of the trade of the respondent in Cochin (vide Exhibits III to VIII) and states that the respondent contested the suit because he did not want to be arrested when he went there on business. The appellant who is the legal representative of the plaintiff in the suit did not examine any witness. He relied mainly on the proceedings in the Anjikaimal Court in that suit (Exhibits H, J, B, C, D, E, F and G) to show that the plea of the respondent is not true and that he merely contested the suit because he expected to win it. But it is clear that the plea of want of jurisdiction was expressly raised by the defendant and the fact that he contested the suit on its merits does not show that it was not with the object of avoiding inconvenience of having a decree against him in the Cochin State. I see no reason on the whole to reject the evidence of the respondent and his witnesses as to the reasons which led him to contest the suit and I find on the issue that the respondent appeared and pleaded in the District Court of Anjikaimal under the circumstances now stated by him.

This Appeal came on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred

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TYABJI, J.

by this Court for trial, before TYABJI and PHILLIPS, JJ., who passed the following ORDERS OF REFERENCE TO THE FULL BENCH :—

TYABJI, J.—This appeal arises out of an application under section 44 of the Civil Procedure Code for execution of a decree passed in the Courts of the State of Cochin. It is admitted that there is such a notification with reference to the Courts in Cochin as is mentioned in that section.

It has been recently held and was not questioned before us, that such an application may be resisted on the grounds mentioned in section 13 of the Civil Procedure Code: *Veeraraghava Aiyar* v. *Muga Seit*(1).

The present application is resisted on the ground that the foreign Court was not of competent jurisdiction: section 13 (*a*) of the Civil Procedure Code.

It is admitted that the Courts in Cochin had jurisdiction in accordance with laws of Cochin. But whether a foreign Court is or is not a Court of competent jurisdiction within the meaning of section 13 (*a*) has to be determined in accordance with the principles of international law and not in accordance with the law of the country in which the foreign Court is situated. See *Pemberton* v. *Hughes*(2), where it is said: "The jurisdiction which alone is important in these matters is the competence of the Court in an international sense, i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Court of this country." See also *Christian* v. *Delanney*(3) and *Saik Atham Sahib* v. *Davud Sahib*(4). In *Pemberton* v. *Hughes*(2) the question was (as it always is in England) whether a suit would lie in England on a foreign judgment. Section 44 however permits execution to be obtained on the foreign judgment itself.

Whether section 44 does not proceed on the principle of "comity" as that expression is understood in *Schibsby* v. *Westenholz*(5) has not been argued before us, and I will assume that the principle of "comity" has no bearing on judgments falling within section 44. The difference between the two aspects is thus explained in *Schibsby* v. *Westenholz*(5), "and we think

(1) (1916) I.L.R., 39 Mad., 24.
(2) (1899) 1 Ch., 781.
(3) (1899) I.L.R., 26 Calc., 931.
(4) (1909) I.L.R., 32 Mad., 469.
(5) (1870) L.R. 6 Q.B., 155 at p. 159.

that if the principle on which foreign judgments were enforced was that which is loosely called 'comity', we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down"; the latter principle being thus explained "we think that for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by PARKE, B. in *Russell* v. *Smyth*(1), and again repeated by him in *Williams* v. *Jones*(2), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given which the Courts in this country are bound to enforce, and consequently that anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action."

The cases in which foreign Courts are in England recognized to be *internationally of competent jurisdiction in regard to suits* of a personal nature have been stated by FRY, J., in *Rousillon* v *Rousillon*(3), to include the following five.—

(1) "where he is the subject of the foreign country in which the judgment has been obtained,

(2) where he was resident in the foreign country when the action began;

(3) where the defendant, in the character of plaintiff, has selected the forum in which he is afterwards sued;

(4) where he has voluntarily appeared,

(5) where he has contracted to submit himself to the forum in which the judgment was obtained."

In the present case only the fourth head need be considered. It is impliedly recognized as a source of international competence in *Gurdyal Singh* v. *Raja of Faridkot*(4) as a decree of a foreign Court to the jurisdiction of which the defendant has in any way submitted himself is in their Lordships' judgment excepted from those decrees which are described as being by international law a nullity.

(1) (1842) 9 M. & W., 810 at p. 819, s.c., 152 E.R., 343 at p. 347
(2) (1845) 13 M. & W. 628 at p. 633, s.c. 153 E.R., 262 at pp. 264 and 265
(3) (1880) 14 Ch. D., 351 at p. 371.
(4) (1894) I.L.R., 22 Calc., 222 at p. 238.

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What we have to decide therefore is whether or not the respondent had voluntarily appeared in the Cochin Court, or to use Lord SELBORNE's words in *Gurdyal Singh* v. *Raja of Faridkot*(1): "whether or not he had in any way submitted himself to the jurisdiction of the Cochin Courts".

Both the lower Courts have answered this question in the negative, and the question before us narrows itself down into whether there is any evidence on which they could have held that the defendant's appearance was caused by duress so as to prevent his appearance having the effect of clothing the Courts of Cochin with jurisdiction under the fourth head.

The facts are as follows:—

A sum of Rs. 2,300 was due from the respondent (Krishna Patter) to the appellant (Rama Ayyar). The respondent paid this sum to Kailasa Ayyar, the son of Rama Ayyar. Rama Ayyar repudiated the payment to his son as a proper payment to himself, and brought the suit in the Cochin Courts. The respondent appeared in the Cochin Courts under protest, but pleaded on the merits. His defence on the merits was upheld in the Court of first instance in Cochin, but that decision was reversed by the Appellate Court. Both Courts decided against the respondent on the question of jurisdiction. The respondent says that his appearance was not voluntary having been actuated by the following circumstances:—

(1) "He states" (in the words of the District Judge) "that Kailasa Aiyar said to him that unless he so contested the suit he would not refund the money to him in the event of his father obtaining a decree against the respondent." In other words, a third party, Kailasa Ayyar, required the respondent to contest the suit and said to him that unless the suit was contested he (Kailasa Ayyar) would not refund the money which had been paid to him by the respondent on behalf of his father.

(2) "The respondent further explains that if a decree were obtained against him he might have been arrested when he went to Cochin State as he used to do to carry on his trade and to see his relations."

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(1) (1894) I.L.R., 22 Calc., 222 at p. 238

Do these two circumstances furnish any evidence that the appearance of the respondent in the Cochin Courts was under duress?

Great reliance was placed by the respondent upon *Parry & Co.* v. *Appasami Pillai*(1), the principle of which decision appears in the following sentences. "The grounds on which those decisions proceeded were that the defendant, by appearing in the foreign Court and taking no objection to its jurisdiction, had for the time put himself under the jurisdiction of the Court and had led the plaintiff to believe that the proceedings were allowed by him to be effectual, and encouraged the plaintiff to proceed on them instead of withdrawing from them and instituting proceedings elsewhere." Mr. Justice MUTTUSWAMI AYYAR whose decision was upheld had said in *Parry & Co.* v. *Appasami Pillai*(1). "The true test seems to be something in the conduct of the defendant which amounts to a voluntary submission to jurisdiction and which might amount to a breach of faith if the defendants were allowed to question the jurisdiction of the foreign Court."

The true principle however seems to be, not that good faith estops the defendant from questioning the jurisdiction of a Court which in fact has no jurisdiction; but that the fact of the defendant appearing and pleading on the merits, and thus taking a chance of a decision being given in his favour (and inviting the Court to pronounce on the merits) makes that Court internationally competent to adjudicate on the merits, in the same manner as is done by residence (even temporary) of the defendant in the foreign country, or by a contract made prior to the suit by the defendant with the plaintiff to submit himself to the jurisdiction of the Court. Applying the test approved of in *Schibsby* v *Westenholz*(2), it may be said that when a person appears before a foreign Court and takes the chance of a judgment in his favour, there is a duty cast upon him to obey that judgment even if it goes against him.

On the other hand, of course, where the defendant's appearance is not voluntary, but brought about under duress, the Courts cannot give to such an act any legal consequence and "the case will be treated as though he had not appeared" *Voinet* v. *Barrett*(3), (per Lord ESHER). It has been assumed that one

(1) (1880) I.L.R., 2 Mad., 407 (2) (1870) L.R., 6 Q.B., 155

(3) (1885) 55 L.J., Q.B., 39 at p. 40.

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example of such duress is where property having been "seized by the foreign tribunal in order to compel appearance" (*Ibid.* per COTTON, L.J.), the defendant appears under *protest in order to protect such property*. On the other hand it has been said by Lord ESHER, M.R., in the same case that the mere fear that things which may be afterwards *carried* into the foreign country will be seized is not such pressure as will prevent appearance from being voluntary under head 4 above: and Lord Justice BOWEN said: "A man cannot be said to be compelled to appear because if he does not do so, he may be inconvenienced in the long run" (page 42). This case would therefore appear to be directly against the contention of the respondent and it is only to be considered whether we are bound to follow the decision in *Parry & Co.* v. *Appasami Pillai*(1), in preference to *Voinet* v. *Barrett*(2).

Parry & Co. v. *Appasami Pillai*(1) has, no doubt, stood in the Indian Law Reports for a long time, and there is much substance in the contention that we ought not to depart from it lightly as many parties may have proceeded on the basis of its correctness. But international law develops rapidly. The *attitude* of the Courts towards foreign judgments has certainly greatly changed since Lord ELLENBOROUGH said, "I will look to these foreign judgments with great jealousy": *Molony* v. *Gibbons*(3). Now the *legislature* of *British* India requires some of them to be executed as if they had been passed by the Courts of British India. Moreover the decision in *Parry & Co.* v. *Appasami Pillai*(1) has *recently* been greatly canvassed and its soundness doubted in *Veeraraghava Aiyar* v. *Muga Sait*(4). It was not followed in *Parameswaran Namburdi* v. *Subramania Pattar*(5) where the English decision in *Boissiere & Co.* v. *Brockner & Co*(6), was followed without reference to *Parry & Co.* v. *Appasami Pillai*(1). The decision in *Narayana Moothad* v. *The Cochin Sircar*(7), however, proceeded mainly on the ground that the defendant had filed an appeal from a decision against the foreign Court and in the appeal he had taken no objection to jurisdiction. On the other hand SADASIVA AYYAR, J., one of the learned Judges who decided

(1) (1880) I.L.R., 2 Mad., 407. (2) (1885) 55 L.J., Q.B., 39 at p. 40.
(3) (1810) 2 Camp., 502. (4) (1916) I.L.R., 39 Mad., 24.
(5) Civil Miscellaneous Second Appeal No. 26 of 1914.
(6) (1889) 6 T.L.R., 85. (7) (1916) I.L.R., 39 Mad., 661.

Veeraraghava Aiyar v. *Muga Seit*(1), and *Narayana Moothad* v. *The Cochin Sircar*(2), was prepared to follow *Parry & Co.* v. *Appasami Pillai*(3).

We have therefore the fact that there is a decision of this Court of long standing which has not been expressly overruled by a Full Bench and which SADASIVA AYYAR, J., is prepared to follow in favour of the respondent. It is argued by the respondent that this consideration is strengthened by the fact that the only alternative to following *Parry & Co.* v *Appasami Pillai*(3) is that we should follow the English decisions, and that the latter alternative ought not to be adopted for this additional reason that the present state of authorities in England leaves the law in an unsatisfactory condition. (See Westlake's Private International Law, *fifth edition*, 406.)

The facts with reference to voluntary or involuntary submission to jurisdiction under protest must (according to Professor Westlake's view of the present English authorities) be arranged under one of three heads —

(1) When the property of the defendant is at the date of appearance actually in the hands of the foreign Court;

(2) When the defendant possesses property which at the same date is within the grasp of the foreign Court, but not actually seized by it;

(3) When the defendant has business transactions in the foreign country and is frequently in such position that a judgment in a Court of that country could be executed against him there.

When the facts fall under the first head the submission to jurisdiction has been considered (without ever having been so decided) to be involuntary; under the other two heads it has been held to be voluntary.

Professor Westlake points out that there cannot be any real distinction between the amount of pressure in cases (1) and (2). This was the view of WILLS, J., in *Voinet* v. *Barrett*(4) reversed on appeal—*Voinet* v. *Barrett*(5). Nor is there any solid distinction between cases (2) and (3). It would follow therefore that logically all three cases must result in the same manner, i.e.,

(1) (1916) I.L.R., 39 Mad., 24. (2) (1916) I.L.R., 39 Mad., 631.
(3) (1880) I.L.R., 2 Mad., 407. (4) (1885) 54 L.J. Q.B., (N.S.) 521.
(5) (1885) 55 L.J. Q.B., 39.

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either in each of these cases it ought to be considered that the submission has been voluntary, or the reverse.

We have therefore three alternative courses open to us—

I. To hold [as held in *Parry & Co.* v. *Appasami Pillai*(1)] that in all three cases the submission is involuntary; in which case "the principle that jurisdiction is given by voluntary appearance would be practically abandoned." This principle has, however, as Professor Westlake points out, not been abandoned in *Boissiere & Co.* v. *Brockner & Co.*(2) nor in *Carrick* v. *Hancock*(3), still less, it may be added, in *Guiard* v. *De Clermont and Donner*(4).

II. To follow the English authorities as they stand, notwithstanding that they are anomalous.

III To hold that in all three cases the submission is voluntary, which would be opposed to the dicta that when a person appears to protect his property, his submission may be considered to be brought about by duress and have no effect in conferring jurisdiction.

The trend of the most recent decisions in England is, however, in favour of this last course, namely, to recognize a foreign judgment whenever the defendant has appeared: *Cf. Guiard* v. *De Clermont and Donner*(4) and the remarks on it in *Veeraraghava Aiyar* v. *Muga Sait*(5). In favour of the same view must be mentioned the principle that if the defendant takes the chance of a decision in his favour then he is bound: whenever he appears and defends the action on the merits, he takes such a chance. The fact that the defendant is even temporarily resident in the foreign country itself gives jurisdiction to the Court, the question of the time during which he has actually been in the country is wholly immaterial—*Carrick* v *Hancock*(3). Jurisdiction may be given by agreement between the parties and where the suit is on a contract it has sometimes been held by the Courts that by implication there was a contract that the foreign Court should have jurisdiction. It is important to note also that possession by the defendant of property in the foreign country is by itself considered by some countries, including Scotland, to be sufficient to give jurisdiction to the

(1) (1880) I.L.R., 2 Mad., 407. (2) (1889) 6 T.L.R., 85.
(3) (1895) 12 T.L.R., 59. (4) (1914) 3 K.B., 145; s.c., 30 T.L.R., 511
(5) (1916) I.L.R., 39 Mad., 24.

foreign country. See Dicey's Conflict of Laws, second edition, pages 56 and 57. Story's Conflict of Laws, eighth edition, section 549, where it is recognized that the property in the foreign country may be seized and attached and the decree is held not to be binding personally only if the defendant "has never appeared and contested the suit." See also *Douglas* v. *Forrest*(1) which was however doubted in *Boissiere & Co.* v. *Brockner & Co.*(2), and in *Gurdyal Singh* v. *Raja of Faridkot*(3) the possession of property was held to be no ground for jurisdiction. But it may be added that when the property is of sufficient value to induce the defendant to appear and defend the suit, the test of effectiveness, on which Professor Dicey bases the whole theory of the international competence of Courts, is satisfied.

On the other side and in support of the view that when property has been seized by the foreign Court appearance should be considered involuntary and be deemed insufficient to clothe that Court with jurisdiction we have in the first place the remarks in *Voinet* v *Barrett*(4), though the actual decision was that the appearance was under such circumstances as to give jurisdiction to the Court. Professor Dicey says on this point· "The distinction suggested rests on good authority" (the authority is not cited) "but is not entirely satisfactory" (Conflict of Laws, page 371, footnote 2.) Professor Westlake on the other hand is in favour of the view that appearance in such circumstances does not bind the defendant, saying that otherwise "the defendant would be bound to abandon his property abroad as the price of saving his English property from the grasp of a Court having *ex hypothesi* no international jurisdiction in the case" (page 406) He is also of opinion that the obvious leaning of Lord BLACKBURN and his colleagues in *Boissere & Co.* v. *Brockner & Co.*(2) was in the same direction. The passage cited immediately before this remark is: "We think it better to leave this question open and to express no opinion as to the effect of the appearance of a defendant where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal But we must observe that the decision in

(1) (1828) 4 Bing, 686 and 701; also 130 E.R., 933 at p. 940
(2) (1889) 6 T.L.R., 85. (3) (1894) I.L.R., 22 Calc., 222
(4) (1885) 55 L.J Q B., 39.

Decosse Brissac v. *Rathbone*(1) is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound" (Westlake, page 406).

There seems, however, to be no decision of the English Courts that when property has been seized by the foreign Court, the defendant's subsequent appearance must be considered to be ineffectual in the sense that the Court is not then competent to pronounce an internationally effective judgment. The *obiter dicta* in *Voinet* v. *Barrett*(2) and Professor Westlake's opinion that such ought to be the law are of course of the greatest weight. But it seems to me as I have already said that the trend of the most recent authorities, the view taken by the Courts of Scotland and other countries and the test of effectiveness mentioned by Professor Dicey all indicate that the law will develop in another direction. As to Professor Westlake's remarks cited above, the defendant virtually abandons his foreign property as soon as he fails to defend the suit successfully; for such property being within the jurisdiction of the foreign Court can be seized in execution of the foreign judgment. See Story's Conflict of Laws, section 549. In the present case the defendant appeared and took the chance of a judgment in his favour. The authorities are quite clear that in such a case the foreign Court has jurisdiction: *Boissiere & Co.* v. *Brockner & Co* (3) and *Harchand Panaji* v. *Gulabchand Kanji*(4). No expression of opinion is necessary on the question whether if his property had been seized the Court would or would not have been deprived of its international competence, as no property had been seized. All I need say is that in my opinion in the present case there is no evidence from which it can be inferred that the defendant appeared in the Cochin Courts through such duress as to render his appearance devoid of the effect which it would ordinarily have under the fourth head mentioned by FRY, J.

My reference to some of the more general aspects of the question was necessary only in order to determine whether we ought to follow *Parry & Co.* v. *Appasami Pillai*(5) and hold, contrary to the English authorities, that though the defendant appears and pleads on the merits, his denial that the Court has

(1) (1870) 30 L.J., Ex., 238
(2) (1885) 55 L.J.Q.B., 39.
(3) (1889) 6 T.L.R., 85.
(4) (1914) I.L.R., 39 Bom., 34.
(5) (1880) I.L.R., 2 Mad., 407.

jurisdiction is sufficient to prevent the Court from becoming internationally competent.

The distinction between voluntary and involuntary appearance in the three cases mentioned by Professor Westlake may be admitted to be unsatisfactory. But if in all the three cases the same decision comes to be given in England, it seems to me that that decision will be that in each case the Court becomes competent by the defendant's appearance. Hence in any case, *Parry & Co* v. *Appasami Pillai*(1) should not in my opinion be followed, when (as in the present case) it is opposed to English decisions, as far as they have already proceeded. If I had thought that the trend of the English decisions was in favour of the view in *Parry & Co.* v. *Appasami Pillai*(1), it would have been proper to follow it, but as I have already said it seems to me to be emphatically in the reverse direction.

I should myself be inclined therefore to allow the appeal but as my learned brother thinks that we ought not to disregard *Parry & Co.* v *Appasami Pillai*(1), unless it is overruled by a Full Bench, I agree to refer the following questions to a full bench of this Court:—

(1) Where there is an application under section 44 of the Civil Procedure Code for execution of a foreign judgment and the judgment-debtor objects on the ground that the judgment was given by a foreign Court that had no personal jurisdiction over him inasmuch as he was not resident within the territorial jurisdiction of that Court,

(a) Is such objection to be upheld where it appears that the judgment-debtor had objected to the jurisdiction of the foreign Court when sued there, or

(b) Will the fact that the judgment-debtor has appeared to contest the suit on the merits and taken the chance of a judgment in his own favour conclude him from taking any objection to the jurisdiction of the Court, irrespective of the question whether his appearance has been voluntary? or

(c) Will the defendant be concluded only if his submission to the jurisdiction was voluntary?

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(1) (1880) I.L.R., 2 Mad., 407.

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(d) If the third alternative is answered in the affirmative is the submission voluntary where the defendant appears in the circumstances of the present case?

(2) Was *Parry & Co* v. *Appasami Pillai*(1) rightly decided?

PHILLIPS, J.

PHILLIPS, J.—The facts of the case are set out in my learned brother's judgment. The only question for consideration is whether the respondent voluntarily submitted to the jurisdiction of the Cochin Court, which passed the decree which it is now sought to execute. The respondent appeared and defended the suit against him in the Cochin Court, but he protested against the jurisdiction of the Court. He renewed his protest in the Appellate Court, and has now taken the same objection in execution of the decree. His reasons for appearing and defending the suit were, as found by the learned District Judge: (1) that his creditor's son to whom he had repaid the suit debt refused to refund him the money unless he defended the suit brought by the father and (2) that if a decree were passed against him he might be arrested when he went to Cochin on business or to see his relations. In *Parry & Co.* v. *Appasami Pillai*(1), the reason for the defendants' submission to a foreign tribunal as given in the judgment (page 412) is "to escape the inconveniences which would attend a judgment against them, if at any time they or their property might be found in French territory." That case is therefore on all fours with the present case and if that ruling is to be followed this appeal would have to be dismissed. The authority of the ruling has, however, been recently doubted by the learned CHIEF JUSTICE and SESHAGIRI AYYAR, J., in *Veeraraghava Aiyar* v. *Muga Seit*(2) in consequence of the decision in *Boissiere & Co.* v. *Brockner & Co*(3). There are also other English decisions which are opposed to the ruling in *Parry & Co.* v. *Appasami Pillai*(1), *Boissiere & Co.* v. *Brockner & Co*(3), *Voinet* v. *Barrett*(4), *Rousillon* v. *Rousillon*(5) and *Decosse Brissac* v. *Rathbone*(6). In a very recent case *Harris* v. *Taylor*(7), where a defendant put in an appearance conditionally and applied to the Court to set aside the order for service out of the jurisdiction

(1) (1880) I.L.R., 2 Mad., 407.
(2) (1916) I.L.R., 39 Mad., 24.
(3) (1889) 6 T.L.R., 85.
(4) (1885) 55 L.J.Q.B., 39.
(5) (1880) 14 Ch. D., 351.
(6) (1870) 30 L.J. Ex., 238.
(7) (1915) 2 K.B., 580.

but did not even defend the action, it was held that the defendant had voluntarily submitted to the jurisdiction because he had sought the protection of the Court. The principle that is apparently applied in these English cases is that when a defendant submits to jurisdiction, except under duress, he is bound by the decision of the Court, because he has elected to take the chance of a decision in his favour and cannot be allowed to demur to a decision against him. A mere protest against jurisdiction does not make his submission involuntary. The ruling in *Parry & Co.* v. *Appasami Pillai*(1), is the concurrent decision of three Judges and proceeds on the grounds that a defendant having protested against jurisdiction puts the plaintiff on his guard and does not lead him to believe that the proceedings will be allowed to be everywhere effectual. This point of view is quite different from that adopted by the English Courts, and in a question like this, which is one of international law, Indian Courts must be guided by the decisions of English Courts. The law however as laid down in *Parry & Co.* v. *Appasami Pillai*(1) has been the law in this Presidency, where the circumstances are not the same as in England, for over thirty-five years and has not been altered notwithstanding the decision in *Voinet* v. *Barrett*(2). On the principle of *stare decisis* I am not prepared to dissent, unless and until that decision is overruled by a considered decision of a Full Bench. I therefore agree to refer to a Full Bench the questions proposed.

T. R. Krishnasuami Ayyar for the appellant.—The defendant put in a written statement objecting to jurisdiction and also pleaded on the merits. This amounts to submission. The recent decision in *Harris* v. *Taylor*(3) is in my favour.

[WALLIS, C.J.—We will hear the other side.]

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *T. K. Govinda Ayyar* for the respondents.

The case against me is *Boissiere & Co.* v. *Brockner & Co.*(4).

[WALLIS, C.J.—But it is approved in *Harris* v. *Taylor*(3).]

Harris v. *Taylor*(3) can be distinguished. There is a distinction between a case in which a person says that he is not

(1) (1880) I.L.R. 2 Mad., 407.
(2) (1885) 55 L.J. Q.B., 3[illegible].
(3) (1915) 2 K.B., 580.
(4) (1889) 6 T.L.R., 85.

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going to submit to the Court's jurisdiction whether the Court has jurisdiction over him or not *and whatever be the law applicable* and a case in which a person says that by the Municipal law the Court has no jurisdiction and yet he will submit to it. (See page 585.) The decision in *Harris* v. *Taylor*(1) must be taken with reference to the facts. No other English case goes so far as *Boissiere & Co.*, v. *Brockner & Co.*(2).

A person has two courses open: (1) to plead altogether against the jurisdiction; (2) to submit and say that the Municipal law has no jurisdiction. *Guiard* v. *De Clermont and Donner*(3) can be distinguished. In *The Vivar*(4) there was appearance under protest. In *Voinet* v. *Barrett*(5), there was no protest but there was appearance. The decision in *Boissiere & Co.*, v. *Brockner & Co.*(2) is questioned by Mr. Dicey in his Conflict of Laws.

[WALLIS, C. J.—Mr Dicey's view was brought to the notice of their Lordships in *Harris* v. *Taylor*(1).]

Your Lordships will have to go to this extent, viz., whether there was protest or no protest, the moment a person appears he submits himself to the jurisdiction.

[WALLIS, C J.—Protest does not matter, appearance is what is material.]

Further the circumstances ought also to be taken notice of. There are many states in this country. Refers to *Veeraraghava Aiyar* v. *Muga Seit*(6), *Narayana Moothad* v. *The Cochin Circar*(7) and *Schibsby* v. *Westenholz*(8).

T. R. Krishnaswami Ayyar for the appellant was not called upon in reply.

This Appeal against Appellate Order coming on for hearing in pursuance of the above ORDER OF REFERENCE, the following OPINION of the Court was delivered by

WALLIS, C J., SESHAGIRI AYYAR AND PHILLIPS, JJ.

WALLIS, C.J.—We think that *Parry & Co.* v. *Appasami Pillai*(9) must be overruled. No authorities are cited in the judgment of the Appellate Court, but the learned Judge who decided the case on the original side referred on the point to *The*

(1) (1915) 2 K B., 580.
(2) (1889) 6 T.L R., 85.
(3) (1914) 3 K.B., 145, 30 T.L.R., 511.
(4) (1876) 2 P.D., 29.
(5) (1885) 55 L J Q B., 39.
(6) (1915) I.L R., 39 Mad., 24.
(7) (1915) I L R., 39 Mad., 661.
(8) (1870) L.R., 6 Q B., 155 at p. 161.
(9) (1880) I.L.R., 2 Mad., 407.

General Steam Navigation Company v. *Guillou*(1) and to *Schibsby* v. *Westenholz*(2). The dicta in *The General Steam Navigation Company* v. *Guillou*(1), on which the learned Judge relied, were questioned in *Schibsby* v. *Westenholz*(2) which is rather against the view taken by him as in that case the question on which the Court of Queen's Bench decided to express no opinion was "as to the effect of the appearance of the defendant, where it is so far not voluntary that he only comes in to try and save some property in the hands of the foreign tribunal" rather implying that at any rate where there was no property in the hands of the foreign tribunal appearance there would amount to submission. The later English Cases referred to in the Order of Reference and in *Veeraraghava Aiyar* v. *Muga Seit*(3), including the recent decision of the Court of Appeal in *Harris* v. *Taylor*(4), as also *Harchand Panaji* v. *Gulabchand Kanji*(5), are clearly opposed to *Parry & Co.* v. *Appasami Pillai*(6), which must be overruled. That is sufficient to dispose of the reference, as the facts of the present case are identical.

C.M.N.

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(1) (1843) 11 M. & W., 877, at p. 894, s.c., 15 E.R., 1061 at p. 1068.
(2) (1870) L.R., 6 Q.B., 155 at p. 162. (3) (1916) I.L.R., 39 Mad., 24.
(4) (1915) 2 K.B., 580. (5) (1914) I.L.R., 39 Bom., 34.
(6) (1880) I.L.R., 2 Mad., 407.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair, Mr. Justice Abdur Rahim, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1911. December 14 and 24, 1912 January 28 and March 1.

BAPU *alias* AUDIMULAM PILLAI, PETITIONER,

v.

BAPU *alias* KRISHNAYEN, RESPONDENT.*

Sanction to prosecute for preferring a false charge—Refusal to revoke, by superior Court—Application to High Court to set aside refusal, under Criminal Procedure Code (Act V of 1898), sec. 195 (6), maintainability of—Judges of High Court equally divided in opinion—Senior Judge's opinion to prevail under clause 36, Letters Patent—Criminal Procedure Code (Act V of 1898), ss. 429 and 439, inapplicability of, to such application—Application to a superior Court under Criminal Procedure Code (Act V of 1898), sec. 195, to set aside a sanction given by an inferior Court, not an appeal within the Indian Limitation Act (IX of 1908), art. 154.

Held, by the Full Bench:

(1) An order refusing to revoke a sanction granted by a lower Court is one granting a sanction, from which an appeal lies to a superior Court under section 195, clause (6), Criminal Procedure Code

Muthusami Mudali v. Veeni Chetti (1907) I.L.R., 30 Mad., 382 (F.B.), followed

(2) When judges composing a bench of the High Court are equally divided in opinion on hearing an application under section 195, clause (6) of the Criminal Procedure Code against an order of the lower Court in a sanction matter, the procedure to be followed is that laid down in clause 36 of the Letters Patent and not the one in section 429 or 439 of the Criminal Procedure Code, accordingly the opinion of the senior Judge prevails.

Per curiam,—The power conferred upon the High Court by section 195 (6), Criminal Procedure Code, is not a part of the appellate and revisional jurisdiction of the High Court conferred by chapters 31 and 32 of the Criminal Procedure Code, but it is a special power conferred by section 195 (6) of the Code.

Held, by the Division Bench (SUNDARA AYYAR and SPENCER, JJ.) that an application to a superior Court under section 195, clause (6), Criminal Procedure Code, to revoke a sanction granted by an inferior Court is not an appeal within the meaning of article 154 of the Limitation Act and hence is not governed by the rule of sixty days allowed by that article for criminal appeals.

Per SPENCER, J., in the Division Bench.—But delay in applying may be a ground for refusing to grant sanction.

PETITION under sections 195 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to

* Criminal Revision Case No. 499 of 1911 (Criminal Revision Petition No. 372 of 1911).

revoke the sanction to prosecute the petitioner, granted by V. SRINIVASA AYYAR, Second-class Magistrate of Madura town, in Miscellaneous Case No. 21 of 1910 and confirmed eventually by D. G. WALLER, the Acting District and Sessions Judge of Madura, in Criminal Miscellaneous Petitions Nos 38 and 39 of 1911 under section 195, sub-sections (6) and (7) of the Code of Criminal Procedure (Act V of 1898) (on appeal from Criminal Appeal No. 3 of 1911 on the file of J. R. HUGGINS, the Acting District Magistrate of Madura).

The facts of the case are given in the first two paragraphs of the ORDER OF REFERENCE to the Full Bench

The Honourable Mr. *L A Govindaraghava Ayyar* and *K. Jagannadha Ayyar* for the petitioner.

M. D. Devadoss for the *Public Prosecutor* for the Crown.

C. S. Venkata Achariyar for the respondent.

The case came on for hearing before SUNDARA AYYAR and SPENCER, JJ, who delivered the following judgments:—

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—This is an application for the revocation of a sanction granted by the Second-class Magistrate of Madura town to prosecute the petitioner for an offence under section 211 of the Indian Penal Code The petitioner, Audimulam, preferred a complaint against the respondent, Krishna Ayyar, and his wife, charging them with criminal breach of trust in respect of some jewels entrusted to them at a marriage which took place in his house. The Magistrate suspected that the case was false and directed the Police Inspector of Madura to hold a preliminary investigation under section 202 of the Criminal Procedure Code. The Inspector reported that the case was entirely false. Krishna Ayyar thereupon applied for sanction to prosecute Audimulam for preferring a false complaint, an offence punishable under section 211 of the Indian Penal Code, and the Magistrate granted the sanction. The District Magistrate, on application made to revoke it, refused to do so. A further application was thereupon made to the Sessions Judge. He dismissed it, regarding it as an appeal presented out of time. The Sessions Judge is wrong in supposing that an application to a superior Court to revoke a sanction granted by an inferior Court is an appeal coming within the purview of article 154 of Schedule II to the Limitation Act. Section 195, clauses (6) and (7) of the Criminal Procedure Code, provides that " any sanction given or refused under that section

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of this Court affirmed the proposition that a sanction for preferring a false charge must be based on legal evidence. The facts of two of the cases before the Full Bench were very similar to those in the present case. MUTTUSWAMI AYYAR, J., observes: "There can be no doubt that sanctioning a prosecution for an offence is a judicial act and the proceeding held in connection with it is a judicial proceeding . . . . It seems to me, from the very nature of the case, that an opinion must be formed as to whether a sanction should be given or refused upon legal evidence . . . But in cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him upon which he is in a position to frame his opinion. It is irregular to substitute the opinion of the police officer who made the report for that of the Magistrate." KERNAN, J., says: "It appears to me that a sanction granted by a Magistrate merely on the report of the police is not the sanction required by law. The law requires the Magistrate to exercise his own judgment on the facts *proved* before him, and decide whether the case is one in which sanction should be accorded." In *In re Paree Kunhammed*(1), BHASHYAM AYYANGAR, J., held the same view. (See page 119.) See also *In re Gubala Rami Reddi*(2) and *Queen-Empress* v. *Ganesh Ramakrishna*(3). In *In the matter of Kalagara Bapiah*(4), BHASHYAM AYYANGAR, J., points out the distinction between a sanction given under clauses (*b*) and (*c*) of section 195 (1) and a sanction given under section 197. He observes: "A Court granting sanction under section 195, clauses (*b*) and (*c*), does so in connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore acts in its judicial capacity in granting a sanction upon legal evidence. But the Government, in according or withholding sanction under section 197, for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant, acts purely in its executive capacity, and the sanction need not be based on legal evidence." The distinction between a sanction given for offences under clause (*a*) of section 195 and clauses (*b*) and (*c*) is pointed

(1) (1903) I.L.R., 26 Mad., 116. (2) (1887) 1 Weir's Cr. R., 158.
(3) (1897) I.L.R., 22 Bom., 60. (4) (1904) I.L.R., 27 Mad., 54.

out in *Jadu Nath Mahta* v. *Jagadish Chandra Deb*(1). Where there are not sufficient grounds for granting sanction, it is open to a Court to lay a complaint of offences referred to in clauses (*b*) and (*c*) of section 195. Such a complaint cannot be interfered with by a superior Court see *Queen-Empress* v. *Ankanna*(2) and *Queen-Empress* v. *Sreenivasalu Nayudu*(3). I am of opinion that the legislature intended in section 195 to provide two alternative modes in which a Court may proceed, one, to make a judicial pronouncement that there is a prima facie case for an enquiry into an offence, leaving the initiation of criminal proceedings to others, and the other, to put the criminal law in motion, itself by a complaint. The two modes are in my opinion quite different in character

In *Kachi Madar Lebbai* v *Emperor*(4), I held that an order directing a prosecution under the allied section 476 must be based on legal evidence, and referred to section 478, which empowers a Court, to whose notice an offence referred to in section 195 is brought in the course of a judicial proceeding, to complete the enquiry and commit the accused to a Court of Sessions—a provision which conclusively shows that the order of the Court must be based on legal evidence. *Queen* v. *Nujum Ali*(5) cited in *Moothavarapu Seshayya* v. *Gatram Ramayya*(6), seems to have no bearing on the question, as what was decided in that case was that the admission of illegal evidence by a Court convicting an accused person is not, of itself, sufficient ground for reversing the conviction, if, in the opinion of the Appellate Court, the other evidence on record would be sufficient to sustain it.

I am, for these reasons, of opinion that the sanction should be set aside.

SPENCER, J. SPENCER, J.—In this case, the Second-class Magistrate of Madura town received a complaint of criminal breach of trust, and, after examining the complainant under section 200 of the Criminal Procedure Code, suspecting the complaint to be the outcome of jealousy, he referred it under section 202 of the Criminal Procedure Code to the police for investigation. On receiving the

(1) (1902) 7 C W N, 423.
(2) (1900) I.L.R., 23 Mad., 205.
(3) (1898) I.L.R., 21 Mad., 124
(4) (1911) 2 M W.N., 9
(5) (1866) 6 W.R., 41 (Cr.R.).
(6) (1911) 2 M.W.N., 520.

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police report, he dismissed the complaint under section 203 of the Criminal Procedure Code. The petitioner, whose prosecution was sanctioned, preferred an unsuccessful appeal to the District Magistrate. He next approached the High Court with a revision petition, which failed as he had not exhausted his right of appeal from the District Magistrate to the Sessions Judge. He then appealed to the Sessions Judge, but his appeal petition was dismissed for delay. He has again come to the High Court with a criminal revision petition.

In the first place, it may be noted that the Sessions Judge was not in order in treating the petitioner's application as one for the admission of an out-of-time appeal. There is no rule of law which subjects applications made under the special provisions of section 195 of the Criminal Procedure Code to the periods of limitation contained in the Limitation Act. It was held in *Queen-Empress* v. *Ajudia Singh*(1) that article 178 of Act XV of 1877 did not apply to applications made under this section.

Neither can appeals preferred under clauses (6) and (7) of section 195 be treated alike with appeals under chapter XXXI, which are governed by articles 154, 155 and 157 of the Limitation Act. While on the subject of limitation, I do not wish to be understood to say that delay is a matter that may be dismissed from consideration. Courts may, in the exercise of their discretion, refuse to grant sanction in cases where there is great delay in applying for it: vide *Venkatrayadu* v. *Sri Venkata Krishna Yachendra*(2).

The objection is taken that the sanction is bad because it is based on the police investigation and because the Magistrate made no independent judicial enquiry into the truth of the complaint, beyond recording the complainant's statement on oath when the complaint was presented.

The petitioner's vakil relies on the decisions in *Queen-Empress* v. *Sheik Beari*(3), *In re Paree Kunhammed*(4) and also upon *Kachi Madar Lebbai* v. *Emperor*(5).

The first of these is a decision by a Full Bench involving three distinct revision cases. In dealing with *Queen-Empress* v.

(1) (1888) I.L.R., 10 All., 350. (2) (1867) 2 Weir's Cr. R., 154.
(3) (1887) I.L.R., 10 Mad., 232 (F.B.) (4) (1903) I.L.R., 26 Mad., 110.
(5) (1911) 2 M.W.N., 9.

Sheik Beari(1), KERNAN, J., observed at page 239: "It appears to me that sanction granted by a Magistrate merely on the report of the police is not the sanction required by law," and, referring to the circumstances of that particular case, which was instituted by information given, in the first instance, to a village magistrate and a police officer and, later, by a complaint to a Second-class Magistrate, he observed further. "What the details of the statement of the accused to the Magistrate made on the 5th November were, does not appear. But I do not doubt that the Magistrate made such investigation as he thought the circumstances required, to satisfy himself whether an offence of false complaint was committed, and whether sanction ought to be granted before he made the order for sanction. He did not act merely on the report of the police. If he had done so, his order, made merely on the police report, should be held to be illegal." MUTTUSWAMI AYYAR, J., expressed the same principle in other words: "It is irregular to substitute the opinion of the police officer who made the report for that of the Magistrate." BRANDT, J., pointed out that the test to be applied is whether or not the Court giving or refusing the sanction had before it legal evidence upon which to form a decision, and that there cannot be said to be legal grounds for a decision as to whether sanction should be allowed or refused, where the original complaint is dismissed upon a reference to, and report made by, a police officer *alone*.

The outcome of the Full Bench decision was that sanction was held to be not given improperly only by reason of previous notice not having been given, provided that the Magistrate who gives the sanction examines the complainant and gives him an opportunity of proving his complaint in a judicial enquiry. From the use of the expressions "legal evidence" and "judicial enquiry" in this decision, I do not understand the learned Judges as meaning to lay down more than the principle, that the authority according sanction under section 195 must act on his own judgment and not substitute for it the opinion of others. There is nothing in the Code to require a Court to take statements of witnesses on oath, if it is considered necessary to hold a preliminary enquiry, and if such an enquiry is held before the grant of sanction. Chapter XXV of the Criminal Procedure

(1) (1887) I.L.R., 10 Mad., 232 (F.B.).

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Code, which deals with the mode of taking and recording evidence in inquiries and trials, would not apply to such an enquiry, which is not expressly provided for by section 195 or any other section in Chapter XV. In the present case, for instance, instead of referring the complaint to the police for investigation, it was open to the Magistrate to have made an investigation himself into the truth of the complaint under section 202 before issuing process, and statements made by witnesses at such an investigation would not have been recorded on oath, nor could sanction be accorded for prosecuting witnesses for false statements made at such an investigation as constituting an offence under section 193, Indian Penal Code: vide *Velu Nair* v. *Gnana Prakasam Pillai*(1) and *Queen-Empress* v. *Venkataramana*(2). A Magistrate proceeding under section 195 of the Criminal Procedure Code would not be wrong, in my opinion, if he took into consideration statements made before himself, not on oath, in the course of an investigation made by himself under section 202 of the Criminal Procedure Code. I agree with the opinion of AYLING, J., in *Kachi Madar Lebbai* v. *Emperor*(3) that an order under section 476 of the Criminal Procedure Code need not necessarily be set aside because it proceeds wholly or partially on a consideration of the result of a preliminary enquiry under section 202 of the Criminal Procedure Code. The decision of BHASHYAM AYYANGAR, J., in *In re Paree Kunhamed*(4), does not go further than saying that the authority giving sanction under section 195 should never be influenced in giving sanction by evidence which, it ought to know, will be altogether inadmissible against an accused person in a criminal trial.

It is, no doubt, necessary to give complainants an opportunity of proving their case which has been thrown out merely on a police report, before sanctioning their prosecution—vide *Queen-Empress* v. *Ganga Ram*(5) and *Government* v. *Karimdad*(6).

In the present case, according to the District Magistrate's order it appears that this procedure was followed but no witnesses were examined by the petitioner or by any one on his behalf.

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(1) (1903) 2 Weir's Cr. R., 167
(2) (1900) I.L.R., 23 Mad., 223
(3) (1911) 2 M.W.N., 9.
(4) (1903) I.L.R., 26 Mad., 118.
(5) (1885) I.L.R., 8 All., 33.
(6) (1880) I.L.R., 6 Calc., 496.

Supposing a complainant, to whom notice is given of a Magistrate's intention to deal with him under section 195, declines to examine his witnesses, or, being given an opportunity of doing so, omits to take advantage of it, is the Magistrate bound to undertake *suo motu* a magisterial enquiry into the truth of the complaint? I think not, if the Magistrate is satisfied on the material before him that there is a prima facie case for a prosecution, and that it is proper, in the interests of public justice, that the complainant should be prosecuted, although he, no doubt, has the power to make an independent enquiry, if not so satisfied—vide, *Queen-Empress* v. *Motha*(1). I may also refer in this connection to *Baperam Surma* v. *Gowrinath Dutt*(2) and the observation of the learned Judges who decided that case, that the adoption of a rigid rule that a preliminary enquiry should be held in every case of sanction, would have the effect of introducing into the criminal procedure in this country a new stage as a matter of imperative necessity (page 478). It was considered at one time in the history of sanctions that a Court had no power to go beyond the record in determining whether or not sanction should be granted—*Zemindar of Sivagiri* v. *The Queen*(3). This view became altered after the passing of Act X of 1882, and the change found expression in *Queen-Empress* v. *Motha*(1). The modern tendency of parties and practitioners is to expect a sort of preliminary trial in every case, and to appeal, if the proof before the sanctioning Court falls short of what would ordinarily be required for framing a charge in a warrant case. But section 195 puts sanctions on a footing similar to that of complaints by public servants of offences against public justice, and it can hardly be suggested that any preliminary enquiry is necessary for complaints which are of matters within the knowledge of the Court or public servant concerned.

Now, in the case before us, the Magistrate did not act merely on a police report; for, he says, he examined the complaint before he referred the matter to the police under section 202, and the result of his examination was that he at once suspected the truth of the complaint. The statement taken by the Magistrate from the complainant is not before us, so that I am not able to express

(1) (1897) I.L.R., 20 Mad., 339 (2) (1892) I.L.R., 20 Calc., 474.
(3) (1881) I.L.R., 6 Mad., 29.

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an opinion that, taken by itself, it would not justify the Magistrate in thinking that a *prima facie* case was made out for prosecuting the complainant. It is impossible for me to discriminate and say how far the Magistrate's order was based upon his own enquiry and how far upon the police investigation in a case where the sanction is not based entirely on a police report.

I prefer to follow KERNAN, J., in the extract quoted above from *Queen-Empress* v. *Sheik Beari*(1) who, when the details of the statement did not appear, remarked that he did not doubt that the Magistrate made such investigation as he thought the circumstances required to satisfy himself whether an offence of false complaint was committed.

As regards the propriety of a prosecution, there can be no room for doubt here of this being an eminently fit case for prosecuting the petitioner, if his complaint was false, for his object, in the opinion of the Magistrate, was to use the facility afforded by the law as an instrument for putting pressure upon the person complained against to place his wife at the complainant's disposal.

In my opinion, the requirements of the law have been substantially complied with, and no case has been made out that would justify us, acting as a Court of Revision, in quashing the sanction already accorded and confirmed by the proceedings of two superior Courts.

I would therefore dismiss the petition.

The case having been set down to be spoken to for argument as to the result of the difference of opinion as above, the following ORDER OF REFERENCE TO THE FULL BENCH OF THE COURT was delivered by

SUNDARA AYYAR AND SPENCER, JJ.

SUNDARA AYYAR, J.—In this case the High Court was invited to set aside a sanction granted by the Second-class Magistrate of Madura town. The District Magistrate refused to revoke the sanction on application made to him under section 195, clause (6) of the Criminal Procedure Code; and the Sessions Judge of Madura also refused to revoke it on a further application made to him under the same provision of law. In this Court, we have been unable to agree on the question whether the sanction should be revoked or not, one of us holding that it should be, and the other, that it should not be revoked.

(1) (1887) I.L.R., 10 Mad., 232 (F.B.).

The question has now arisen: what is the result, or, what order is to be passed, when we differ in our opinions.

It is contended by Mr. Govindaraghava Ayyar, who appears for the petitioner, that the opinion of the Senior Judge should prevail, while Mr. Devadoss, appearing for the Public Prosecutor, contends that the case should be referred to a third Judge of this Court with our opinions, under section 439 of the Criminal Procedure Code. If the order be regarded as one passed under that section, it is not contended that Mr. Devadoss is not right. But the petitioner argues that our jurisdiction was invoked by him under section 195, clause (6), and that section 36 of the Letters Patent, according to which the opinion of the Senior Judge should prevail, is applicable to the case. It is admitted that section 36 governs all cases which are not specially provided for by the Criminal Procedure Code or the Civil Procedure Code.

It has therefore to be decided, whether the provision in section 439 of the Criminal Procedure Code, that "when the Judges composing a Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429," is applicable to the case.

We may, before proceeding further, observe that there was some controversy at the hearing, as to whether the petitioner put in his application to this Court under section 195, clause (6), or under section 435. The petition itself does not refer to any particular section. Of course, if the jurisdiction of this Court could be invoked only in one particular manner, it can be regarded as exercised only in that manner. But, if the Court has power to exercise its jurisdiction in more ways than one, then it would be open to a litigant to invoke it in any of the ways in which it might be exercised. Assuming at present that section 195 (6) and section 435 provide two different ways in which this Court's jurisdiction may be exercised, we have come to the conclusion that the petitioner must be taken to have applied to the Court to exercise its powers under section 195 (6). At the heading of the petition, it is at first styled "Memorandum of Criminal Revision Petition," but it is subsequently described as "In the High Court of Judicature at Madras, Criminal Miscellaneous Petition No. 498 of 1911;" and the petition proceeds to say that the petitioner in this Court begs to prefer this

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petition for the revocation of sanction granted by the Madura Sessions Court by its order in Criminal Miscellaneous Petitions Nos. 38 and 39 of 1911;" and the petitioner describes himself as "appellant," as is often done when proceedings are instituted under section 195, clause (6). Rule 186 of the Criminal Rules of Practice framed by this Court provides that an application made to the Court under section 195 of the Criminal Procedure Code for the revocation of a sanction "should be registered as a *Criminal Miscellaneous Petition* and not as a *Revision Petition.*" As the petitioner intended to put in a Criminal Miscellaneous Petition and described himself as appellant, we are of opinion that the application should be taken to have been put in under section 195 (6), if it could legally be presented under that section.

It is urged for the Crown that no petition would lie to this Court under section 195, clause (6), as the petition is not one asking us to revoke a sanction granted by the Sessions Court, as that Court did not itself give any sanction, but only refused to revoke the sanction granted by the Second-class Magistrate, or, more correctly speaking, refused to set aside the order of the District Magistrate, who refused to revoke the sanction granted by the Second-class Magistrate.

For the petitioner it is argued that an order refusing to revoke a sanction must be regarded as one granting a sanction and that the application to this Court should therefore be viewed as one for the revocation of a sanction granted by the Sessions Court. This is a question on which there is conflict of authority. The petitioner's contention, if upheld, would lead to the result that, where a Court subordinate to this Court merely refused to revoke a sanction granted by an inferior Court, the result of a difference of opinion between the Judges composing the bench hearing the petition would depend on whether the jurisdiction of the Court is invoked under section 195, clause (6), or under section 435—the result being apparently different in each case.

This has induced us to consider whether, in reality, the petitioner has an option to move this Court in such a case either under section 195 (6) or section 435.

It seems to us that an order refusing to revoke a sanction cannot properly be regarded as an order granting a sanction. Clause (6) of section 195 provides that "no sanction shall remain

in force for more than six months from the date on which it was given, provided that the High Court may, for good cause shown, extend the time." It appears to us to be clear that the six months must be computed from the date of the order of the Court which originally granted the sanction, and the contrary has, so far as we are aware, never been held. If an order refusing to revoke can be regarded as an order granting a sanction, the result would be that the sanction would be in force for six months from the date on which the last Court whose jurisdiction is invoked, refused to revoke it, and, if that Court is the High Court, for six months from the date of its order. And it would be unnecessary for the High Court in such cases to pass any order extending the time. This, in our opinion, was clearly not the intention of the legislature.

Besides, it seems to be hardly right to speak of an order refusing to revoke as an order giving a sanction which has already been given.

We have both come to the conclusion, as stated in our opinions on the petition itself, that an application under section 195, clause (6), cannot strictly be regarded as an "appeal." The jurisdiction exercised by a Court under that clause may no doubt be regarded as similar to an appeal. But it may also be regarded as similar to a revisional jurisdiction.

It will be noted that clause (6) applies not only to cases of application to a superior Court of justice, but to superior executive officers or to Government, to whom the authority granting the sanction is subordinate, and the legislature appears to have deliberately refrained from describing the proceeding before the superior officer as either "appeal" or "revision." In *Muthusami Mudali* v. *Veeni Chetti*(1), a bench of three learned Judges of this Court held "that an order revoking a sanction is a refusal of a sanction and that an order confirming a sanction is the giving of a sanction," while two other learned Judges, BENSON and WALLIS, JJ., expressed a contrary opinion in their order of reference to the Full Bench. In *Palaniappa Chetti* v. *Annamalai Chetti*(2), which was approved in *Muthusami Mudali* v. *Veeni Chetti*(1), BHASHYAM AYYANGAR and BODDAM, JJ., in speaking of an order refusing to revoke a sanction, observed;

(1) (1907) I.L.R., 30 Mad., 382 (F.B.). (2) (1904) I.L.R., 27 Mad., 223.

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"An order passed by the Court of Appeal is in law the order which ought to have been passed by the subordinate Court and will have the same efficacy and operation as the order which ought to have been passed by the latter." But the learned Judges proceed to say "that section 439, Criminal Procedure Code, provides that the High Court, as a Court of Revision, may exercise the powers conferred on a Court of Appeal by section 195." It is, by no means, clear to us that they intended to lay down that the High Court's jurisdiction in setting aside an order refusing to revoke a sanction is to be exercised under section 195, clause (6), and not under sections 435 and 439. The jurisdiction of the Court was as a fact exercised in this case not under either of those sections but under section 15 of the Charter Act, the order refusing to revoke having been passed by a Civil Court. In *Hamijuddi Mondol* v. *Damodar Ghose*(1), RAMPINI and GEIDT, JJ., held that an order refusing to revoke is not an order granting a sanction. In *Habibar Rahaman* v. *Khoda Bux*(2), RAMPINI and MOOKERJI, JJ., held a contrary view. The judgment contains no reference to the previous judgment in *Hamijuddi Mondol* v. *Damodar Ghose*(1). The Allahabad High Court in *Emperor* v. *Serh Mal*(3) has dissented from *Muthusami Mudali* v. *Veeni Chetti*(4). In *Habibar Rahaman* v. *Khoda Bux*(2), the order refusing to revoke is regarded as an order confirming a sanction. The language employed by the learned Judges in *Palaniappa Chetti* v. *Annamalai Chetti*(5) seems, to some extent, to support this view. No doubt, where a Court of Appeal has plenary jurisdiction over a cause, its function is, not merely to refuse to interfere with the decision of the Court from whose decision the appeal is preferred, but also to confirm it, and its judgment when it does so, takes the place of the judgment of the Court of First Instance. The sections relating to appeals in both the Civil and Criminal Procedure Codes lay down explicitly that the Appellate Court is to confirm the judgment of the first Court where it does not interfere with it. But it appears to us that the function of a superior Court is not the same where its powers of interference

(1) (1906) 10 C W N., 1026
(2) (1906) 5 C L J., 210
(3) (1905) I L.R., 30 All , 243.
(4) (1907) I.L.R , 30 Mad., 382 (F.B.).
(5) (1904) I.L.R , 27 Mad , 223.

are limited to special grounds. A Court of Error does not confirm the judgment of the inferior Court whose decision it refuses to interfere with. The same would seem to be the case with respect to a Court of Revision and the Court of Second Appeal in civil cases where there is no question of law and the Court merely dismisses the second appeal on that ground. With all deference, it seems to us that it should not be assumed that a Court refusing to revoke a sanction under section 195 (6) can be taken to confirm the sanction, so as to make the sanction one granted by itself. The provision with regard to extension by the High Court of the time during which the sanction is to be in force seems to us to be a strong argument against such a view. That provision does not seem to have been brought to the notice of the Court in *Muthusami Mudali* v *Veeni Chetti*(1).

Mr. Devadoss contends that all applications to the High Court in any matter relating to a sanction must be regarded as petitions for revision. This contention is in our opinion untenable. Section 439 itself seems to supply a conclusive answer to the argument. It provides that in revision the High Court may exercise the powers conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428. The powers under the last four sections, which apply primarily to appeals, are exercisable in revision, which is not an appeal. Similarly the power under section 195, which primarily vests in a Court of Appeal, is exercisable by the High Court in revision. If the Court which gives or refuses a sanction is immediately subordinate to the High Court, section 439 would not be necessary to give it power to revoke or give the sanction given or refused, as section 195 itself gives it. The exercise of powers under section 439 cannot itself be an exercise of it under section 195, though it is of the same kind of power as is given by section 195. Where the Court giving or refusing sanction is not immediately subordinate to the High Court, it has undoubtedly powers of revision under section 439, whether it has power under section 195 or not. But section 439 seems clearly to show that a proceeding before the High Court under section 195 cannot itself be regarded as a proceeding under section 439. No doubt, section 439 refers to

(1) (1907) I.L.R., 30 Mad., 382 (F.B.).

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"any proceeding, the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge." But this will not justify a proceeding under section 195 being regarded "as a proceeding which comes to its knowledge" within the meaning of the section. The clause appears to relate only to the source of knowledge of the High Court regarding the proceeding sought to be revised. That source may be either information received by itself directly (as by examination of a criminal calendar sent up to it) or a report made by an inferior Court or information received otherwise. This last source seems to refer to information derived from the accused or complainant or the Crown through the Public Prosecutor. A different construction would have the result of including appeals also within the purview of section 435. We therefore cannot accept the argument that proceedings under section 195 are *ipso facto* proceeding under section 439. If an order refusing to revoke a sanction cannot be regarded as one granting a sanction, then the High Court's powers of interference with such an order would be only in revision under section 439, and the rule laid down in section 429 will regulate the procedure to be followed in cases of a difference of opinion between the Judges hearing the application, and this is the view we are inclined to take.

Mr. Devadoss contends that, even if an application under section 195, clause (6), cannot be regarded as one under section 435, the proper course in case of difference of opinion is to follow the procedure laid down in section 429, and he refers to two cases in support of this contention—viz., *Queen-Empress* v. *Dala Ana*(1) and *Queen* v. *Mukhun*(2). In the first case JARDINE and CANDY, JJ., held that, where there was a difference of opinion in a reference by a Sessions Judge under section 307 of the Criminal Procedure Code, the proper course was to refer the case to a third Judge. The point was not argued, as stated in the judgment—see page 474. The learned Judges say: "There appears to have been no previous instance of Judges differing on a reference made under section 307. In a case under the

(1) (1889) I.L.R., 15 Bom., 452. (2) (1877) 1 C.L.R., 275.

corresponding section of the older Code [*Queen* v. *Mukhun*(1)] the course adopted by the High Court of Bengal was to lay the case before a third Judge. We are of opinion that section 307 with perhaps section 439 applies section 429 about appeals to cases of reference and that this seems the justest and best procedure to follow. So we adopt the example of the Calcutta Court and do not dispose of the case in the manner provided by section 36 of our amended Letters Patent, i.e., by the opinion of the Senior Judge." The learned Judges treated themselves as a Court of Revision in hearing a reference under section 307.

Assuming that this view is correct, regarding which we express no opinion, the present case is not one of a reference by a lower Court.

Queen v. *Mukhun*(1) was also a case of reference with respect to the verdict of a jury. The question of the procedure to be followed in case of a difference of opinion is not discussed. If the view taken in *Muthusami Mudali* v. *Veeni Chetti*(2) that an order refusing to revoke a sanction is tantamount to one granting a sanction, be adhered to, the question of procedure in case of a difference of opinion is likely to be of frequent occurrence. It may also arise in cases where the High Court is asked to interfere with an order granting or refusing a sanction passed by a Court immediately subordinate to it. We consider it desirable that the question should be authoritatively decided and we therefore refer to a Full Bench the following questions :—

(1) Is an order refusing to revoke a sanction one granting a sanction, in which it is open to a party dissatisfied with the order to apply to a superior Court under section 195, clause (6), Criminal Procedure Code ?

(2) Is the procedure described in section 429, Criminal Procedure Code, or in section 36 of the Letters Patent to be followed where an application to the High Court is made under section 195, clause (6), to revoke a sanction granted by a lower Court or to give a sanction refused by it, when the Judges composing the bench hearing the application differ in opinion ?

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(1) (1877) 1 C.L.R., 275. (2) (1907) I.L.R., 30 Mad., 382 (F.B.).

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SANKARAN
NAIR, ABDUR
RAHIM,
AYLING AND
SADASIVA
AYYAR, JJ.

This case coming on for hearing in pursuance of the above order, and upon hearing the arguments of the pleaders aforementioned, the following OPINION of the Court was delivered by

WHITE, C.J.—We are not prepared to dissent from the conclusion arrived at by a Full Bench of this Court in *Muthusawmi Mudali* v. *Veeni Chetti*(1).

We think, however, the power conferred upon this Court by section 195 (6) of the Code of Criminal Procedure is not a part of the appellate and revisional jurisdiction of this Court conferred by Chapters 31 and 32 of the Code of Criminal Procedure. It is a special power conferred by section 195 (6). It follows, therefore, that when the Judges are equally divided the case is governed by section 36 of the Letters Patent and not by section 429 or section 439 of the Code of Criminal Procedure.

Our answer to the first question referred to us is in the affirmative. Our answer to the second question is that, in the case stated, the provision described in section 36 of the Letters Patent is to be followed.*

N.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Charles Arnold White, Chief Justice, Mr. Justice Miller and Mr. Justice Oldfield.

1913.
March 26.

BAPU *alias* KRISHNAYEN (PETITIONER), APPELLANT,

v

BAPU *alias* AUDIMULAM PILLAI (COUNTER-PETITIONER), RESPONDENT.†

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction, granting of, under, to be made on legal evidence—Section 195 (6), High Court hearing an appeal under—Judges divided equally in opinion—Whether an appeal lies under article 15 of the Letters Patent.

A Magistrate received a complaint of criminal breach of trust, examined the complainant on oath under section 200, Criminal Procedure Code, but suspecting

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(1) (1907) I.L.R., 30 Mad., 382 (F.B.).

* [Compare the note of the reporter at the end of the report of *In re An Attorney* (1914) I.L.R., 41 Calc., 734 at p. 743.]

† Letters Patent Appeal No. 48 of 1912.

the complaint to be false referred it under section 202, Criminal Procedure Code, to a Police Inspector for investigation and on receiving the report of the Inspector to the effect that the case was entirely false dismissed the complaint under section 203, Criminal Procedure Code. On an application being made for sanction to prosecute the complainant for preferring a false complaint, the Magistrate asked the complainant to show cause why sanction should not be given but as no witnesses were examined by him to show the truth of his complaint, the Magistrate granted sanction

Held, affirming the decision of SUNDARA AYYAR, J, that the above materials did not constitute legal evidence for the Magistrate to grant the sanction and that hence the sanction given should be set aside.

Quære Whether an appeal under section 15 of the Letters Patent lies against an order of a Division Bench of the High Court when one of the Judges differs from his colleague on hearing an application under section 195 (*b*), *Criminal* Procedure Code, to revoke a sanction granted by a lower Court.

APPEAL under article 15 of the Letters Patent against the judgment of SUNDARA AYYAR, J., in *Bapu* v. *Bapu*(1), whose judgment prevailed according to the decision of the Full Bench—see page 768 supra.

The facts of the case appear from the ORDER OF REFERENCE to FULL BENCH—vide page 751 supra

C. S. Venkatachariyar for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *K. Jagannadha Ayyar* for the respondent.

M. D. Devadoss for the *Public Prosecutor* for the Crown.

The following order of the Court was delivered by

WHITE, C.J.—On the materials before us we are not prepared to say there was legal evidence before the Second class Magistrate on which the order should be made; we therefore dismiss the appeal.

WHITE, C.J., MILLER AND OLDFIELD, JJ.

It is not necessary to consider the preliminary objection that no appeal lies.

N.R.

(1) (1916) I.L.R., 39 Mad., 750 (F.B.)

APPELLATE CRIMINAL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. April 8 and 9.

Re ABIBULLA RAVUTHAN *alias* KABIB RAVUTHAN AND THREE OTHERS *

Criminal Procedure Code (Act V of 1898), sec. 342—Right of the Magistrate or Sessions Judge to put questions or take statements from accused when no evidence given by prosecution to implicate them—Answers taken from accused in contravention of section 342, not admissible in evidence.

If in a criminal case the prosecution had not let in any evidence implicating the accused or some of the accused in the crime charged, the Magistrate is not entitled under section 342 of Criminal Procedure Code to put questions to such accused or to invite them to make a statement; and this rule equally applies to trials before the Sessions Court. Answers to questions received by the committing Magistrate in contravention of section 342 of the Criminal Procedure Code are not admissible in evidence against the accused in the subsequent trial before the Sessions Court.

Mohideen Abdul Kader v. *Emperor* (1904) I.L.R., 27 Mad., 238 and *Reg.* v. *Berriman* (1854) 6 Cox Cr. C., 388, followed.

APPEAL against the conviction and judgment of H. O. D. HARDING, District Judge, Trichinopoly, in Sessions Case No. 7 of 1915, committed by T. PALANIANDI PILLAI, Second Class Magistrate, Aravakurichi, in Police Report No 13 of 1914.

In this case the accused Nos. 2 and 4 were convicted of forgery of a promissory note and accused Nos. 6 and 7 were convicted of abetting the same.

Against this, accused Nos. 2, 4, 6 and 7 preferred this appeal.

Dr. S. Swaminathan for the appellant.—There was no evidence given by the prosecution against the accused Nos. 2, 6 and 7 before the committing Magistrate and the Magistrate was not therefore entitled to put any questions to them or to take any statements from them. Section 342 of Criminal Procedure Code enables him to do so only if there are circumstances appearing against the accused in the evidence given by the prosecution and the only materials relied on by the Sessions

* Criminal Appeal No. 90 of 1915.

Judge for convicting them are the answers given by them to questions put by him and by the committing Magistrate. Such answers cannot be treated as evidence and the prosecution is not entitled to fill up a gap in its proof by what is improperly elicited from the accused. Reference was made to *Mohideen Abdul Kader* v. *Emperor*(1), *Basantha Kumar Ghattak* v. *Queen-Empress*(2), *Queen-Empress* v. *Hawthorne*(3), *Queen-Empress* v. *Viran*(4), Ratan Lal's Unreported judgments, page 679 and *Reg.* v. *Berriman*(5) As regards the other accused his conviction is based on highly interested evidence.

C. Sidney Smith for the *Public Prosecutor* for the Crown argued that the suspicious appearance of the promissory note justified the action of the lower Court and that as against the fourth accused, there was the evidence of prosecution witnesses Nos. 1 and 2 which, it was submitted, was believed by the lower Court.

The following judgment of the Court was delivered by

WALLIS, C.J., AND COUTTS TROTTER, J.

COUTTS TROTTER, J.—There was no evidence before the Sessions Court against accused Nos. 2, 6 and 7 other than their own admissions in the Court below and the Sessions Court itself. The admissions in the Court below were made in answer to an invitation from the committing Magistrate to say what they had to say. At the time when these statements were made in the Court of the committing Magistrate the prosecution had given no evidence at all involving any one of these accused, as appears from an examination of the record of the evidence given in that Court. Section 342 of the Code of Criminal Procedure only gives the Magistrate the right to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him. We think that where no evidence has been given implicating the accused, the Magistrate has no right under the statute to put questions to the accused or invite him to make a statement. We further think that if a statement is made by the accused in such circumstances it is not admissible evidence against the accused on his subsequent trial. This is in agreement with the decision of WHITE, C.J., in *Mohideen Abdul*

(1) (1904) I.L.R., 27 Mad., 234. (2) (1898) I.L.R., 26 Calc., 49.
(3) (1891) I.L.R., 13 All., 345. (4) (1886) I.L.R., 9 Mad., 224.
(5) (1854) 6 Cox Cr.C., 388.

Re ABIBULLA RAVUTHAN. — WALLIS, C.J., AND COUTTS TROTTER, J.

Kader v. *Emperor*(1) and the same principle was applied by ERLE, J., in *Reg.* v. *Berriman*(2) to a statement elicited from a prisoner improperly questioned by an examining Magistrate in England. The same objection applies to the answers elicited from the accused by the learned Judge at the trial; and we feel constrained to say that the learned Judge subjected the accused to a cross-examination which far outstripped anything enjoined or permitted by section 342 of the Code. We set aside the convictions of accused Nos. 2, 6 and 7.

With regard to the fourth accused, there is some evidence against him, but it is practically the word of prosecution witnesses Nos 1 and 2 against that of the fourth accused. The surrounding circumstances throw no light on the probabilities of the matter and we do not think it would be safe to convict on the evidence of two interested persons. We set aside this conviction and sentence also

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. March 30 and 31 and April 1, 8 and 29

RAJAH DAMARA KUMARA VENKATAPPA NAYANIM BAHADUR VARU (LATE A MINOR BUT NOW OF FULL AGE) (PLAINTIFF), APPELLANT IN APPEAL NO. 225 OF 1912 AND RESPONDENT IN APPEAL NO. 136 OF 1912,

v.

DAMARA RENGA RAO (LATE A MINOR BUT NOW OF FULL AGE) (DEFENDANT), RESPONDENT IN APPEAL NO. 225 OF 1912 AND APPELLANT IN APPEAL NO 136 OF 1912.*

Hindu Law—Adoption by junior widow without consulting senior widow but with sapindas' consent, invalidity of—Preferential right of senior widow to adopt.

An adoption made by a junior widow of a deceased Hindu purporting to be made with the consent of the sapindas but without consulting the senior widow is invalid.

(1) (1904) I.L.R., 27 Mad., 238. (2) (1854) 6 Cox Cr C., 388.

* Appeals Nos. 225 and 136 of 1912.

Kakerla Chukkamma v. *Kakerla Punnamma* (1914) 28 M.L.J., 72, followed.

Vellanki Venkata Krishna Rao v. *Venkatarama Lakshmi* (1876) I.L.R., 1 Mad., 174 (P.C.), referred to.

Per WALLIS, C.J.—In the absence of an express authority by the husband to any one of the widows the senior widow has the preferential right to adopt with the consent of the sapindas.

The senior widow is one of the kinsmen whom it is the duty of the junior widow to consult, within the meaning of the rule enunciated in *The Ramnad case* (1868) 12 M.I.A., 397.

RAJAH VENKATAPPA NAYANIM BAHADUR v. RENGA RAO.

APPEALS against the decree of L. G. MOORE, the District Judge of North Arcot, in Original Suit No. 23 of 1910.

The facts of the case appear from the judgment of WALLIS, C.J.

A. Krishnaswami Ayyar and *T. M. Krishnaswami Ayyar* for the appellant.

T. V. Venkatarama Ayyar and *V. Ramesam* for the respondent.

WALLIS, C.J.

WALLIS, C.J.—The plaintiff-appellant in this case bases his claim to succeed to the estate of the late Gangadhara Rama Nayanim on the ground that he was duly adopted by the junior widow with the consent of the sapindas after the senior widow had refused to adopt a boy. The District Judge has found and we agree with him, that no such refusal is proved. On the other hand the evidence shows that the senior widow who left the family house shortly after her husband's death set up almost at once that her husband had authorized her to adopt during his life time. It also appears that two days after the adoption of the plaintiff by the junior widow, and as soon as she heard of it, she went through the form of adopting the defendant purporting to t under the alleged authority from her husband. The District dge found that this authority had not been proved, but this ding did not affect the result, as he also found that the plaint-'s adoption by the junior widow was invalid on the ground at it was made by her without consulting the senior widow and taining her consent, and also because it was made without con-lting one of the nearest reversioners of the deceased, and that nsequently he had no right to sue.

The view taken by the District Judge as to the senior widow's nsent is in accordance with a subsequent and very recent deci-on of SANKARAN NAIR and SPENCER, JJ., in *Kakerla Chukkamma* *Kakerla Punnamma*(1), where it was held that the senior

(1) (1914) 28 M.L.J., 72.

RAJA VENKATAPPA NAYANIM BAHADUR v. RENGA RAO.

WALLIS, C.J.

widow has a preferential right to adopt, and that, so long as such preferential right subsists, the junior widow has no right to adopt. The learned Judges, one of them a Hindu Judge of long experience, based the decision not only on the decisions of the Bombay and Calcutta Courts but also on the preferential right of the senior widow to perform religious acts such as adoption.

The question which is one of considerable importance and had not previously come before this Court has again been very ably and elaborately argued before us by Mr. A. Krishnaswami Ayyar for the appellant and by Mr. T. V. Venkatarama Ayyar for the respondent, and after a careful consideration of their arguments I see no reason to differ from the conclusions arrived at by the learned Judges or the grounds on which it was based.

The preferential right of the senior wife as regards religious acts is in my opinion clearly established. The *Mitakshara*, Book I, Chapter III, verse 88, which has been specially translated for us, first cites the text of Yagnavalkya "when there is a wife of an equal class present, never do acts of religion with any other. When there is more than one wife of the same class as yourself in matters of religion never employ any but the eldest." On this Vignaneswara comments as follows: "When there is a wife of equal class never do acts of religion with wives of any other class. When there are several wives of the same class in matters of religion do not pass over the eldest wife and do not employ either the second or the third (*lit.* the middle or the youngest one)" See also Colebrook, volume 2, Digest, pages 124 to 126. The senior widow's preferential right of adoption is expressly recognized in Steele's Law and Custom of Hindu Castes, page 48, which embodies the results of an enquiry held in the year 1831 as to the Hindu customs and usages prevailing in the Deccan, and in *Padaji Rao* v. *Rama Rao*(1), SARGENT, C.J., after referring to this passage observed that the superior right of the elder widow was doubtless based on her being the *patni* (पत्नी) and as such entitled to take part with her husband in all religious ceremonies. I think that here the learned Judge was only offering an explanation of the usage prevailing in the Deccan, and even if, as contended by the appellant, he was mistaken in supposing

(1) (1888) I.L.R., 13 Bom., 160 at p. 164.

that the senior wife alone was entitled to be styled *patni*, I do not think that matters much, as it does not affect the preferential right of the senior wife to perform religious acts As regards the meaning of *patni* (पत्नी) it appears from the passages in the Mitakshara and Viramitrodaya referred to in *Janokinath Mukhopadhya* v. *Mathuranath Mukhopadhya*(1), that the celebrated grammarian Panini considered that the word had been formed by affixing the particle *ni* (नी) to *pati* (पति) (husband) to signify one who partakes in the holy sacrifices. Fanciful as this may be, it was of course accepted on Panini's authority by the commentators, and Vignaneswara after referring to it states that all the wives were to be regarded as *patnis* and as such entitled to share in the inheritance The omission in Colebrook's translation of the Mitakshara of this passage which is now accepted as genuine was responsible for Strange's view that the senior widow alone was entitled to succeed, a view which had been overruled by *Kissen Lala* v. *Javallah Prasad Lala*(2), and by the Privy Council in *Gajapathi Nilamani* v. *Gajapathy Radhamani*(3), which only left her the exclusive right of management until partition. Admitting however that the junior wives are *patnis* in the sense of being capable of partaking in sacrificial acts, it still remains true on the express authority of the Mitakshara already cited, that the senior wife has the preferential right, as regards religious acts, and this appears to me to be a sufficient foundation for her preferential right as to adoption.

It is then said that the learned Judges were wrong in applying the Bombay rulings—*Rakkhmabai* v. *Radhabai*(4), and *Padaji Rao* v. *Rama Rao*(5)—to this Presidency and that these decisions are opposed to the decisions of the Privy Council with reference to adoption in this part of India beginning with *The Ramnad Case*(6). But, as pointed out by their Lordships in that case, the law of adoption in all these presidencies rests on the text of Vasishta; "nor let a woman give or accept a son without the consent of her lord," and the main difference is as to the circumstances in which such consent should be considered

(1) (1883) I.L.R., 9 Calc., 580 at p. 583.
(2) (1867) 3 M.H.C.R., 346 at p. 351.
(3) (1876) I.L.R., 1 Mad., 290 at p. 293 (P.C.)
(4) (1868) 5 Bom. H.C.R., 192 (A.C.J.)
(5) (1888) I.L.R., 13 Bom., 160 at p. 166. (6) (1868) 12 M.I.A., 397.

RAJAH VENKATAPPA NAYANIM BAHADUR v. RENGA RAO.

WALLIS, C.J.

to have been given, evidence of express authority being required in Bengal, whereas in Bombay it is presumed except in cases where the husband was the member of a joint family where the consent of the managing member is required, while in Madras, as held by their Lordships in the Ramnad case on a variety of considerations the want of the husband's consent may be supplied by the consent of his kindred. Following Bombay decisions the Calcutta High Court has recently held that, where the husband authorized his two widows to adopt, he must be held to have intended the senior widow to have the preferential right The Bombay decisions, JENKINS, C.J., observed "rest upon fundamental principles and on views of Hindu life and economy which appear to me to be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act." *Ranjit Lal* v. *Bijoy Krishna*(1). These observations in my view are equally applicable in this Presidency . . . . where, as observed by their Lordships in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2), the law in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay. Further in view of the inconveniences attendant on simultaneous rights of adoption, and in the significant absence of any evidence that such an equal right has ever been claimed in our Courts for junior widows prior to these two cases, I think the onus is on those who assert it to show that the law in Madras differs in this respect from that which prevails in the adjoining presidency. In the case of impartible estates the estate necessarily vests in the senior widow, and the result of holding that the junior widow with the consent of a majority of the sapindas has the right to adopt without reference to the senior widow would be to render the latter's tenure of the estate exceedingly precarious. The absence until now of any such attempt by the junior widow and sapindas goes far to show that the rule in this presidency has been the same as in Bombay, and that we should effect an innovation by holding otherwise.

It is then argued that the equal right of the junior widow is to be deduced from the decisions of their Lordships of the Judicial Committee in which the question was not raised or

(1) (1912) I.L.R., 39 Calc., 582 at p. 586. (2) (1876) I.L.R., 1 Mad., 81.

considered. These arguments must be received with great caution, as their Lordships' observations were only directed to the questions before them. In *The Ramnad Case*(1) it was held not only on the authority of the Smrithi Chandrika and the Dattaka Mimamsa but also on the ground of proved usage that in Madras a *Hindu widow not* having her husband's *permission* might lawfully adopt if duly authorized by his kindred—the assent of the kinsmen being apparently required, by reason of the presumed incapacity of women for independence. The question of priority among co-widows did not arise and was not considered in the case. The further explanation of that decision by their Lordships in *Sri Virada Pratapa Raghunada Deo* v *Sri Brozo Kishoro Deo*(2), as to what amounts to a sufficient consent of kinsmen does not affect the present question. In the next case—*Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(3)—where the question was whether an adoption made by a widow with the assent of the kindred after the death of her natural son was valid, their Lordships held that the husband during his lifetime might have authorized his wife in the event of the death of the natural son to adopt another son, and, if she could have done it with the husband's assent, she could equally do it with the assent of the kindred. Their Lordships no doubt laid down generally but of course with reference to the facts before them that a widow without permission from her husband may if duly authorized by her kinsmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. This is the major proposition of the syllogism. The minor is to be found in the observation of their Lordships in *Annapurni Nachiar* v. *Forbes*(4): "It seems not to be doubted that a man may authorize one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother." We are then asked to conclude that a junior widow with the consent of the kinsmen may adopt without reference to the senior widow. The fallacy of this argument in my opinion consists in applying the general expressions of their Lordships in *Vellanki Venkata Krishna Rao* v.

(1) (1868) 12 M.I.A., 397. (2) (1876) I.L.R., 1 Mad., 81
(3) (1876) I.L.R., 1 Mad., 174. (4) (1900) I.L.R., 23 Mad., 1 at p 9

RAJAH VENKATAPPA NAYANIM BAHADUR v. RENGA RAO.

WALLIS, C.J.

Venkata Rama Lakshmi(1) to a case which was not before them and which involves, as I have sought to show, considerations of authority, usage, and convenience which were not presented to them.

The decision of the Bombay High Court in *Rakhmabai* v. *Radhabai*(2) that the senior widow is entitled to adopt without the consent of the junior widow, and the decision of this Court in *Narayanasami Naik* v. *Mangammal*(3) that in this part of India the senior widow with the consent of the kinsmen may proceed without the consent of the junior widow must be considered as proceeding on a recognition of the senior widow's preferential right, and are no authority for holding that the junior widow may adopt without the senior's consent.

Mr. Venkatarama Ayyar for the respondent also argued that in any case the senior widow was entitled to be consulted as one of the kindred while on the other side it was argued that a widow is not a sapinda but only succeeds as one of the enumerated heirs. I do not think it necessary to go into this question, but having regard to the decision of their Lordships in *The Ramnad Case*(4) that the assent of the mother-in-law Muthaveerojee in that case was operative in support of the adoption, I should be disposed to hold that the senior widow was one of the kinsmen whom it was the duty of the junior widow to consult and that the adoption was bad for failing to consult her.

I do not consider it necessary to consider on the evidence whether as found by the District Judge there was a failure to consult one of the next reversioners, because for the reasons already given I think Appeal No. 225 fails and must be dismissed with costs. For the purposes of this appeal it is not necessary to consider the finding as to the adoption by the senior widow of the first defendant. It has also become unnecessary to hear the cross-appeal of the first defendant against the finding that he was not validly adopted by the senior widow, as that finding has become immaterial to the decision. Appeal No. 1[illegible]5 is withdrawn by consent. No order as to costs.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I also desire to express my indebtedness to the able and lucid arguments which have been addressed to

(1) (1876) I.L.R., 1 Mad., 174.
(2) (1868) 5 B.H.C.R., 192 (A.C.J.).
(3) (1905) I.L.R., 28 Mad., 315.
(4) (1868) 12 M.I.A., 397.

us, from which I have derived much assistance and instruction. Up to a certain point the law is clear, and its provisions are a common starting point to both parties; and the following propositions may be laid down. In Bengal a widow can only adopt if the husband had before his death given his express authority to her to do so. In Bombay, the consent of her husband is always implied and she can adopt without proving any authority on her own motion In Southern India, she can adopt without express authority, if she obtains the consent of the sapindas of her husband. When a man has more wives than one, he can associate any one of them with him in adoption, and can give an authority to any one of them to adopt after his death; his choice is in no way restricted and he can prefer the junior widow to the senior, the younger to the elder. It is argued for the appellant here, that as the junior widow can adopt with the authority of her deceased husband, she is in exactly the same position if she obtains the consent of the sapindas: for the sole object and import of the consent of the sapindas is that it should be the equivalent of the authority of the husband. In support of this view of the scope and nature of the authority of the sapindas, reliance was placed on the judgment in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1), and particularly on the observations of Sir James Colvile at pages 184 and 187.

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COUTTS TROTTER, J.

For the respondent reliance was placed on the fact that both in Bengal, where the rule is stricter, and in Bombay where it is laxer than in Madras, the junior widow is not allowed to adopt in preference to or without the consent of the senior. See *Padaji Rao* v. *Rama Rao*(2) and *Ranjit Lal* v. *Bijoy Krishna*(3). In the Bengal case, the question arose and only could arise where a husband had given an authority to his wives to adopt, without distinguishing between them: the Court read the authority distributively, and held that its exercise was restricted in the first instance to the senior widow. In the Bombay case, where there was no question of express authority, it was held that the power was not exercisable by the junior widow without the consent of the senior. Mr. Krishnaswami

(1) (1876) I.L.R., 1 Mad., 174. (2) (1888) I.L.R., 13 Bom., 160.
(3) (1912) I.L.R., 39 Calc., 582.

RAJAH VENKATAPPA NAYANIM BAHADUR v. RANGA RAO.

COUTTS TROTTER, J.

Ayyar, while prepared if necessary to say that these cases are wrong or at any rate have no application to Madras, distinguishes them from the present case. He points out that the Calcutta case only laid down a rule for the construction of an express authority given to two persons: and that the Bombay case applies the same construction to an implied authority. Here we have an express authority, that of the sapindas, to a definite person, and he contends that there is nothing in either decision to prevent our giving effect to it.

An English Judge in deciding a question of English common law is in theory declaring what custom on the subject has subsisted immemorially in the country (Stephen's Blackstone, volume I, introduction, section I). An Indian Judge in deciding a question of Hindu law is in theory expounding the true construction of mandatory utterances to which a divine origin is ascribed, aided or impeded in his task by ancient commentaries, text books of authority, and judicial decisions of the Indian Courts and of the Privy Council. Nowadays there is little but fiction in either theory, and a Judge in both countries has only to apply the principles of previous decisions to particular sets of facts. But I think that the theoretical objective has just this much effect; that the argument that a suggested result is not in accordance with known practice will have less weight in India, if it can be shown to be the logical deduction from the authorities. In the present case, I feel it very difficult to escape from the conclusion that *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1) has declared the consent of the sapindas to be in all respects the equivalent of express authority from the husband. On the other hand, it is quite clear from the books that to give effect to the appellant's contention would be quite contrary to what everyone has hitherto supposed to be the law, and to legalize what in practice is a complete innovation. It is also a practice likely to lead to extreme inconvenience, to use no stronger term. In this state of things, I find that two Judges of this Court have in *Kakerla Chukkamma* v. *Kakerla Punnamma*(2) decided this question adversely to the appellant; one of those Judges being SANKARAN NAIR, J., whose authority on such a subject has the weight of his great experience. Further, I find that my Lord in

(1) (1876) I.L.R., 1 Mad., 174. (2) (1914) 24 M.L.J., 72.

RAJAH VENKATAPPA NAYANIM BAHADUR v. RENGA RAO.

COUTTS TROTTER, J.

the present case takes the same view. That being so, I think it would be quite wrong for me to give expression to any opinion that might tend to unsettle the former decision of this Court, or give any encouragement to its challenge in other cases The expressions used in the Privy Council in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1) were not really necessary to the decision and I think if the decision in *Kakerla Chukkamma* v. *Kakerla Punnamma*(2) is to be challenged, it must be challenged elsewhere than in this Court. The appeal fails and is dismissed with costs. I agree with the order proposed in my Lord's judgment.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

1915. April 19, 20 and 23.

A. M. ROSS (AUTHORIZED AGENT OF CERTAIN TEA COMPANIES AND LABOUR ASSOCIATIONS IN ASSAM) (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

Secretary of State in Council, suit against, in respect of illegal order of District Magistrate under Assam Labour and Emigration Act (VI of 1901), sec. 91, and also for alleged defamation in a Government Order—Damage, remoteness of—Liability of defendant under the Government of India Act (I of 1858)—No liability, on the ground that the order was made in the course of employment, and that the acts were done by Government servants in the exercise of statutory powers—Alleged ratification by the Local Government—Government Order—Absolute privilege—Absence of malice

Suit by the plaintiff, who represented the Assam Labour Supply Association in Ganjam and other districts, against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one *T.S*, the local agent of the Association in Ganjam, and closing his depot to recruiting under the Assam Labour and Emigration Act (VI of 1901), whereby the plaintiff was prevented from earning from the members of the association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor-in-Council on appeals by the plaintiff and others against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion,

(1) (1876) I.L.R., 1 Mad., 174. (2) (1914) 28 M.L.J., 72.

* Original Side Appeal No. 32 of 1913.

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Held by the Court on appeal (affirming the judgment of WALLIS, J., on the Original Side) that (1) As the action of the Collector and District Magistrate who was found to have acted without any malice was not directed against the plaintiff, but only against others and as the injury to the plaintiff, if any, was not the direct consequence of the Collector's act but was only very remotely connected with it, the plaintiff had no cause of action, and (2) The Governor-in-Council was not liable for the publication of the defamation as the same was done on a privileged occasion, i.e., in the course of its official duties

Held further, by SADASIVA AYYAR, J.—(a) Even the Collector and District Magistrate was not personally liable as he only did his duty imposed on him by the statute [viz, section 22, clause (3) of Assam Labour and Emigration Act (VI of 1901)], and (b) as in doing so he was not the agent of the Government and as the act was not done on Government's behalf, the Government could not ratify the same, nor could Government be liable even if it had ratified the same.

Held further, by BAKEWELL, J., that so far as the plaintiff was concerned, as he was neither an employer nor his agent, he was, according to the Act, carrying on an illegal business and his suit was liable to be dismissed also on this ground.

APPEAL from the judgment of WALLIS, J., in Civil Suit No. 51 of 1911.

The facts of the case are fully set out in the original judgment of WALLIS, J., in *Ross* v. *Secretary of State*(1), and in the second paragraph of the judgment of Mr. Justice SADASIVA AYYAR on appeal, for which, see below.

C. P. Ramaswami Ayyar, A Krishnaswami Ayyar and *M. Subbaraya Ayyar* for the appellant.

The Honourable Mr. *F. H. M. Corbet, Advocate-General* and *W. Barton* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. So far as this suit (which is brought to recover damages against the Secretary of State for India in Council) is based upon the suspension and dismissal of Rama Sastri (a "local" agent of the Assam Planters) by the Collector and District Magistrate of Ganjam, the plaintiff gave up his contention that such suspension and dismissal were wrongful.

The remaining facts on which the claim is founded are (a) that the Collector and District Magistrate on the 22nd February 1910 closed a labour-recruiting depot at Berhampur, that recruiting depot having been intended for the accommodation of coolies recruited on behalf of certain Tea Planting

(1) (1914) I.L.R., 37 Mad., 55.

Associations in Assam of which associations the plaintiff had been appointed as *agent*; (*b*) *that the Governor in Council by* a Government Order, dated 12th October 1910, ratified and confirmed the Collector's order closing the depot till that date; (*c*) that the Government on the said 12th October 1910 in the said order made the defamatory remark that "the conduct of Mr. Ross (the plaintiff) was not wholly above suspicion" in the matter of the irregularities committed by the local agent, T. S. Rama Sastri, on account of which irregularities Rama Sastri's license as local agent was cancelled by the Collector and District Magistrate.

The learned CHIEF JUSTICE who tried this case on the original side dismissed the suit making certain observations in his judgment which observations might be stated as follows, using in great part the words of the learned CHIEF JUSTICE :—

(1) The Collector's order of February 1910 closing the depot to recruiting by the garden sardars working under the Assam Labour and Emigration Act VI of 1901 on behalf of the Assam Planting Associations was ultra vires.

(2) The Secretary of State in Council is not legally liable for the tortious acts of the Collector of Ganjām or of the Governor of Madras in Council. If section 416 of the old Civil Procedure Code really laid down that the Secretary of State can be made liable for the tortious acts of a local Government or of an officer of that Government notwithstanding that the East India Company would not have been liable for such acts that section is ultra vires of the Indian legislature as opposed to the provisions of the Indian Councils Act of 1861. If the decision in *Vijayaraghava* v. *Secretary of State for India*(1) holds otherwise, it is no longer an authority as opposed to the Privy Council decision in *Moment* v. *The Secretary of State*(2). See also *Shivabhaja* v. *Secretary of State for India*(3). In *Dhackjee Dadaji* v. *The East-India Company*(4), Sir ERSKINE PERRY held that the only ratification which would bind the company was a ratification by the Court of Proprietors itself. This is not a case in which a petition of right would lie against the Crown. Hence this action against the Secretary of State

(1) (1884) I.L.R., 7 Mad., 466. (2) (1912) I.L.R., 40 Calc., 391 (P.C.).
(3) (1904) I.L.R., 28 Bom., 314. (4) (1843) 2 Morley's Digest, 307.

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who is not alleged to have himself ratified the Collector's acts or the Local Government's acts cannot lie.

(3) In *Tobin* v. *Reg.*(1) it was held that independently of the doctrine that the King can do no wrong, the Crown could not be made liable for the action of a Government servant purporting to act under a statutory power conferred upon him because the action of a Government servant purporting to exercise a statutory power cannot be held to be an act done as an agent of the Crown—see *Shivabhaja* v. *Secretary of State for India*(2). There can be no ratification by the principal of such an act, as such an act was not done on behalf of the principal.

(4) As regards the alleged libel by the Madras Government, the Secretary of State (defendant) is not liable for reasons already stated as the publication of the libel was not (*a*) made under the orders of the Secretary of State, or (*b*) made on his behalf and ratified by him—see *Jehangir* v. *Secretary of State*(3).

(5) In *Grant* v. *The Secretary of State for India in Council*(4), it was held that the Secretary of State was not liable for the publication of an alleged libel in the *Fort St. George Gazette* as, at all events, the libel was not alleged to have been published maliciously and without reasonable and probable cause: see also *Chatterton* v. *The Secretary of State for India in Council*(5).

In the decision of this appeal, I shall confine myself to the following questions on which we have heard arguments from the appellant's learned vakil, Mr. C. P. Ramaswami Ayyar:—

(1) Whether the Collector's act in closing the plaint depot gave a cause of action to the plaintiff against the Government.

(2) Whether even the Collector and District Magistrate of Ganjām who passed the order closing the depot is liable to the plaintiff

(3) Whether assuming that the remark in the Government Order referred to in the plaint is libellous and was published, the statement is privileged and the Governor in Council cannot be made liable for making and publishing that statement.

There can be no doubt that the Collector (and District Magistrate) in ordering the closing of the depot intended to use the

(1) (1864) 33 L.J.C.P., 199 at p. 210.
(2) (1904) I.L.R., 28 Bom., 314 at p. 325.
(3) (1903) 6 Bom. L.R., 131.
(4) (1877) 2 C.P.D., 445 at p. 453.
(5) (1895) 2 Q.B., 189.

powers given to him by section 22, clause (3) of the Assam Labour and Emigration Act VI of 1901. That clause says: "Where the Superintendent" (in this case the Collector and District Magistrate) "considers that any depot is unhealthy or has become unsuitable for the purpose for which it was established he may, by order in writing, prohibit the use of the depot for the reception and lodging of labourers."

I am clear that the Government cannot be made liable for illegal orders made by the Collector and District Magistrate purporting to use the powers given by the Statute Law, the authority of *Tobin* v. *Reg.*(1), followed in *Shivabhaja* v. *Secretary of State for India*(2), being, in my opinion, almost conclusive on this point The District Magistrate who purported to use the powers given by the Statute Law cannot be treated as the Agent of the Government of Madras nor can the Government ratify that act so as to make itself liable for that act, because the act was not done on its behalf and the Government cannot be treated as a principal and the District Magistrate as its agent when the latter purported to exercise statutory powers. "When the duty to be performed is imposed by law" on the agent . . . . "the employer is not liable for the wrong done by the agent in such employment" See *Tobin* v. *Reg.*(1) and *Nireaha Tamaki* v. *Baker*(3). Before leaving this part of the case, I might finally add that on the highest grounds of public policy, the Government should not be made liable for the tortious acts of its agents or servants except probably for acts done in the course of those kinds of transactions which even an ordinary private mercantile firm can enter into. This, namely, the civil irresponsibility of Government "for tortious acts" of its agents has been assumed as undoubted law in *Rogers* v. *Rajendro Dutt*(4), and though it may be argued that the observation was obiter, the obiter of the Privy Council expressed through the mouth of that most eminent jurist, His Lordship the Right Honourable Dr. LUSHINGTON, ought, I think, to be followed by this Court.

I am further of opinion that the District Magistrate himself even in his personal capacity cannot be made liable to the plaintiff for the order made by him to close the depot, though

(1) (1864) 33 L.J.C.P., 199 at p. 210. (2) (1904) I.L.R., 28 Bom., 314 at p. 325.
(3) (1901) A.C., 561 at p. 575. (4) (1860) 8 M.I.A., 103 at p. 131.

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it was an illegal order. I shall assume that the depot was a place which was provided not only by the local agent [who was bound to provide such a depot under clause (8) of rule 11, made by the local Government in exercise of the power conferred on the Governor in Council by section 91, clause (b) of the Assam Labour and Emigration Act] but that that same depot was also the depot provided by the Planters' garden sardars under section 62, clause (1) of Act VI of 1901. The illegal order of the District Magistrate affected directly only the local agent and then it affected the garden sardars; the local agent's license having been properly cancelled, he had no cause of action against the District Magistrate. Assuming that the sardars and even the plaintiff's employers whose labour supply was cut off are entitled to sue the Collector and District Magistrate for damages, they have not brought any suit. It is the plaintiff who has lost his expected commission as agent that has brought this suit. No malice or fraud or deceit is alleged as against the Collector and District Magistrate. Has an agent a right to bring a suit for recovery of damages incurred by him against a person who illegally prevented his principal's garden sardars from taking their coolies to the Emigration depot if the tort-feasor is not proved guilty (a) of personal malice directed against the agent or of fraud or deceit, or (b) if it is not proved that his object was to injure the plaintiff's legal right (to receive commission from his employers for coolies sent through the depot)? The Collector and District Magistrate was under no obligation created by contractual, statute or any other law to the plaintiff in the plaintiff's individual capacity.

. . . .

still more indirectly against the planters. So far as that action affected the plaintiff's pocket, it did so in the third or fourth degree of remoteness, so to say. Passages from some of the judgments in the well-known cases of *Lumley* v. *Gye*(1), *South Wales Miners' Federation* v *Glamorgon Coal Company*(2) and *Quinn* v. *Leathem*(3) might be quoted (and they are usually quoted in those cases where a person who is not directly affected by an

(1) (1853) 2 E. & B., 216. (2) (1905) A C., 239.
(3) (1901) A.C., 495 at p 510.

alleged tortious act seeks to recover damages) which passages, taken apart from the context, can ingeniously be interpreted to support claims by a person most remotely connected with the wrongful act, for recovery of damages of as remote a kind [see the observations of Lord HALSBURY in *Quinn* v. *Leathem*(1) itself as to the right mode of interpreting such passages]. As Mr. Justice JOYCE put it in *National Phonograph Company, Limited* v. *Edison Bill Consolidated Phonograph Company, Limited*(2): " What was said was never intended to be, and ought not to be, treated and construed as an article of a code or a section of an Act of Parliament." In *Allen* v. *Flood*(3), six very learned Law Lords formed the majority and three other learned Lords including Lord HALSBURY were in the minority. In *Quinn* v. *Leathem*(1), the House of Lords led by HALSBURY without overruling *Allen* v. *Flood*(3) explained its real effect. Even Lord HALSBURY who seems to have gone furthest in his judgment in *Allen* v. *Flood*(3) in favour of the claims of a plaintiff who is injured by the defendant's bringing about a breach of relations between plaintiff and a third party said that the defendant should be held liable if he " maliciously and wrongfully with intent to injure the plaintiffs intimidated and coerced " the third party " not to enter into contracts with the plaintiffs." (I need not say that the question of remoteness of damages is much more strictly considered against a plaintiff who makes a claim based on other torts committed by a defendant than the tort of inducing a breach of contractual relations of a third party with the plaintiff.) Even as regards cases of the procuring of a breach of contract, see RIGBY, L.J. in *Exchange Telegraph Company* v. *Gregory & Co.*(4) and Justice JOYCE's remarks in *National Phonograph Company, Limited* v. *Edison Bell Consolidated Phonograph Company, Limited*(2).

In the present case there is not a word in the plaint to indicate that the Collector and District Magistrate in closing the depot maliciously intended by his order to hit at the plaintiff's right to the benefit of the commission obtainable by the plaintiff from the plaintiff's employers or that the Collector and District

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(1) (1901) A.C., 495.
(2) (1908) 1 Ch., 335 at pp. 349 and 350.
(3) (1898) A.C., 1.
(4) (1896) 1 Q.B., 147 at p. 157.

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Magistrate was actuated by any indirect motive directed against the plaintiff. I am clear that even if the garden sardars and the planters have claims for damages against the Collector (on which I express no opinion), the plaintiff who is an agent of the planters has no legal claim to recover damages for any injury caused to himself pecuniarily and not to his employers.

On the question of the alleged liability of the Governor in Council for defaming the plaintiff, I have nothing to add to the reasons given by the learned CHIEF JUSTICE (in which I concur) for holding that the Governor in Council is not liable for publishing words concerning the plaintiff in the course of the official duties of the Governor in Council when it is not alleged that the publication was made maliciously and without reasonable and probable cause.

In the result, I would dismiss the appeal with costs. Two counsel certified.

Bakewell, J.

BAKEWELL, J.—By virtue of section 3 of the Assam Labour and Emigration Act, 1901, and the notification of the Local Government made thereunder, all persons are prohibited from recruiting, engaging, inducing or assisting any native of India to emigrate from certain parts of the district of Ganjam to any labour district of Assam, otherwise than in accordance with the provisions of chapters III and IV of the Act; and under section 164 of the Act any person who knowingly does or attempts to do any of the acts so prohibited is punishable with imprisonment or fine or with both. Under section 4 of the Act the Local Government has appointed certain of its officers, by virtue of their official position, to exercise the powers and perform the duties therein mentioned. The general scheme of the Act is that the acts mentioned shall only be done by particular persons duly licensed by the specified authority, under the supervision and control of specified officers and in a particular manner; and the different classes of licensees and their respective powers and duties are carefully enumerated and described.

The Act provides that every intending emigrant shall be brought by the recruiting agent before a registering officer, but the Local Government has enabled certain licensees termed "local agents" to perform the duties of this officer. The "local agents" represent the employers of the emigrants in all matters connected with the supervision of garden-sardars under chapter

IV of the Act (section 64), the garden-sardar being a person employed on an estate and deputed by his employer to engage labourers [section 2 (1) (h)]. Every garden-sardar is bound under section 62 to provide sufficient and proper accommodation in a suitable place for the labourers or persons intending to become labourers collected by him, and under section 68 to produce them before the Registering Officer.

The plaintiff owns a building at Berhampur, in the district of Ganjam, which has been used by numerous garden-sardars working in the district as a joint depot for the accommodation of the labourers collected by them In his evidence the plaintiff said: "The depot belongs to me. I purchased it I own the building. I did not rent it to my employers. I bought it out of the commission paid to me . . . now it has been passed as a depot under chapter IV of the Act since 1906. It is a place of accommodation which sardars are bound to maintain."

The plaintiff holds powers of attorney from various tea companies and superintendents of companies owning tea gardens in Assam who are "employers" within the Act; an employer being the chief person for the time being in charge of any estate upon which labourers are employed—section 2 (1) (f). In his evidence the plaintiff said that the superintendents were resident in Assam and the chief authorities on the spot; "they hold powers of attorney from the companies. In 1906 I held a contractor's license, I gave it up that year. Since then I have taken no license. I first began to work with local agents about October or November 1906, if I remember right, and continued up to the present time, I was working with local agents." In paragraph 3 of his plaint, he alleges that various labour employers in Assam have nominated him "as their emigration agent for the Madras Presidency for the purpose of securing coolies for labour on the several tea estates." The plaintiff holds general powers of attorney from the several companies aforesaid and by agreement with them is entitled to be paid Rs. 7 for every coolie recruited by him; and in paragraphs 8 and 11 he says: "The plaintiff has several local agents working under him and several garden-sardars engaged in recruiting. Both the sardars and the local agents mentioned above and working on behalf of the various tea companies and

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employers of labour are placed under the directions and superintendence of the plaintiff and work under him subject to his orders. And the depot mentioned above is also maintained under his supervision and control."

In his evidence the plaintiff speaks repeatedly of my local agents, "my depot" and "my business."

In February 1910, the District Magistrate and Superintendent of Emigrants, suspecting that the local agent at Berhampur was collecting coolies from parts of the district of Ganjam in which recruiting was absolutely prohibited under the Act, suspended his license and issued orders to the local officials to close the plaintiff's depot, which was under the superintendence of this agent. The plaintiff claims that these acts of the Magistrate were unauthorized and ultra vires, that they have resulted in stopping the work of emigration, have "interfered seriously with plaintiff's business" and have prevented him from earning his commission of "Rs. 7 per head of adult coolie remitted and forwarded to Assam under his supervision and of the local agent" The plaintiff in his cross-examination and his vakil, in his argument before us, contended that he was in the position of an employer, and not one of the agents mentioned in the Act, but a kind of diplomatic agent between the employers and the local authorities. It is, however, perfectly clear from the allegations of the plaint and the plaintiff's evidence that he has been carrying on the business of a wholesale emigration agent and supplying tea planters in Assam with labourers at a fixed rate per head, and that the injury which he complains of is the damage caused to his own business.

I think that the Act contemplates only two classes of persons to whom it shall be lawful to carry on this business, namely, the employer, and the employer's licensed agent, and that the plaintiff is not included within either of these classes and was therefore prohibited from carrying on this business and was criminally liable for so doing. The only argument of the learned vakil for the plaintiff when this aspect of the case was put to him was that this point was not taken before the learned trial Judge, and that argument might avail him in most cases, but this Court cannot possibly ignore

the facts that the plaintiff has been carrying on an illegal business, and that his complaint is that the defendant and his agents have interrupted its course and prevented him from reaping its profits. I am of opinion that this suit might have been dismissed on the ground that the plaintiff has no right of action in respect of an illegal business.

If the plaintiff's contentions were correct and he should be considered to be in the position of an employer I am still of opinion that he has no remedy. His vakil has abandoned the first part of the case, the suspension and subsequent dismissal of the local agent, and has relied upon, the closing of the plaintiff's depot, and the latter act did not result in any direct damage to the plaintiff or his employers. The plaintiff has not shown that the garden sardars could not accommodate their labourers in other suitable places, and could not register their coolies with the Government registering officers, and that the business of his employers could not be carried on without using this building, and the evidence goes to show that the stoppage in the flow of emigrants resulted from the plaintiff's attempt to continue the system of registration by a "local agent" and the resistance thereto of the District Magistrate. The latter's power of appointing local agents is discretionary [section 64 (1)], so that the plaintiff could not base his claim upon a refusal to appoint It has not been shown that the District Magistrate was aware of the terms of the contract between the plaintiff and his principals, or of the manner in which a stoppage of the flow of emigrants would injure the plaintiff. The only evidence on this point appears in Mr. Macmichael's cross-examination, "*Q.* You know that by this order (that is to close the depot) you would not only be causing loss to these tea associations but also to Mr Ross personally? *A.* I know in a general way that Mr Ross was commonly interested *Q.* And therefore that he would be financially a loser by this order? *A.* Probably."

The District Magistrate cannot be presumed to have known that the plaintiff was remunerated in a manner which suggests an active recruitment of labourers by him, and an infringement of the provisions of the Act. The doer of an unlawful act is liable for its ordinary consequences, but not for consequences which he did not and could not reasonably be expected to

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foresee—*Sharp* v. *Powell*(1); and I am of opinion that the Magistrate could not be expected to foresee that his act in the depot would result in so injuring the business of the plaintiff's principals that further damage would result to the plaintiff himself. The observations of Lord PENZANCE in *Simpson v. Thomson*(2) relate to a negligent act but indicate the manner in which the Court will limit the liability of a tort-feasor.

I am of opinion that the plaintiff has failed to show that the damage complained of was the consequence of the Magistrate's act, and that in any case it is too remote to give a cause of action.

I agree with the judgment of the learned CHIEF JUSTICE with respect to the claim for damages for defamation and with the order proposed by my learned brother

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APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr Justice Napier.

1915. April 30.

RANGASAMI AYYANGAR (DIED) (REPRESENTED BY RAMAN AYYANGAR, MINOR, THROUGH HIS NEXT FRIEND LAKSHMI AMMAL (DEFENDANT)), APPELLANT,

v.

SOURI AYYANGAR (PLAINTIFF), RESPONDENT.*

Indian Evidence Act (I of 1872), sec. 92, cl. (a)—Mistake in sale-deed defendant resisting suit for possession—Specific Relief Act (I of 1877), sec. Plea of mistake without previous rectification of sale-deed, maintainability

The combined effect of section 92, clause (a) of Indian Evidence Act 1872) and of section 31 of Specific Relief Act (I of 1877), is to entitle party to a contract whether plaintiff or defendant to protect his rights by ing a mistake in a written contract, as e.g., in this case, a mistake in description of the property sold by giving a wrong survey number to the The facts that the party who is obliged to prove the mistake happens to defendant in the suit resisting a claim for possession of that property and he has not previously obtained a rectification of his sale-deed are no bar t advancement of the plea

(1) (1872) L.R., 7 C P., 253. (2) (1877) L.R., 3 A.C., 279 at p. 259.

* Second Appeal No. 803 of 1914.

Mahendra Nath Mukherjee v. Jogendra Nath Roy Chaudry (1897) 2 C.W.N., 260, followed.

Mahadeva Ayyar v. Gopala Ayyar (1911) I.L.R., 34 Mad., 51, referred to.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 464 of 1913, preferred against the decree of C. V. KRISHNASWAMI AYYAR, the District Munsif of Tiruvalur, in Original Suit No. 73 of 1912. The facts are given in the judgment.

K. Parthasarathi Ayyangar (and *A. Srirangachariyar* for *R. Rangaswami Ayyangar*) for the appellant.—Either party to a contract may show that the contract as written contains a mistake—vide section 92, clause (*a*) of the Evidence Act, and this can be done even by a defendant resisting a suit for possession by showing that a mistake has crept in his sale-deed in that a wrong survey number was given to the property sold to him—*vide*, *Mahendra Nath Mukherjee* v. *Jogendra Nath Roy Chaudry*(1). The reported cases of this Court, viz., *Karuppa Goundan* alias *Thoppala Goundan* v. *Periatambi Goundan*(2) and *Mahadeva Ayyar* v. *Gopala Ayyar*(3) relate to the case of a plaintiff trying to prove a mistake and *Mahadeva Ayyar* v. *Gopala Ayyar*(3) actually decides that a prior rectification of the deed is not necessary to the advancement of a plea. I submit it is likewise for the defendant.

T. Narasimha Ayyangar for the respondent.—The case of a plaintiff and that of a defendant are different. A plaintiff can claim relief of rectification as ancillary to his main relief based on the contract and his position is such that he can even amend his plaint by a later addition of a prayer for rectification and all reliefs can be prayed for and given to him in the same suit, whereas the same cannot be the case with the defendant. Moreover, the questions to be determined under section 31 of the Specific Relief Act such as whether the plaintiff has been prejudiced or not, have not been gone into in this case. On the facts, there is no mistake which can be availed of by the defendant. Reliance was also placed on section 91 of the Evidence Act.

(1) (1897) 2 C.W.N., 260. (2) (1907) I.L.R., 30 Mad., 397.
(3) (1911) I.L.R., 34 Mad., 51.

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holder. The sixth defendant was a similar purchaser of some other villages therein within the jurisdiction of the Agency Court. For default in payment of revenue accruing due subsequent to the plaintiff's purchase, one of the villages purchased by him was attached by the Government; the plaintiff paid the full amount due on the entire zamindari to save his village from revenue sale. The plaintiff brought the suit in the Subordinate Judge's Court against the first defendant, defendants Nos. 2 to 5 (who were his undivided brother, sons and nephew, respectively) and the sixth defendant, to recover the full amount paid by him from all the defendants personally and from the sale-proceeds of the rest of the zamindari kept in deposit in the Government treasury. The defendants pleaded non-liability in law for the full amount, while the sixth defendant raised the further plea that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against him.

Held:

(a) that the only person who is personally bound to pay the revenue to the Government is the registered holder,

(b) that a co-owner who pays to the Government the whole revenue due on an estate is not entitled to a personal decree against the other co-owners who, not being registered holders, are not under a personal obligation to pay the revenue, though it may be a charge on the lands in their holding,

(c) that section 70 of the Indian Contract Act does not apply to such a case,

(d) that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against the sixth defendant to enforce the charge on the villages purchased by him, as the lands did not lie within its jurisdiction,

(e) that section 69 of the Indian Contract Act does not apply to a suit for contribution, as "*the person interested in the payment of money*" must be a person who is not himself bound to pay the whole or any portion of the amount;

(f) that the plaintiff was entitled to sue the first defendant only for contribution and to recover from him and from the sale proceeds in deposit only the share of revenue payable on account of the property in the hands of the first defendant.

Subramania Chetti v *Mahalingasami Sivan* (1910) I.L.R., 33 Mad., 41, *Paruykys* v *Pakram Haji* (1912) 15 I.C., 262, *Narain Pai* v *Appu* (1915) 28 I.C., 450 and *Futteh Ali* v. *Gunganath Roy* (1882) I.L.R., 8 Calc., 113, followed.

Raja of Vizianagaram v *Raja Setrucherla Somasekhararaz* (1903) I.L.R., 26 Mad., 748, distinguished.

Gajapathi Kristna Chendra Deo v *Srinivasa Charlu* (1914) 25 M.L.J., 433, *Raja of Pittapuram* v *Secretary of State* (1914) 16 M.L.T., 375, *Jogambal Boyee Ammani Ammal* v *Naina Pillai Marakayar* (1910) I.L.R., 33 Mad., 15, *Mangaluthammal* v *Narayanaswami Aiyar* (1907) 17 M.L.J., 250, *Manindra Chandra Nandy* v *Jamahir Kumari* (1905) I.L.R., 32 Calc., 643 and *Moule* v. *Garrett* (1872) 7 Ex., 101 at p. 104, referred to.

APPEAL against the decree of D. RAGHAVENDRA RAO, the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 46 of 1908.

The first defendant was the zamindar of Pachipenta. In execution of a decree obtained by *B* against the first defendant, the plaintiff purchased in auction four villages in the zamindari on the 8th January 1906, and the sixth defendant purchased in auction 69 other villages in the Agency tracts within the jurisdiction of the Agency Court on the 26th March 1908, and the remaining portion of the zamindari was also sold and the sale-proceeds were deposited in the Taluk treasury. The plaintiff alleged in the plaint that the first defendant, and defendants Nos 2 to 5 who were the undivided brother, sons and nephew, respectively, of the first defendant, failed to pay the peshkash or revenue due on the Pachipenta estate from April 1907 to the end of November 1908; that, for the recovery of the amount that was due, the Deputy Tahsildar of Salur attached a village purchased by the first defendant, and that, to save the property from revenue sale, he paid the full amount of the revenue. The plaintiff brought this suit in the Subordinate Judge's Court of Vizagapatam to recover the whole amount so paid by him from all the defendants personally and from the sale-proceeds of the rest of the zamindari (which had also been sold), which were in deposit in the Taluk treasury to the credit of the first defendant. The defendants Nos. 1 to 5 pleaded that they were not liable to pay the entire amount as the plaintiff and the sixth defendant were bound to pay a portion each, and that the suit as brought was not maintainable. The sixth defendant, who was subsequently added, pleaded inter alia that the Subordinate Judge's Court had no jurisdiction to entertain the suit against him as the portion of the zamindari purchased by him was in the Agency tracts and he also resided therein, and, on the merits, that he was not liable to pay any amount as no arrears were due on the portion purchased by him prior to his purchase and even if they were due he would not be liable in law to pay any amount to the plaintiff. The Subordinate Judge dismissed the suit as against the sixth defendant on the ground of want of jurisdiction but passed a decree for the plaintiff as against the first to fifth defendants and the sale-proceeds of the zamindari in deposit in the Taluk treasury for an amount which represented the share of revenue payable by the defendants Nos. 1 to 5 in respect of the lands left with them after deducting the portions purchased by the plaintiff and the sixth

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defendant. The plaintiff preferred an appeal against the decree and claimed to recover the whole amount of revenue paid by him from all the defendants personally and as a charge on the amount in deposit in the Taluk treasury.

The Honourable Mr. *B. Narasimhesuara Sarma* for the appellants.

V. Ramesam for the respondents Nos. 1 to 5.

S. Srinivasa Ayyangar for the sixth respondent.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—Two points are raised in this appeal, first as to the liability of the sixth defendant, second as to the amount recoverable from the first defendant, the registered holder.

So far as the sixth defendant is concerned it is clear that the plaintiff cannot recover anything personally from him as he was under no personal obligation to pay the proportionate revenue to the Government. It is now settled that the only person who is personally bound to pay the revenue to Government is the registered holder, who is called the defaulter in the Revenue Recovery Act, and that co-owners or co-sharers who are not also registered holders are not under any such obligation, though the Government revenue may be a charge on the lands in their holding—*Subramania Chetti* v *Mahalingasami Sivan*(1) Payment of the revenue by the plaintiff could not give him a larger or higher right than what the Government had. See Ghose on Mortgages, page 371, and Freeman on Co-tenancy, pages 254 and 319. On this principle this Court has held in *Parughyi* v. *Pakr ini Haji*(2) and *Narain Pai* v. *Appu*(3), that a person who pays the whole revenue to the Government under circumstances similar to the present case is not entitled to a personal decree against the co-owners or co-sharers who were not under a personal obligation to pay to the Government. The observations of BHASHYAM AYYANGAR, J., in *Raja of Vizianagram* v *Raja Setrucherla Somasekhararaz*(4) were based on the assumption that all the co-owners or co-sharers were liable personally to pay to the Government. Nor do we think that section 70 of the Contract Act has any application to the present case. *Gajapathi Kistna Chendra Deo* v *Srinivasa Charlu*(5), on which Mr. Sarma relied has not been

(1) (1910) I.L.R., 33 Mad., 41. (2) (1912) 15 I.C., 262.
(3) (1915) 28 I.C., 456. (4) (1903) I.L.R., 26 Mad., 793 at p. 815.
(5) (1914) 25 M.L.J., 433.

followed in *Raja of Pittapuram* v. *Secretary of State*(1) in which all the previous cases were reviewed by SPENCER, J., and this case was followed in *Narain Pai* v. *Appu*(2) by SADASIVA AYYAR, J, who was himself a party to the decision in *Gajapathi Kistna Chendra Deo* v. *Srinivasa Charlu*(3). *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(4) is also to the same effect. If the sixth defendant had been personally liable to pay, the Subordinate Judge's Court of Vizagapatam would have jurisdiction to pass a money decree, though the sixth defendant was residing in the Agency tracts, as the cause of action arose at least in part within the jurisdiction of the Vizagapatam Subordinate Judge's Court; but that Court has no jurisdiction to enforce a charge over the portion of the estate purchased by the sixth defendant as it is situated in the Agency tracts, and the plaintiff must be left to enforce his charge in the Agency Courts. We therefore confirm the decree of the lower Court as regards the sixth defendant.

The next question which alone admits of any doubt is the amount, which the plaintiff is entitled to recover from the first defendant, the registered holder. The plaintiff, the first defendant and the sixth defendant are each in possession of portions of the estate. The Government revenue paid by the plaintiff accrued due after the purchase by the plaintiff and the sixth defendant of portions of the property in execution of a mortgage decree. If it was a case of a private sale under section 56 of the Transfer of Property Act, the plaintiff and the sixth defendant would each be bound to pay the proportionate share of the Government revenue due on the lands in their possession, the fact that the purchase was made in a Court-sale does not make any difference. The position therefore is this: There was a charge on the whole estate in favour of the Government, and the registered holder, the first defendant, was also personally liable to pay the amount of the charge to the Government (We are assuming that the statutory liability of the registered holder is a personal liability) The case is analogous to that of a mortgagor who had covenanted to pay the mortgage money and who afterwards sells portions of the mortgaged property to

(1) (1914) 16 M.L.T., 375.
(2) (1915) 25 I.C., 156
(3) (1914) 25 M.L.J., 433.
(4) (1910) I.L.R., 33 Mad., 15.

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several persons subject to the mortgage. As between the mortgagor and his vendees, the mortgagor would be liable in proportion to the value of the property in his hands, while his vendees would be liable in proportion to the value of the property in their hands. This of course would not affect the right of the mortgagee to enforce the personal covenant against the mortgagor or the charge against any portion of the mortgaged property If in such a case the whole amount is collected from the mortgagor on his personal liability or by the sale of the property in the hands of any one of the owners, the person who so paid the money or out of whose property the mortgage amount was realized would be entitled to contribution from the property of the other owners under section 82 of the Transfer of Property Act. The mortgaged property is considered the primary fund for payment of the mortgage debt: Jones on Mortgages, sections 736 and 740; also see *Palmer* v. *Hendrie*(1). If therefore the present plaintiff had asked for contribution out of the properties, he could not have recovered more than the amount payable by the first defendant, in proportion to the value of the property in his hands. For example if the plaintiff was the purchaser of one-third share, sixth defendant another one-third, the first defendant remaining in possession of the other third, whoever paid the whole of the charge, whether plaintiff or the sixth defendant or the first defendant, would be entitled to recover one-third from each of the remaining two as a charge on the property. Does the fact that the plaintiff sues under section 69 of the Contract Act to recover the money personally from the registered holder make any difference as regards the amount claimable from him? Reading the terms of section 69 literally, in the case supposed, the plaintiff, it may be contended, would be entitled to recover the whole amount and not merely two-thirds or one-third personally from the registered holder, for the first defendant was the person who in law was bound to pay the revenue; the plaintiff of course was interested in the payment, i.e., he was not a volunteer. That, I think, would be manifestly absurd, for the property in the hands of the plaintiff is itself liable to pay one-third of the Government revenue, and it is this liability on his part that gives him a right to make the payment at all to the

(1) (1859) 27 Beavan, 349.

Government, so as to enable him to recover back from the co-owners the share of the revenue which they personally were bound to pay or for which the property in their hands was liable. A simple illustration will make this matter clear. *A* mortgages certain lands to *B* and sells the property subject to the mortgage to *C*. Supposing *B* sues *C* on the mortgage, and *C* to save the property pays the mortgagee; could *C* recover the money from *A*, he being the person who under law was bound to pay within the meaning of section 69? clearly not, for as between *A* and *C*, *C* is the person who is bound to discharge the debt, though so far as *B*, the mortgagee, is concerned there is no novation of the liability of *A*; the position of *A* in such cases is said to be analogous to that of a surety, *C* being the principal debtor. It is the ultimate liability that determines the right to recover the amount paid to discharge the original liability. It is possible to contend in the case above said that *C* is entitled to recover from *A* personally the amount of the mortgage debt, but that *A* in his turn would be entitled to a charge upon the mortgaged property for the sum which he paid to *C* and recover as much as he can from the mortgaged property, which amount may conceivably be less than the amount which he paid; this would be untenable, because the purchaser of the property subject to the mortgage would then be entitled indirectly to recover back the amount paid by him for the sale of the equity of redemption. To put the converse case, if *A* had been sued by the mortgagee personally and had been obliged to pay *B*, he certainly would be entitled to call on *C* to pay back the money which he paid. In an English conveyance on sale of the equity of redemption a covenant would be implied on the part of the vendee to indemnify the vendor from all the consequences of non-payment of the mortgage amount by the vendee. Under the Transfer of Property Act, section 55, though there is no implied covenant of indemnity the same result would follow as the statute makes it obligatory on the part of the vendee to discharge the mortgage as between him and his vendor though the liability of the vendor-mortgagor to his mortgagee is not affected. It is clear therefore that the person who is interested in the payment mentioned in section 69 must be a person who as between himself and the defendant was not bound to pay though the defendant may be under an obligation to pay to a third

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party. See *Mangalathammal* v. *Narayanaswami Aiyar*(1) a *Manindra Chandra Nandy* v. *Jamahir Kumari*(2). Wheth the basis of section 69 is the Common Law action of "mon paid at the defendant's request" or the equitable doctrine subrogation does not much matter as the plaintiff can in eith case recover only from the person ultimately liable. See *Ma* v. *Garrett*(3) per COCKBURN, C.J., citing Leake, page 45, sixth ed tion Sheldon on Subrogation, page 15, section 11 In this case, the plaintiff and the first defendant were the only two perso who had an interest in the property, and if the plaintiff had pa the whole of the Government revenue he could not have recovere more than the share payable on account of the property in th hands of the defendant Is the plaintiff also entitled to recov from the first defendant the proportionate share of the revenu payable on account of the properties in the hands of sixth defend ant, because the plaintiff is not the person liable to pay that sum If the plaintiff is allowed to recover from the first defendant the amount payable both on account of the properties in his hands and in the hands of the sixth defendant, unless the first defendant is in his turn subrogated to the rights of the plaintiff (which is more than doubtful), the first defendant would have been compelled to pay the amount really payable by the sixth defendant; that, I think, would be unfair. The present suit is a suit for contribution and it was of course necessary to make all persons who are liable to contribute, whether personally or out of their properties. parties, in order to fix the proportionate amount which each person was ultimately bound to pay. If section 69 applies to a suit for contribution it may be that no effective relief could be given against all the parties so as to dispose of all matters in controversy and avoid multiplicity of suits. In *Futteh Ali* v. *Gunganath Roy*(4), it was doubted whether a suit for contribution comes within the scope of section 69.

"The person interested in the payment of money" must, we think, be a person who is not himself bound to pay *the whole or any portion of the amount.* It is to be noted that there are express provisions in the Contract Act for contribution in the cases of joint promisors and co-sureties. (Section 43, clause 2,

(1) (1907) 17 M L.J., 250.
(2) (1905) I.L.R., 32 Calc., 643.
(3) (1872) L.R., 7 Ex., 101 at p 104.
(4) (1882) I.L.R, 8 Calc., 113.

and sections 146 and 147.) We are therefore inclined to hold that section 69 does not apply to a suit for contribution at all. The result is the appeal is dismissed with costs.

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WALLIS, C.J.

WALLIS, C.J.—I agree.

K.R.

APPELLATE CIVIL

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1915 August 16 and 26

PARVATHI AMMAL (APPELLANT IN SECOND APPEAL No 1127 AND RESPONDENT IN SECOND APPEAL No 1147 OF 1914), DEFENDANT,

v

GOVINDASAMI PILLAI (RESPONDENT IN SECOND APPEAL No 1127 AND APPELLANT IN SECOND APPEAL No. 1147 OF 1914), PLAINTIFF.*

Execution sale set aside for irregularities of decree-holder—Right of purchaser to return of poundage fees and to interest on purchase money—Right of suit—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, no bar by.

A Court-sale was set aside on account of irregularities in its conduct, perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage fees not returned to him and interest on the purchase money paid by him

Held (overruling the objection that remedy for the return of the poundage fees lay only in execution), that a suit was maintainable for the recovery of the same

Powell v. *Powell* (1875) 19 Eq., 422, followed.

The poundage fee is really part of the purchase money paid

Held also, that the purchaser was entitled to interest on the purchase money paid by him

Raghubir Dayal v *The Bank of Upper India, Ltd.* (1882) I.L.R., 5 All., 364, followed.

SECOND APPEALS against the decree of G. KODANDARAMANJULU NAYUDU, the Subordinate Judge of Tanjore, in Appeals Nos. 690 and 718 of 1912, respectively, preferred against the decree of P. C. TIRUVENKATA ACHARIYAR, the District Munsif of Tanjore, in Original Suit No. 271 of 1911.

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* Second Appeals Nos. 1127 and 1147 of 1914.

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The facts of the case appear from the judgment.

Second Appeal No. 1127 *of* 1914.

K. S. Ganapati Ayyar for the appellant.

G. S Ramachandra Ayyar for the respondent.

Second Appeal No. 1174 *of* 1914.

G. S. Ramachandra Ayyar for the appellant.

K. S. Ganapati Ayyar for the respondent.

SPENCER AND SESHAGIRI AYYAR, JJ.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—The facts of the case are not in dispute. The defendant obtained a decree against certain persons. Immoveable properties were sold under that decree and the plaintiff became the purchaser. At the instance of the judgment-debtors the sale was set aside on the ground of irregularities in the conduct of the sale. Plaintiff, the purchaser, sued to recover the amount of the poundage fees deducted from the purchase money paid by him, and also interest. The claim for vakils' fees, etc., has not been pressed before us. The District Munsif held that plaintiff was entitled to interest at 6 per cent, and that a separate suit would not lie to recover poundage. Both the parties appealed The Subordinate Judge held that the claim for poundage was sustainable, but that interest should not have been decreed. Second Appeal No. 1127 of 1914 is by the defendant against the decree for poundage. Second Appeal No 1147 of 1914 is by the plaintiff for the interest disallowed.

Before dealing with the question of law argued before us, we may state that we see no reason to differ from the conclusion of the Courts below that defendant is responsible for the irregularities in the conduct of the execution sale. In the order passed on the application of the judgment-debtor, the Subordinate Judge held that the decree-holder was responsible for the material irregularity in the publishing or conducting the sale." (See paragraph 9 of the District Munsif's judgment.) The District Munsif in the present suit came to the same conclusion; apparently the liability of the defendant was not disputed in appeal It is true the Court in ordering the sale of the property should have directed the amin to sell the property in different lots, but that would not absolve the defendant from his liability. The responsibility of the officer levying execution in the mufassal is

not like that of the Sheriff in England. It is the duty of the decree-holder to put the Court in possession of the necessary information and to attend to the various requirements of the law in publishing and conducting the sale. The Court cannot be proceeded against for the irregularity in execution, if it acted to the best of its information and without malice The party who puts the Court in motion is liable to the purchaser who has been aggrieved. Even in Sheriff's sales, the purchaser is entitled to proceed against the decree-holder. In *Dorab Ally Khan* v. *Abdool Azeez*(1) in which the Judicial Committee had to pronounce upon the liability of the Sheriff who executed a decree of the Original Side of the Calcotta High Court, it was pointed out that the Sheriff may render himself liable if he seized the property situated beyond his territorial jurisdiction or if he exceeded the powers expressly conferred on him by the statute Their Lordships have also laid down that where the Sheriff acts under the advice and guidance of the execution creditor, the latter will be responsible to the purchaser. The present is an *a fortiori* case.

The main question argued related to the maintainability of the suit Mr. Ganapati Ayyar contented that the plaintiff should have sought redress in execution and that a separate suit did not lie. Section 315 of Act XIV of 1882 provided for two classes of cases · (1) where the sale has been set aside as provided for in the Code and (2) where it was found that the judgment-debtor had no saleable interest in the property sold. The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be as suggested by Mr. Ramachandra Ayyar for the respondent that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ally Khan* v. *Abdool Azeez*(1) that there was no warranty of title in Court-sales: see also *Sundara Gopalan* v. *Venkata Varadaiyangar*(2). The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred

(1) (1878) I.L.R., 3 Calc., 806 (P.C.). (2) (1894) I.L.R., 17 Mad., 228.

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SPENCER AND SESHAGIRI AYYAR, JJ.

can only be exercised within the limitations prescribed. Consequently without getting the sale set aside through Court, the purchaser has no right of action. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given to him by the statute. But the right to recover from a party whose fraud or carelessness has led to the invalidity of the sale stands on a different footing. In such cases by neglecting the duty cast on him, he renders himself liable to compensate the injured party for the loss the latter has sustained. This right is not created for the first time by the statute. The Code only recognized what has existed all along. As stated by Sir JAMES BACON (Vice-Chancellor) in *Powell* v. *Powell*(1) the purchaser is entitled under these circumstances to be discharged from his contract by reason of the invalidity of the proceedings which led up to the sale and is entitled to be placed in *status quo ante*. The same proposition is stated in 24 Cyclopædia of Law and Procedure, 70, thus: "It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase-money paid by him, and to be reimbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land." The decision in *Mohideen Ibrahim* v. *Mahomed Meera Levai*(2) on which the appellant relied strongly, does not touch the present question. Mr. Justice NAPIER held in that case that where the purchaser was deprived of his possession by reason of a decision in a subsequent suit he is not entitled to sue for the return of the purchase-money. The omission from the Code of 1908 of the clause relating to the want of "saleable interest" in the judgment-debtor is relied on strongly by the learned Judge. In the present case the sale has not become abortive owing to the want of saleable interest in the judgment-debtor. Mr. Ganapati Ayyar contended that the words of section 315 of Act XIV of 1882 "that the purchaser shall be entitled to receive back his purchase money" may confer a right of suit as held in numerous cases, but that the words "shall be entitled to an order for repayment" in rule 93 indicates a deliberate policy to restrict the remedy to execution in all cases

(1) (1875) 19 Eq., 422. (2) (1912) 23 M.L.J., 457

of sales being set aside. We are unable to see the distinction. There are no words in the present Code as in the Code of 1882, enabling the purchaser to realize his money by way of execution. Further he is no party to the suit or the decree. Unless, therefore, his right of action is taken away by express words, he is entitled to pursue his ordinary remedy by filing a suit.

Another contention of the appellant was that as poundage is taken by the Court, the decree-holder is not bound to pay it to the purchaser. This argument proceeds on a misconception of the nature of the poundage fees. As was pointed out by Mr. Ramachandra Ayyar in his able argument, what the purchaser claims is really a portion of the purchase-money. It is from the payment made by him the Court makes a deduction for poundage and pays the balance to the decree-holder. Poundage is the fee which is levied in England by the Sheriff as remuneration for his service. In this country, as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase-money is taken for purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from the Court. In England as well as in this country, this fee is taken out of the sale-proceeds. See paragraph 71 in 14 Halsbury's Laws of England and rule 154 of the Civil Rules of Practice There is therefore no warrant for the suggestion that in claiming the money retained as poundage fees, the purchaser does not ask for the return of the purchase-money Nor do we see any reason to assent to the argument that the claim for the recovery of such fees should be disposed of in execution. The omission of the word "poundage" in rule 157, clause (2), was much relied on. This omission cannot affect the substantive right of suit which the purchaser has. It was held in *Rawstorne* v *Wilkinson*(1) that the Sheriff has a right of action to recover poundage fees where the sale proves abortive. See also *Tyson* v. *Paske*(2) The auction-purchaser whose money has been paid by way of poundage to the Sheriff will stand in his shoes to recover it against the execution creditor. The fact that it is retained by the Court can make no difference in principle. We have therefore come to the conclusion that the Subordinate

(1) (1815) 4 Maule & Selwyn, 256

(2) (1705) 2 Lord Raym., 1212, s.c 92 E R., 300

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SPENCER AND SESHAGIRI AYYAR, JJ.

Judge was right in holding that the suit is not obnoxious to the execution provisions of the Code of Civil Procedure. We dismiss Second Appeal No. 1127 of 1914 with costs.

We are, however, unable to agree with the lower Appellate Court that the purchaser has lost his right to interest by any laches on his part. He is under no duty to see that the property is put up for sale in separate lots. He is not affected by any anterior mismanagement in the conduct of the sale. He has to take the property as advertised and sold. As he paid the money required by law, there is no reason for depriving him of the interest on his money. See *Raghubir Dayal* v. *The Bank of Upper India, Limited*(1). The rate of interest awarded by the Munsif is correct. We must reverse the decree in Second Appeal No. 1147 of 1914 with costs in this and in the lower Appellate Court, and give a decree for Rs. 306 with interest at 6 per cent from the date that the plaintiff deposited the money into Court.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1915. September 20.

M RAMACHANDRA RAO (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF GODAVARI (DEFENDANT), RESPONDENT.*

Madras Village Courts Act (I of 1889), sec 24—Order of Deputy Collector debarring one from appearing as vakil for parties in village courts, ultra vires—Specific Relief Act (I of 1877), sec 42—Suit for declaration of invalidity of order, maintainability of

Under section 24 of the Madras Village Courts Act (I of 1889), any person holding a vakalatnama from a party may appear and plead in a village Court, and there is no provision in the Act for debarring any one from this privilege. The power of removing, suspending and dismissing village munsifs conferred on

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(1) (1883) I.L.R., 5 All., 364.

* Second Appeal No. 1635 of 1914.

Divisional officers does not include the power of debarring a person from acting as a vakil for a party in village Courts.

A suit for a declaration that an order debarring one from acting as vakil for another in village courts is void is maintainable though it may not be covered by section 42 of the Specific Relief Act (I of 1877).

SECOND APPEAL against the decree of A. RAGHUNATHA RAO PANTULU, the Subordinate Judge of Cocanada, in Appeal No. 191 of 1913, preferred against the decree of E. J. S. WHITE, the District Munsif of Cocanada, in Original Suit No. 239 of 1913.

Suit for a declaration under section 42 of the Specific Relief Act (I of 1877) that the proceedings of the Headquarters Deputy Collector, Cocanada, debarring plaintiff from practising as a private vakil in any of the village courts in his jurisdiction and the proceedings of the Collector, Godavari, and the Revenue Board confirming the same are null and void.

The defence was (*a*) that the plaintiff's conduct in certain cases of alleged forgery of vakalats was found to be suspicious, (*b*) that plaintiff's conduct towards a village munsif was insolent; (*c*) that plaintiff was not deemed a proper person to represent clients and was consequently debarred from appearing in the village courts of Cocanada division; and (*d*) that the Collector was competent to pass the order debarring plaintiff from appearing in village courts, as plaintiff was not a certificated pleader.

The District Munsif allowed the suit but the Subordinate Judge dismissed it.

Hence the Second Appeal by the plaintiff.

T. Ramachandra Rao for the appellant.

K. S. Krishnaswami Ayyangar for the *Government Pleader* for the Crown.

AYLING AND TYABJI, JJ.

The following judgment of the Court was delivered by AYLING, J.—We are not satisfied that the suit is covered by section 42 of the Specific Relief Act; but it does not follow that it is not maintainable: vide, *Robert Fisher* v. *The Secretary of State for India in Council*(1) and *Ramakrishna Patter* v. *Narayana Patter*(2). We can see no reason for holding that the present suit does not lie.

The order in question is passed by the Deputy Collector in charge of the Cocanada Sub-division and debars plaintiff from

(1) (1899) I.L.R., 22 Mad., 270. (2) (1914) 27 M.L.J., 634.

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AYLING AND TYABJI, JJ.

practising in any of the village courts of that division. Under section 24 of the Madras Village Courts Act *any person* holding a vakalatnama from a party may appear and plead in a village court and there is no provision in the Act for debarring any one from this privilege.

Mr. K. S Krishnaswami Ayyangar who appears for the Government Pleader is unable to support the legality of the order Whatever general powers of supervision can be inferred from the power of appointment, suspension and removal of village munsifs conferred by sections 7 and 8 of the Madras Village Courts Act it cannot be held to extend to the passing of an order of this description. It is no doubt desirable that bad characters should be prevented from practising in village courts and the Act may need amendment, but as it stands the order is undoubtedly illegal and in our opinion the District Munsif exercised a correct discretion in granting the declaration sued for.

We set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs in this and the lower Appellate Court.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Srinivasa Ayyangar.

1914. August 20. 1915. April 28. August 4 and 31.

VYAPURI AND ANOTHER (DEFENDANTS NOS 1 AND 2), APPELLANTS,

v.

SONAMMA BOI AMMANI (PLAINTIFF), RESPONDENT *

Adverse possession—Simple mortgage—Dispossession of mortgagor after mortgage, not adverse to the mortgagee.

The possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is not adverse to the simple mortgagee.

Parthasarathy Naicker v. *Lakshmana Naicker* (1912) I L.R , 35 Mad., 231, followed.

Ramasami Chetti v. *Ponna Padayachi* (1913) I L.R , 36 Mad , 97, overruled.

SECOND APPEAL against the decree of D VENKOBA RAO, the Subordinate Judge of Tanjore, in Appeal No. 223 of 1911, preferred against the decree of P. G. RAMA AYYAR, District Munsif of Tiruvadi, in Original Suit No 131 of 1910.

One Solomon Thenkondan hypothecated 30 gulies in Paimash No. 72/4 (Survey No 379) to one Jathow Rao Sahib under the original of Exhibit A on the 28th August 1878. In 1900 a suit (Original Suit No. 250 of 1900) was brought on the said hypothecation bond by the mortgagee and a decree for sale was obtained by him on the 27th November 1900 (Exhibit B). In execution of the said decree the hypothecated lands were sold and the decree-holder's widow (plaintiff) purchased the land aforesaid on the 31st October 1906 and obtained sale-certificate on the 1st December 1906. When she attempted to obtain delivery she was obstructed by some strangers, viz , defendants Nos. 1 and 2 and the Court refused to remove the obstruction. Thereupon she instituted the present suit in the year 1910.

The District Munsif dismissed the suit holding, *inter alia*, that the defendants had acquired title to the plaint land by long adverse possession and that the plaintiff's suit was barred by limitation. The plaintiff appealed to the lower Appellate Court The lower Appellate Court gave a decree for the plaintiff, holding that the land belonged to the mortgagor and that the evidence on the plaintiff's side established that the first defendant was after the execution of the mortgage let into

* Second Appeal No. 19 of 1913 (F B.).

ago, and that even if the tenancy first defendant's adverse possession period could not bar the plaintiff's such possession commenced only after cation, the Court relied on Amal Dey(1).

Thereupon the defendants Nos Second Appeal on the following ground Judge not having found that the possess ant was permissive he should have confir lower Court."

"The Subordinate Judge should have against the hypothecator, will also be ad hypothecatee."

G. S Ramachandra Ayyar for the appell

A R. Madhava Rao for the respondent

This Second Appeal coming on for hear instance before OLDFIELD and SESHAGIRI AYYAR, ORDER of the Court was delivered by

OLDFIELD AND SESHAGIRI AYYAR, JJ.

OLDFIELD, J.—The learned Subordinate J with the case in the alternative with reference possible views of the facts. We think it neces conclusion as to them definitely expressed and him for a finding on the following issue.—

"Was first defendant admitted by Solom as a purakudi, and, if so, when?"

The finding should be submitted within six date; and the parties will be at liberty to file ob finding within seven days after notice of the retu shall have been posted up in this Court.

In compliance with the above order, the Subc of Tanjore submitted the following FINDING:—

" * * * * *

It is not possible to accept plaintiff's witne about the purakudi tenancy set up by the plainti issue for defendants and against plaintiff."

This Second Appeal coming on for hearing, a of the finding of the lower Appellate Court u

(1) (1906) I.L R, 33 Calc, 1015.

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OLDFIELD AND SESHAGIRI AYYAR, JJ.

referred by this Court for trial, before OLDFIELD and SESHAGIRI AYYAR, JJ., the following ORDER OF REFERENCE TO THE FULL [illegible] was delivered by

[illegible] AYYAR, J.—We accept the finding which is one of [illegible] [illegible]n for decision is whether the defendants Nos. 1 [illegible] quired an absolute title, by prescription, against [illegible] purchaser at Court auction of the right title and [illegible] mortgagor of the property. The plaintiff is [illegible] recover possession. The defendants Nos. 1 and 2 [illegible] the prescription conferred on them full title, [illegible] the mortgagor's and mortgagee's interests. The [illegible]ed or found are: that the mortgage was in 1878 [illegible] was in 1900; the plaintiff's title originated in her [illegible] the 31st October 1906; the present suit was brought [illegible] and the defendants' adverse possession began twenty [illegible] suit, that is, in 1890. The effect of prescription [illegible] mortgagee under a simple mortgage has been dealt [illegible] Benches of this Court in *Parthasarathy Naicker* v. [illegible] *Naicker* 1) and *Ramasami Chetti* v. *Ponna Padayachi* [illegible] diametrically opposite conclusions being reached. The [illegible] the subject of reference to a Full Bench in *Peria* [illegible] *mbalam* v. *Shanmugasundaram*(3), but it was found [illegible] sary to deal with the question. In this conflict of authority [illegible] refer to the Full Bench the question, "Whether the [illegible] sion of a trespasser who has dispossessed a mortgagor, the [illegible] age being simple, is adverse to the simple mortgagee."

[illegible] *S. Ramachandra Ayyar* for the appellant—This reference [illegible] been necessitated by a conflict in the decisions in *Parthasarathy Naicker* v. *Lakshmana Naicker*(1) and *Ramasami Chetti* v. [illegible] *Padayachi*(2). The decision in *Parthasarathy Naicker* v. [illegible] *Lakshmana Naicker*(1) refers to *Ramasami Chetti* v. *Ponna Padayachi*(2).

The most important right to which an owner of property is [illegible] titled is the right to possession. If this right is acquired [illegible] a third person under the statute of limitation, the mortgagor's [illegible] right is destroyed completely and there remains nothing on which [illegible] the mortgage security can operate. The mortgagee's right is to

(1) (1912) I.L.R., 35 Mad., 231. (2) (1913) I.L.R., 36 Mad., 97.
(3) (1914) 26 M.L.J., 140 (F.B.)

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sell his mortgagor's interest in the properties mortgaged and the decree for sale would not bind a person who claims adversely to the mortgagor and who has acquired a valid title under the statute of limitation. The possession of a third person adverse to the mortgagor would be adverse to the mortgagee as well, and it makes no difference whether the mortgagee is entitled to possession or not. See observations of the Privy Council in *Karan Singh* v. *Bakar Ali Khan*(1). Explanation suggested by the later rulings cannot stand if the whole judgment is taken together. Reliance was placed upon *Ramasami Chetti* v. *Ponna Padayachi*(2), *Nandan Singh* v. *Jumman*(3), *Raj Nath* v. *Narain Das*(4), *Ammu* v. *Ramakrishna Sastri*(5), *Bireshwar Samanta* v. *Priya Sakhi Debi*(6), *Nand Kumar Dobey* v. *Ajodhya Sahu*(7), *Prannath Roy Chowdry* v *Rookea Begum*(8) and *Nallamuttu Pillai* v. *Betha Naickan*(9). If the mortgagee's right arises only at the time of the Court sale when the right, title and interest of the mortgagor is sold (the equity of redemption having been barred by the law of limitation) nothing is conveyed by the sale and the purchaser takes no interest in the property sold. This view is in accordance with the Roman Law—vide Salkowski's Roman Law by Whitefield, page 503 See also at page 117. In England by special statutes—7 Will. IV., cap. 14, and 1 Vict., cap. 28—the person in possession would acquire a complete title and the right saved under the latter statute is only the right of the mortgagee to make an entry and bring the action to recover the land—see Darby and Bosanquet, page 470—This also seems to be the law in America: *Martin* v. *Jackson*(10)

Parthasarathy Naicker v. *Lakshmana Naicker*(11) is not a case of adverse possession at all though their Lordships put it as though it were. In that case the decisions relied on in *Ramasami Chetti* v. *Ponna Padayachi*(2) are distinguished and *Aimadar-mandal* v. *Makhan Lal Dey*(12) referred to. The cases sought to be distinguished in *Parthasarathy Naicker* v. *Lakshmana*

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(1) (1883) I.L.R., 5 All. 1 (P.C.); s.c., 9 I.A., 99.
(2) (1913) I.L.R., 36 Mad., 97
(3) (1912) I.L.R., 34 All., 640
(4) (1914) I.L.R., 36 All., 567 (F.B.)
(5) (1879) I.L.R., 2 Mad., 226
(6) (1915) 28 I.C., 917.
(7) (1911) 14 C.L.J., 292.
(8) (1859) 7 M.I.A., 323.
(9) (1900) I.L.R., 23 Mad., 37
(10) 67 Am.D., 482
(11) (1912) I.L.R., 35 Mad., 241.
(12) (1906) I.L.R., 33 Calc., 1015.

Naicker(1) are cases of mortgagees in possession or who are entitled to immediate possession. It is immaterial that the mortgagee is not in possession or is not entitled to possession. Notice of the trespass is sufficient. The matter has been set at rest by the Full Bench case of *Peria Aiya Ambalam* v. *Shanmugasundaram*(2).

C. Padmanabha Ayyangar for *A. K. Madhava Rao* for the respondents—This matter has been the subject of reference to a Full Bench in Allahabad subsequent to *Parthasarathy Naicker* v. *Lakshmana Naicker*(1) and *Ramasami Chetti* v. *Ponna Padayachi*(3). *Raj Nath* v. *Narain Dass*(4) holds that adverse possession against the mortgagor cannot be adverse to the mortgagee following *Nandan Singh* v *Jumman*(5) in which *Parthasarathy Naicker* v. *Lakshmana Naicker*(1) has been accepted. A mortgage is a transfer of an interest in immoveable property and is not a mere security. The principle of the decision in *Ramasami Chetti* v. *Ponna Padayachi*(3) is not correct. The interest that is affected by adverse possession is that of the person in actual possession or who is entitled to immediate possession at the time the adverse possession began—*Parthasarathy Naicker* v. *Lakshmana Naicker*(1), *Lakshmi Narayana Aiyar* v. *Ulagammal*(6), and *In re Nisbet and Potts' Contract*(7). Therefore *Parthasarathy Naicker* v. *Lakshmana Naicker*(1) and *Nandan Singh* v. *Jumman*(5) are correctly decided.

Cases cited by the appellant are all cases [except *Ramasami Chetti* v. *Ponna Padayachi*(3)], where the adverse possession began before the mortgage or when the mortgagee is entitled to possession or where he becomes entitled to possession subsequently. If a mortgagee purchases the property in execution of a mortgage decree his right to possession accrues only from the date of purchase -*Aimadarmandal* v. *Makhan Lal Dey*(8)—and the rights of the mortgagee cannot be affected by any act of a stranger before he becomes entitled to possession. If it were held otherwise obvious difficulties will arise in the case of simple mortgages with long terms

This Second Appeal coming on for hearing the Court expressed the following opinion.

(1) (1912) I L R , 35 Mad., 231.
(2) (1914) 26 M.L J., 110 (F B)
(3) (1913) I.L R., 36 Mad., 97.
(4) (1914) I.L.R , 36 All., 567 (F B.)
(5) (1912) I.L.R., 34 All., 640.
(6) (1914) 28 M.L J., 256.
(7) (1906) L R., 1 Ch , 386
(8) (1906) I.L R., 33 Calc., 1015.

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WALLIS, C.J.—I should have been prepared to adopt the judgment of MUNRO, J., in *Parthasarathy Naicker* v. *Lakshmana Naicker*(1) which was followed in Allahabad in *Nandan Singh* v. *Jumman*(2) and approved by the Full Bench of that Court in *Raj Nath* v. *Narain Das*(3) and was itself in accordance with the Calcutta decision in *Aimudarmandal* v. *Makhan Lal Dey*(4) if it were not that this last decision has been questioned in *Nand Kumar Dobey* v. *Ajodhya Sahu*(5) and not followed in *Bireshwar Samanta* v. *Priya Sakhi Debi*(6) where the opposite view taken by ABDUR RAHIM and AYLING, JJ., in an earlier case in this Court—*Ramasami Chetti* v. *Ponna Padayachi*(7)—was accepted as being in accordance with the decisions of the Privy Council in *Prannath Roy Chowdry* v. *Rookea Begum*(8) and *Karan Singh* v. *Bakar Ali Khan*(9). Before dealing with these decisions I may say we have not been referred to any English authority for the position that a mortgagee whose right to possession has not accrued may be debarred from suing by possession adverse to his mortgagor commencing after the date of the mortgage. Under the Statute of 21 Jac. I., c. 16, what was barred was the right of entry or right of taking possession, and time did not begin to run until that right accrued, and then only when the possession of the occupier was adverse. So too under sections 2 and 3 of the English Real Property Limitations Act, 1833, in suits by persons entitled to possession under an instrument, time only begins to run from the date when the right to possession accrues. It is well settled that these are the sections applicable to a mortgagee *Doe d. Roylance* v. *Lightfoot*(10) though there are other provisions giving a fresh starting point from the date of part-payment. Under an ordinary English mortgage the mortgagee was entitled to possession at any time, and could bring ejectment against the mortgagor who only held at his pleasure—*Keech* v. *Hall*(11)—but the possession so taken by him would be the onerous possession of a mortgagee accountable for the profits to the mortgagor; and it was held that on foreclosure a fresh right

(1) (1912) I.L.R., 35 Mad., 231.
(2) (1912) I.L.R., 34 All., 640.
(3) (1914) I.L.R., 36 All., 567 (F.B.)
(4) (1906) I.L.R., 33 Calc., 1015.
(5) (1911) 14 C.L.J., 292 at p. 293.
(6) (1915) 28 I.C., 917.
(7) (1913) I.L.R., 36 Mad., 97.
(8) (1859) 7 M.I.A., 323 at p. 331.
(9) (1883) I.L.R., 5 All., 1 (P.C.); s.c. 9 I.A., 99.
(10) (1841) 8 M. & W., 553; s.c., 151 E.R., 1158.
(11) (1779) 1 Dougl., 21; s.c., 1 Sm. L.C., 511.

of action arises for possession as owner: *Pugh* v. *Heath*(1). Under the English statutes it seems to me to be immaterial whether possession commencing after the date of the mortgage was or was not adverse to the mortgagor, and the recent decision in *In re Nisbet and Potts' Contract*(2) is in accordance with this view.

In Bengal and Madras, outside the Presidency towns where the Act of James I was received, time under the Regulations ran from the accrual of the plaintiff's cause of action, and this in the case of immoveable property was held to accrue when the possession of the occupier became adverse.

In *Prannath Roy Chowdry* v. *Rookea Begum*(3) which was governed by the Bengal Regulations, the main contention raised by Mr. Roundell Palmer for the appellant was that a suit for foreclosure instituted by his clients more than twelve years after the mortgage debt had become payable was not barred under the Bengal Limitation Regulations, because the disputes and litigation going on between the heirs of the mortgagor and third parties claiming as purchasers were a good cause for not suing earlier. In addition, however, to this contention, which was upheld by their Lordships and disposed of the suit, he argued further that there was no rule of law which creates an absolute possessory title in a twelve years' undisturbed possession even if that had been such. On the other side it was not contended that the respondents who claimed under an alleged purchase from the mortgagor had been holding adversely to the mortgagee. The contention was that they had purchased subject to the mortgage and were entitled to redeem. Their Lordships' judgment must be read with reference to these contentions. The case was one of a mortgage by conditional sale, and their Lordships observed that if the mortgage deed had been allowed to take effect according to its tenor possession might be considered to have become adverse to the mortgagee-purchaser from the completion of the title, or as I understand it, from the time when the mortgagee was to become owner under the terms of the deed and entitled to possession as such. As however under the Bengal Regulations the conditional sale was to be treated as a mortgage, they held that the possession of persons in the position of

(1) (1882) 7 A.C., 235. (2) (1906) L.R. 1 Ch., 386.
(3) (1859) 7 M.I.A., 323 at p. 331.

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the respondents whose case was that they had acquired and held the property subject to the mortgage was not, any more than in England, inconsistent with the mortgagee's title, or their possession adverse to the mortgagee. As regards the defences with which a mortgagee suing for possession after foreclosure might be met by occupants other than the mortgagor, their Lordships say that he might be met "by proof of a prior or a superior title, or by proof of want of title in himself, or that he has not perfected his title to possession." By these last words I understand that the mortgagee must show that his own title to possession has accrued. Their Lordships certainly did not say that a mortgagee suing in the circumstances stated might be met by proof of possession adverse to his mortgagor commencing subsequently to the mortgage at a time when he himself had no right to possession against the mortgagor or any one else.

Under the Indian Limitation Act of 1859, as under the English Real Property Limitations Act, 1833, there was no special provision for suits by mortgagees, but as regards suits to recover the mortgaged property they clearly came within the terms of section I, article 12, which allowed twelve years from the date of the cause of action for suits to recover immoveable property or any interest therein not otherwise provided for. Even suits by a mortgagee to enforce his rights by sale were held by this Court to come within this section in *Chetti Gaundan* v. *Sundaram Pillai*(1); and the decisions of the Full Bench in Calcutta in *Surwan Hossein* v. *Shahazadah Golam Mahomed*(2) and of the Privy Council in *Juneswar Dass* v. *Mahabeer Singh*(3) were to the same effect. Dealing with a suit by a mortgagee governed by this section in *Brojanath Koondoo Chowdry* v. *Khelut Chunder Ghose*(4), their Lordships observed, that "where both things occur, possession by such a holder" (a holder claiming adversely) "and the right of entry under the mortgage deed more than twelve years old, it was impossible to say that such a possession is not protected by the law of limitation." In the case just mentioned the mortgagee himself had the right to take possession and had failed to exercise it for twelve years.

Under the Act of 1859, it was no doubt held in Calcutta by BAYLEY and JACKSON, JJ., in *Ram Coomar Sein* v. *Prosunno*

(1) (1864) 2 M.H.C.R., 51.
(2) (1868) 9 W.R., 170.
(3) (1876) I.L.R., 1 Calc., 163 (P.C.)
(4) (1871) 14 M.I.A., 144.

Coomar Sein(1) that in a suit by a mortgagee for possession after foreclosure he might be met by proof of possession for twelve years adverse to the mortgagor, and the decision of their Lordships in *Prannath Roy Chowdry* v. *Rookea Begum*(2) was cited in support of this view, but, as I have endeavoured to show, their Lordships laid down no such proposition in that case, and indeed their observations point the other way. Further I do not see how *Ram Coomar Sein* v *Prosunno Coomar Sein*(1) is to be reconciled with the subsequent decision of the House of Lords in *Pugh* v. *Heath*(3) already referred to. As regards *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar*(4), a decision of the year 1870, which was also cited, it is stated in the very brief judgment that the possession of the third party was adverse to the mortgagee but the facts are not set out. If this case proceeded on the authority of *Ram Coomar Sein* v *Prosunno Coomar Sein*(1) it is open to the same observations

Karan Singh v. *Bakar Ali Khan*(5), the case on which most reliance is placed in *Ramasami Chetti* v. *Ponna Padayachi*(6) and *Bireshwar Samanta* v. *Priya Sakhi Debi*(7), was decided under the Limitation Act of 1871 which by article 132, in suits for money charged on immoveable property, allowed twelve years from the date of the money being due, and by article 135, in suits instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged, allowed twelve years from the time when the mortgagee was first entitled to possession; and by article 145, in suits for possession of immoveable property or any interest therein not otherwise specially provided for, allowed "twelve years from the time when the possession of the defendant or of some person through whom he claims became adverse to the mortgagee." The judgments of the Allahabad High Court before whom *Karan Singh* v. *Bakar Ali Khan*(5) came on appeal and Letters Patent Appeal have not been reported, but the learned Judges who made the reference to the Full Bench in *Raj Nath* v. *Narain Dass*(8) state that they examined the records of this case and that the five Judges of the Allahabad Court before whom the case came seem

(1) (1864) W.R., 375.
(2) (1859) 7 M.I.A., 323 at p. 331.
(3) (1882) 7 A.C., 235.
(4) (1870) 2 N.W. P.H.C.R., 223.
(5) (1883) I.L.R., 5 All., 1 (P.C.); s.c. 9 I.A., 99).
(6) (1913) I.L.R., 56 Mad., 97.
(7) (1915) 28 I.C., 917.
(8) (1914) I.L.R., 36 All., 567 (F.B.).

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however, a case where the adverse possession began *before* the date of the mortgage] that rule of Roman Law was probably based (as pointed out by my learned brother SRINIVASA AYYANGAR, J, in the judgment now to be pronounced by him) on the rights of a simple mortgagee under the Roman Law to get possession of the hypotheca after the money became due by expiry of the time fixed for payment. If, however, it is otherwise, it does not then seem to me to be such an equitable rule as ought to be followed by Indian Courts, having regard to the fact that the English Statute Law has deliberately laid down the opposite rule, even though a mortgagee under the English form of mortgage obtains the legal ownership of the mortgaged property unlike an Indian mortgagee.

If some tangible benefit (periodical or otherwise such as the right to receive rents and profits though not to get physical possession) is derivable by the owner of an incorporeal right and if he is prevented by the trespasser from getting that benefit and if the trespasser obtains that benefit himself, a dispossession of such incorporeal right is conceivable See *Venkataramanachari* v *Thirunaranachari*(1) but not in other cases. I therefore adhere to the views expressed by NAPIER, J., and myself in *Venkata Krishna Moorthi* v *Bheemakka*(2) and I willingly follow the very carefully considered judgment (if I may respectfully say so) in *Parthasarathy Naicker* v. *Lakshmana Naicker*(3) whose authority is endorsed by the judgment just now pronounced by my Lord answering the reference in the negative.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—I think on principle the question under reference admits only of one answer, i.e., in the negative. The rights of a simple mortgagee of immoveable property are now settled by statute. He is not an owner and is not entitled to possession of the mortgaged property. He has no claim to the produce or the rents and profits of the property either before or after the mortgage money becomes due. A simple mortgage does not vest any estate in the mortgagee: Ghose on Mortgages, page 76, fourth edition and *Papamma Rao* v. *Ramachandra*(4). His only right is to cause the property to be sold through Court. The mortgagor as owner is entitled to remain in

(1) (1914) 2 L.W., 212 at p. 217. (2) (1914) 26 I.C., 265.

(3) (1912) I.L.R., 35 Mad., 231.

(4) [illegible] I.L.R., 19 Mad., 2[illegible] (P.C.).

possession and receive the rents and profits of the land ; he is not accountable for them or for the use he makes of his property to the mortgagee provided he does not commit waste so as to render the security insufficient. The right of a simple mortgagee is however a real right, and he is entitled to enforce his charge even against a purchaser for value without notice Except for a possible difference as regards their enforceability against purchasers for value without notice, there is no difference in their legal incidents between a simple mortgage and a charge. See observations of KRISHNASWAMI AYYAR, J., in *Balasubramania* v. *Sivaguru*(1). A suit by a simple mortgagee to enforce payment of the mortgage money by a sale of the property is governed by article 132 of the Limitation Act, and he is entitled to bring such a suit within twelve years after the mortgage money had become due : see *Vasudeva Mudaliar v. Srinivasa Pillai*(2). His right cannot be extinguished under section 28 of the Limitation Act, though the bar of the remedy in the case of a real right may have the same effect as the extinction of the right itself. As he is not entitled to possession of any sort or kind of the mortgaged property, *there can be no adverse possession against him.* Can then his rights be affected by a trespasser taking possession of the mortgaged property ousting the mortgagor in possession ? If they are, he must have a cause of action against the trespasser. ABDUR RAHIM, J , thinks he has He says that " these two cases " [referring to *Ram Coomar Sien* v. *Prosunno Coomar Sein*(3) and *Sheoumber Sahoo* v. *Bhowaneedeen Kuluar*(4)] " make it clear that the mortgagee is not without remedy against a trespasser taking possession of the mortgaged land, although it may be that he is not entitled to possession under his mortgage, and I myself do not see any valid reason why the mortgagee should not be able under such circumstances to protect his interests by proper proceedings " *Ramasami Chetti* v *Ponna Padayachi*(5) : I am unable to see what suit a simple mortgagee is entitled to bring to protect his interests as against a trespasser, and there is no indication in the learned Judge's judgment as to the nature of the proceedings by which he is to protect his interests. He obviously cannot bring ejectment against the trespasser, and he certainly cannot bring a suit praying that possession be delivered

(1) (1911) 21 M.L J , 562 at p 568 (2) (1907) I L R., 30 Mad , 426 (P C).
(3) (1864) W.R., 375 (4) (1870) 2 N.W P H.C R., 223.
(5) (1913) I L.R , 36 Mad , 97 at p. 103.

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to the mortgagor as the mortgagor's possession is not in any sense for the benefit of the simple mortgagee. A simple suit for declaration of the mortgagee's right when such a right is denied by the trespasser may probably be brought, but that is a proceeding which the mortgagee is not bound to take, and a decree in such a suit cannot save the rights of the mortgagee from becoming barred if otherwise they would be. The cases referred to by the learned Judge were cases where the mortgagee was entitled to possession either before or after the mortgage amount had become due, and it is possible in those cases for a mortgagee to bring ejectment against a trespasser. A squatter taking possession of the mortgaged property may equally affect the interests of the mortgagee and the mortgagor where both of them are entitled to or are in possession of their respective interests in the property where such interests are capable of possession. Even incorporeal property may be capable of possession in law, but such possession involves either actual possession of tangible property or the receipt of some tangible benefit therefrom. Such possession may also be protected by possessory remedies. It must also be remembered that the mortgagor does not hold possession of the property on behalf of the mortgagee and the mortgagor is not charged with the duty of protecting the interests of the mortgagee, as a trustee or the karnavan of a tarwad or the manager of a joint Hindu family is charged with the duty of protecting the interests of a *cestui qui trust* or the junior members of the family. [See the observations of SUNDARA AYYAR, J., in *Ambalavana Chetty* v. *Singaravelu Udayar*(1)] The mortgagor's laches or negligence should not affect the rights of the mortgagee. If therefore a simple mortgagee has no cause of action against a trespasser, his rights should not be affected or be extinguished by the operation of any law of limitation. It is true that a simple mortgagee may be entitled to enforce payment of the money due, by a sale of the property if the mortgage amount had become due; but that cause of action accrues to him owing to the default of the mortgagor and not on account of any act of the trespasser. If the mortgage money had not become due, he cannot institute a suit to recover it though a trespasser may have taken possession of the mortgaged property and it would be most unreasonable to hold that the mortgagee's rights are extinguished by the extinction of the

(1) (1912) M.W.N., 660 at p. 660.

mortgagor's title by twelve years' adverse possession before the mortgagee is in a position to protect his rights. To adopt the language of the Master of the Rolls in *In re Nisbet and Potts' Contract*(1), "unless and until the right of the mortgagee has been in some way infringed so that it becomes necessary for him to enforce that right, there is no reason, either in principle or in fairness, why his right should be in any way affected." I see no reason therefore for holding that the extinction of the mortgagor's title by the adverse possession of a third party operates to extinguish the mortgagee's right to enforce his charge, any more than easements over the property.

SUBRAHMANYA AYYAR, J., however seems to think that a hypothecation right is liable to be affected by prescription. He says that "there can be no doubt that such a right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor"* and relies on some passages in Salkowski's Roman Law, Mackeldey's Roman Law and Hunter's Roman Law. In the passage just quoted the learned Judge seems to assume that a mere claim to hold property free of a charge could operate to extinguish such rights although the act of possession by itself may not affect it If the trespasser's possession by itself could not affect the rights of the simple mortgagee the assertion by such trespasser could not possibly have any effect. As stated in Angell on Limitations "The principle on which the statute of limitations is predicated is not that the party in whose favour it is invoked has set up an adverse claim for the period specified, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by statute." (See Angell on Limitations at page 398.)

(1) (1906) L.R., 1 Ch., 386 at p. 402

[* Quotation from *Nallamuttu Pillai* v. *Betha Naickan* (1900) I.L.R., 23 Mad., 37 at p. 40—Rep.]

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In Roman Law there was, it seems, in later times, no distinction between a pignus and a hypotheca and in both forms of mortgage the mortgagee was entitled to the possession of the mortgaged property. In pignus the possession was given to the mortgagee at the time of the transaction, while in hypothecation the mortgagee was entitled to obtain possession after the debt became due. [Hunter's Roman Law, pages 436 and 447 (Remedies), Salkowski's Roman Law at page 485 and Mackledey's Roman Law at page 285]. It is instructive to note that Lord HOBHOUSE thought that except for long practice and the Transfer of Property Act, it might be reasonably argued that a simple mortgagee in India was entitled to usufructuary possession under the terms of his contract: *Papamma Rao* v. *Ramachandra*(1).

Are we then compelled to answer the question in the affirmative by any authority binding on us? Reliance was placed on the decisions of the Privy Council in *Prannath Roy Choudry* v. *Rookea Begum*(2) and *Karan Singh* v. *Bakar Ali Khan*(3). The plaintiff in *Prannath Roy Choudry* v. *Rookea Begum*(2) had obtained a mortgage by conditional sale from the owner and had instituted proceedings to foreclose the mortgage under Regulation XVII of 1806. After obtaining a foreclosure order he brought a suit to recover possession of the properties, as owner against the defendant who was in possession claiming under a purchase from the mortgagor which however was not proved or admitted in the case. The question was whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to enable him to bring ejectment as owner. The proceedings for foreclosure were taken more than twelve years after the expiry of the term for the repayment of the mortgage money. Under Bengal Regulation III of 1793 a suit was barred "where the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it." In discussing the question whether the plaintiff was entitled to bring a suit for foreclosure after the expiry of twelve years, their Lordships pointed out that a suit for foreclosure against the mortgagor or against persons claiming in privity with the mortgagor may not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage may be barred. But their Lordships do not say that the mortgagee's right may be

(1) (1893) I.L.R., 19 Mad., 249 at p. 254. (2) (1859) 7 M.I.A., 323.
(3) (1883) I.L.R., 5 All., 1 (P.C.), s.c. 9 I.A., 99.

barred by the possession of an adverse claimant, even if the mortgagee's right to possession had not accrued, or where the mortgagee was not entitled to possession at all. On the other hand in *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee*(1), their Lordships say: "If the title of the mortgagee to *enter* by reason of a default having occurred before, had accrued, and if the purchaser under such a title, i.e., as purchaser at an execution sale, had been in possession for twelve years, believing himself to be the *bona fide* owner, under a claim to the ownership of the property, and not being in possession in any way as mortgagor or under the mortgagor, they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the twelve years after the commencement of his possession." That I think conclusively shows that a mortgagee who had no right to enter was not affected by any adverse possession.

In *Karan Singh* v. *Bakar Ali Khan*(2) the plaintiff a simple mortgagee sued to enforce his charge. The mortgages were executed in the year 1862 on behalf of the daughter's sons of the last male owner. The property was in the possession of his widow till the end of 1860. It appears that on the death of the widow disputes arose as to the title to the property between the defendant Karan Singh and the daughter's sons of the last male owner, each claiming the property as his. Neither party was in possession, the Collector having taken possession of the property in 1861 soon after the death of the widow to secure the Government revenue pending the settlement of the disputes between the rival claimants. The mortgages were executed in January and October of 1862 on behalf of the daughter's sons when they were not in possession of the property and before the disputes as to title were settled. In 1863 by an award the title of the defendant Karan Singh was established against the daughter's sons in a proceeding to which the mortgagee was not a party and the Collector handed over possession of the property to Karan Singh and also paid him the income of the estate in his hands The plaintiff brought the suit in July 1874 and the defendant pleaded that he had been in adverse possession for the statutory period of twelve years from the year 1861 treating the

(1) (1871) 14 M.I.A., 101 at p 111.
(2) (1883) I.L.R., 5 All. 1 (P.C.), s.c., 9 I.A., 99.

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possession of the Collector as his possession. If the defendant's contention was correct it is obvious that the mortgagee would not be entitled to sue to enforce his mortgages as the effect of the defendant's possession would have been to extinguish the title of the mortgagor from the year 1861. *Rajah of Venkatagiri* v. *Isakapalli Subbiah*(1) and *Nand Kumar Dobey* v. *Ajodhya Sahu*(2). The sole question in the case therefore was whether the defendant was in adverse possession from 1861 When their Lordships speak of the possession of the plaintiff or of the possession of the defendant adverse to the plaintiff, they were, I think, referring to the mortgagor under whom the plaintiff claimed, as they speak of possession and adverse possession in 1861 before even the mortgages were executed. There is really no warrant for the inference that their Lordships assumed that a suit by a simple mortgagee to enforce his charge by sale was a suit for *possession*, that such a mortgagee was entitled to *possession* or that such a suit was governed by article 145 of the Limitation Act of 1871 corresponding to article 144 of the Acts of 1877 and 1908. In the Act of 1859 there was no special provision for suits by a mortgagee except that in suits by a mortgagee to recover possession of the *mortgaged properties* from the mortgagor in Courts established by a Royal Charter the time when the cause of action arose was defined by section 6. They were governed by clause 12 of section 1 and even a suit by a hypothecatee to enforce his charge was held to be a suit for recovery of an interest in immoveable property and the period of limitation was twelve years from the time the cause of action arose. [*Surwan Hossein* v. *Shahazadah Golam Mahomed*(3), *Chetti Gaundan* v. *Sundaram Pillai*(4) and *Junesurar Dass* v. *Mahabeer Singh*(5)]. Sir BARNES PEACOCK is reported to have said that "if land is mortgaged as security for a loan, in addition to a covenant for the payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that

(1) (1903) I.L.R., 26 Mad., 410 at p. 417.
(2) (1911) 14 C.L.J., 231 at p. 233.
(3) (1868) 9 W.R., 170.
(4) (1864) 2 M.H.C.R., 51.
(5) (1876) I.L.R., 1 Calc., 163 (P.C.).

a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest." See page 174 in *Surwan Hussein* v. *Shahazadah Golam Mahomed*(1). A simple mortgagee under the Transfer of Property Act can neither bring ejectment to recover the land mortgaged, nor can it be said that his right is an equitable interest. As pointed out by SETON KARR, J., in the same case it must be admitted that the language of the article was not quite appropriate as applied to a suit to enforce a charge by sale. Clause 12 was however applicable whether the suit was against the mortgagor or persons claiming under him or against a trespasser in possession. When the Act of 1859 was repealed and the Act of 1871 passed, special articles were enacted, viz., article 132 in respect of suits to enforce payment of money charged on land, article 149 in respect of suits in the Chartered High Courts to recover possession of the mortgaged property from the mortgagor, and article 135 for similar suits in mufassal Courts; but the words "from the mortgagor" are omitted. It has been held that article 135 applies to suits for possession against both mortgagors and strangers: *Surnomoyee Dasi* v. *Srinath Das*(2). There was no special article as regards suits for foreclosure (that was first introduced in the Act of 1877, article 147) Clause 12 was re-enacted as article 145, but with a change in the wording. Instead of the words "for the recovery of" the words "for possession of" were substituted which are even less appropriate to a suit for sale It is admitted that article 132 of the Act of 1871 was applicable to suits by a simple mortgagee instituted against the mortgagors or persons claiming under them to enforce the charge by sale of the mortgaged property, and the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai*(3) say that it was perfectly settled that such suits were governed by that article The Privy Council in the above case make no distinction whatever between suits against mortgagors and against strangers in possession of the mortgaged property and the language of the article does not warrant any such distinction. But we are asked to infer that their Lordships in *Karan Singh* v *Bakar Ali Khan*(4) assumed without question or

(1) (1868) 9 W R, 170 at p 174 (2) (1886) I L R, 12 Calc, 614 at p. 620

(3) (1907) I L R, 30 Mad, 426 at p 433 (P C.)

(4) (1883) I L.R., 5 All, 1 (P.C), s c, 9 I.A., 99

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possession of the Collector as his possession. If the defenda[nt's] contention was correct it is obvious that the mortgagee wo[uld] not be entitled to sue to enforce his mortgages as the effec[t of] the defendant's possession would have been to extinguish [the] title of the mortgagor from the year 1861. *Rajah of Venka[ta]giri* v. *Isakapalli Subbiah*(1) and *Nand Kumar Dobey* v. *Ajodh[ya] Sahu*(2). The sole question in the case therefore was whet[her] the defendant was in adverse possession from 1861. Wh[en] their Lordships speak of the possession of the plaintiff or of t[he] possession of the defendant adverse to the plaintiff, they we[re], I think, referring to the mortgagor under whom the plaint[iff] claimed, as they speak of possession and adverse possession [in] 1861 before even the mortgages were executed. There is real[ly] no warrant for the inference that their Lordships assumed th[at] a suit by a simple mortgagee to enforce his charge by sale wa[s] a suit for possession, that such a mortgagee was entitled t[o] possession or that such a suit was governed by article 145 of th[e] Limitation Act of 1871 corresponding to article 144 of the Act[s] of 1877 and 1908. In the Act of 1859 there was no special provision for suits by a mortgagee except that in suits by a mortgagee to recover possession of the mortgaged properties from the mortgagor in Courts established by a Royal Charter the time when the cause of action arose was defined by section 6. They were governed by clause 12 of section 1 and even a suit by a hypothecatee to enforce his charge was held to be a suit for recovery of an interest in immoveable property and the period of limitation was twelve years from the time the cause of action arose [*Suruan Hossein* v. *Shahazadah Golam Mahomed*(3), *Chetti Gaundan* v. *Sundaram Pillai*(4) and *Junesvar Dass* v. *Mahabier Singh*(5)] Sir BARNES PEACOCK is reported to have said that "if land is mortgaged as security for a loan, in addition to a covenant for the payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that

(1) (1903) I.L.R., 26 Mad., 410 at p. 417. (2) (1911) 14 C.L.J., 293 at p. 2[..]
(3) (1868) 9 W.R., 170. (4) (1864) 2 M.H.C.R., 51.
(5) (1876) I.L.R., 1 Calc., 163 (P.C.).

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Kumaraswami Sastriyar and Mr. Justice Phillips.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF TANJORE), DEFENDANT, APPELLANT,

1915. March 29 and 1916. January 3.

v.

RANGASAMY AYYANGAR AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 88—Absconding person, a member of an undivided Hindu family—Undivided interest of his, in the family property, or any portion thereof whether liable to attachment under section 88.

The undivided interest of an absconding person who is a member of an undivided Hindu family in the family property or any portion thereof can be attached under section 88 of the Criminal Procedure Code (Act V of 1898)

Mussumat Golab Koonwur v. *The Collector of Benares and Raja Oodit Narain Sing* (1847) 4 M I A, 246 and *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry* (1867) 11 M I.A., 223, followed

Re Umayan (1903) 2 Weir's Cr R., 43, approved.

Re Chinniyan (1903) 2 Weir's Cr. R., 43, overruled.

SECOND APPEAL against the decree of J. S. GNANI NADAR, the Subordinate Judge of Negapatam, in Appeal No. 260 of 1911 preferred against the decree of G. J. QURASHI, the acting District Munsif of Tirutturaippundi, in Original Suit No. 47 of 1910.

The facts of the case necessary for this report appear from the Order of Reference to the Full Bench

The Government Pleader for the appellant (Crown).

S. T. Srinivasa Gopalachariyar and *N. Srinivasachariyar* for the respondents.

This Second Appeal coming on for hearing before SANKARAN NAIR and SPENCER, JJ., the following ORDER OF REFERENCE TO THE FULL BENCH was delivered by

SANKARAN NAIR AND SPENCER, JJ.

SANKARAN NAIR, J. —On account of the importance of the question and the conflicting decisions on the point in *Re Umayan*(1) and *Re Chinniyan*(2) we refer to a Full Bench for decision the question :

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* Second Appeal No 203 of 1914 (F B.).

(1) (1903) 2 Weir's Cr. R., 43. (2) (1903) 2 Weir's Cr. R., 43.

SECRETARY OF STATE FOR INDIA v. RANGASAMY AYYANGAR.

"Can the undivided interest of an absconding person who is a member of an undivided Hindu family in the family property or any portion thereof be attached under section 88 of the Code of Criminal Procedure?"

T. Narasimha Ayyangar for *the Government Pleader* for the Crown.

The reference is in consequence of two conflicting rulings. *Re Chinnayan*(1) and *Re Umayan*(2), the case in the footnote on the same page. Section 88 of the Criminal Procedure Code corresponds to section 4 of Bengal Regulation XI of 1796. Under that section it was held that the undivided share of a member of a joint Hindu family could be attached or sold by the Government. See *Mussumat Golab Koonwur* v. *The Collector of Benares and Raja Oodit Narain Sing*(3) and *Juggomohun Bukshee* v. *Roy Mothooranath Choudry*(4). By virtue of section 88 and not by virtue of any rule of Hindu Law the Government becomes the owner of the attached property. There is nothing to show that property means only property which is in the physical possession of the accused.

Reference was also made to *Golam Abed* v. *Toolseeram Bera*(5).

S. T. Srinivasa Gopalachariyar (and *N. Srinivasachariyar*) for the respondents—Property means property belonging to the accused. In this case the property does not belong to him.

[WALLIS, C.J.—Why do you say property cannot mean interest in property?]

The penal law must be strictly construed. An unascertained share in property cannot be property within the meaning of the section. In the case of a coparcener it cannot mean anything else than separate property exclusively belonging to him.

[PHILLIPS, J.—You contend that property must mean tangible property.]

The provisions of Civil Procedure Code will not apply. The language of the Criminal Procedure Code is different. There is no definite property. The Civil Procedure Code contains definite provisions for attachment. Sections 386 and 514, Criminal Procedure Code may be referred to for the meaning of the word property.

(1) (1903) 2 Weir's Cr. R., 43.
(2) (1903) 2 Weir's Cr. R., 43.
(3) (1847) 4 M.I.A., 246 at p. 254.
(4) (1867) 11 M.I.A., 223 at p. 237.
(5) (1853) I.L.R., 9 Calc., 861.

SECRETARY OF STATE FOR INDIA *v.* RANGASAMY AYYANGAR.

In *High Court Proceedings No.* 521 *of 16th February*, 1876(1) and *The Queen-Empress* v. *Sita Nath Mitra*(2), section 386, Criminal Procedure Code, has been construed to apply only to property belonging to the offender. Schedule V, form 6, Criminal Procedure Code, throws some light on the construction of the word property. It is "sole ownership" that is contemplated.

The cases referred to by the other side have reference to Dayabhaga law.

This Second Appeal coming on for hearing the following Opinion of the Court was delivered by

WALLIS, C.J., AND KUMARASWAMI SASTRIYAR AND PHILLIPS, JJ.

WALLIS, C J.—We think the question must be answered in the affirmative. Mr. Narasimha Ayyangar has called our attention to two decisions of the Privy Council under Bengal Regulation XI of 1796 which apparently were not brought to the notice of the learned Judges who decided the cases mentioned in the reference. Under Regulation XI of 1796, section 4, the Magistrate was to order the attachment of any land or other real property held by the absentee, and under section 6 on failure of the absentee to attend within six months after the attachment the lands were to be at the disposal of the Governor-General in Council. It was held by the Privy Council in *Mussumat Golab Koonwur* v. *The Collector of Benares and Raja Oodit Narain Sing*(3) under the Regulation in a case from Benares governed by the Mitakshara law that the undivided interest of the defaulting member of the joint family passed to the alienee from Government and in *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry*(4) their Lordships again took the view that the share of the defaulting member of the joint family was liable to confiscation.

The provisions of section 88 of the present Code of Criminal Procedure are wider than the Regulation in so far as they include moveable as well as immoveable property; but as regards procedure, they deal with the matter in greater detail specifying the manner in which each description of property is to be attached. What has to be attached under the section in a case such as this is the share of the defaulting member of the joint

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(1) 2 Weir's Cr. R., 442
(2) (1893) I.L.R., 20 Calc., 478.
(3) (1847) 4 M.I.A., 246
(4) (1867) 11 M.I.A., 223 at p. 239.

SECRETARY OF STATE FOR INDIA v. RANGASAMY AYYANGAR.

WALLIS, C.J., AND KUMARASWAMI SASTRIYAR AND PHILLIPS, JJ.

family, which is of course subject to the rights of the other members of the family and may be realized by a receiver in a suit for partition or otherwise. We are unable to agree with the observations of SUBRAHMANYA AYYAR, J., in *Re Chinniyan*(1) that a receiver cannot be appointed under the section to realize the share of the defaulting member, or that such an appointment would necessarily take the property out of the hands of the managing member. On the other hand we agree with COLLINS, C J., and SHEPHARD, J., in *Re Umayan*(2) that there is nothing in the language of section 88 to restrict the meaning of the word property and that it must include the rights and interests of persons who as members of an undivided family are jointly entitled to the property of the family.

C.M.N.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

APPAYYA SHETTY (THIRD DEFENDANT), APPELLANT,

1915. August 2 and 10.

v.

B. P M. MAHAMMAD BEARI AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Landlord and tenant—Agricultural lease—Days of grace for payment of rent—Forfeiture clause for non-payment of rent after days of grace—Relief against forfeiture.

Courts in India have power to relieve against forfeiture for non payment of rent even in cases where a period of grace is allowed for payment by the lease deed, and this rule applies equally to a lease (as in this case) for agricultural purposes.

Whether relief against forfeiture should in any particular case be given depends on the facts of that case

Per SESHAGIRI AYYAR, J—It is open to Courts to look at legislative provisions regarding the liability of other lessees and tenants as embodying the principles of justice, equity and good conscience.

Per NAPIER, J.—When the statute specifically excludes one transaction of the same class as that which is being dealt with from its purview, the doctrine cannot be applied. The Transfer of Property Act cannot be looked to for guidance in the matter of an agricultural lease.

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(1) (1903) 2 Weir's Cr. R., 43. (2) (1903) 2 Weir's Cr. R., 43.

* Second Appeal No 1959 of 1913.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 73 of 1912, preferred against the decree of V. S. KRISHNA AYYAR, the District Munsif of Kasaragod, in Original Suit No. 690 of 1910.

APPAYYA SHETTY v. MAHAMMAD BEARI.

The facts of the case appear from the opening paragraph of the judgment of NAPIER, J.

B. Sitarama Rao for the appellant.

K. Ramanath Shenai for the respondents.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. As the question is one of considerable importance and as the decisions bearing on it are not consistent with each other, I think it desirable to state my views on the subject shortly.

The lease to defendants Nos. 1 and 2 is a permanent one. The plaint says that the produce was set apart for a religious service I take it that the grantor was only anxious that he should be paid the rent. He gave up rights of possession, etc., when he granted this permanent lease. The original grantees paid the rent regularly for sixteen years It was after the transfer of their interests to the third defendant in 1907 that default was made. There were three years' arrears of rent when the suit was brought. The document in question provides for the payment of the first year's rent with that of the second year. If rent remained unpaid even then, the lessees were liable to be evicted. The question is whether under the circumstances above set forth, the defaulting lessees were entitled to be relieved from forfeiture. There is no statutory provision for forfeiture on non-payment of rent regarding agricultural leases. It is open to Courts to look at legislative provisions regarding the liability of other lessees and tenants as embodying the principles of equity, justice and good conscience. I cannot accede to the proposition that such a guidance should be sought only from English decisions and not from statutory provisions in this country.

Let us first see how the Legislature has treated tenants under the Estates Land Act. Chapter VI of the Act deals exhaustively with the remedies open to the landholder. He can sue for the rent or distrain. The proceedings to be taken on distraint are hemmed in with strict conditions. The landholder has to exhaust all available sources before he sells the defaulter's interest in the holding. The distress will have to be

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withdrawn, if the arrears are deposited or security given for th payment. Even after the commencement of the sale, the tena is given a *locus penitentiae* to save his property. It is th clear that the Legislature has provided very salutary restrictio against turning out a tenant from his fields. As regards oth lessees the Transfer of Property Act lays down that t forfeiture clause must be express. Section 114 provides for rel from the forfeiture incurred even after the institution of the su The Indian Statute Law therefore distinctly leans against fo feiture for non-payment of rent. I may also refer to section ' of the Contract Act which has abolished the distinction betwe penalty and liquidated damages and has enacted a general ru affording relief to the defaulting party under certain limitation Now, turning to the English law, the course of decisions leave no room for doubt that Courts have striven against evictin tenants from their holdings. *Peachy* v. *Duke of Somerset*(1) t which our attention was drawn by Mr. Sitarama Rao and which was followed in the earlier decisions of this Court enunciates the proposition that were the intention of the parties is only to enforce punctual payment, the forfeiture clause should be relieved against. In *Bowser* v. *Colly*(2) the tenant applying to redeem a forfeited lease was not required to pay the rent and costs into Court before being decreed possession. All the cases have been reviewed in *Peachy* v. *Duke of Somerset*(1) and the result of the authorities is stated to be that the proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent, and that relief will be given on payment of the arrears and of the expenses incurred. In England there can be relief after suit is brought and before judgment. There is a further indulgence given even after judgment provided the costs of the suit are paid in addition. The period within which this latter remedy is available is now restricted to six months after judgment (15 & 16 Vict., cap. 76, section 210). Relief after decree may not be granted in India, as the effect of it will be to enable the executing Court to vary the decree. The decision in *Nagappa* v. *Venkat Row*(3) proceeded on the footing that the compromise decree was only evidence of the contract between

(1) (1724) 1 Str., 447, s.c., 2 White and Tudor's Leading Cases, 235.
(2) (1841) 1 Hare, 109. (3) (1901) I.L.R., 24 Mad., 265.

the parties and that the Court was not varying the decree in such cases. *Balambhat* v. *Vinayak Ganpat Row*(1) is to the same effect.

The rule to be deduced from an examination of legislative provisions and authorities bearing on the subject is that *primâ facie* the clause for re-entry for non-payment of rent is intended only as security for the payment of the rent. Therefore Courts should relieve against this clause, if the arrears and expenses are paid and if the parties can be placed in *status quo ante*. In *Kilmer* v. *British Columbia Orchard Lands, Ltd.*(2) it was pointed out that Courts should not encourage the enforcement of the strict letter of the contract which contains a penal provision. The payment of the money being the principal aim of the contract, the proviso is designed to hold out a threat relating to its fulfilment. As has been concisely put in Story's Equity Jurisprudence, article 1316. "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said, that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort." In no country is there a greater need for the application of this beneficent statement of the law than in India, and if it is true that we are administering both equity and law in our Courts, there must be an endeavour on our part to soften the rigour of the law and to mete out substantial justice unless our hands are tied by the legislature.

It is this view of the functions of a Court that inclines me to hesitate to follow some of the decisions of this Court to which

(1) (1910) I.L.R., 35 Bom., 239. (2) (1913) A.C., 319.

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—
NAPIER, J.

Nambudri(1) and on *Mahalakshmi Amma* v. *Lakshmi*(2) a case in which a period of grace was allowed and in spite of that, the clause was relieved against. I quite agree that the question must to a certain extent depend upon the facts of each particular case, but I think that it is necessary to decide whether the existence of days of grace is a bar as held in the two cases quoted above.

It is sought to apply the provisions of the Transfer of Property Act as laying down the principle which should guide the Court although admittedly those sections do not apply to agricultural leases, and this contention has found favour with some Judges of this Court, and my learned brother adopts this view. With all respect I regret I cannot agree. I entirely accept the proposition that where the statute embodies equities with respect to certain classes of transactions with which it is dealing it is reasonable to found equities with regard to other classes of transactions on the principles there enunciated, but where the statute specifically excludes one transaction of the same class as that which is being dealt with from its purview, we cannot apply the same doctrine. We do not know why the legislature exempted agricultural leases from the purview of the Transfer of Property Act lease sections. It might be that the legislature thought that the provisions for forfeiture of rent embodied in those sections were not suitable to agricultural leases. It is not open to us to investigate the reasons for the exclusion and we cannot therefore presume that some other cause operated on the mind of the legislature. If we are to apply any equity in relieving against forfeiture, we must in my view seek for it outside the Transfer of Property Act; and the proper course is to ascertain the practice in England and apply it subject to such modifications that seem proper in view of the conditions in this country. This was the course adopted by this Court in *Kottal Uppi* v. *Edavalath Thathan Nambudri*(1). There reliance is placed on *Peachy* v. *Duke of Somerset*(3). The language of the Lord Chancellor is as follows:—"The true ground of the relief against penalties is from the original intent of the case where the penalty is designed only to secure money and the Court gives him all that

(1) (1871) 6 M.H.C.R., 258. (2) (1911) 21 M.L.J., 964.
(3) (1724) 1 Str., 447, s.c., 2 White and Tudor's Leading Cases, 255.

he expected or desired." This is treated as the leading case in White and Tudor, Vol. II, where the learned editor points out that even where the penalty of the bond is to secure a collateral object, the Court will grant relief [vide, *Sloman* v. *Walter*(1)] and states as the result of the examination of the authorities that from a very early period, equity would, at any indefinite time after the tenant had incurred forfeiture and *been ejected for non-payment of rent* at a particular time under the stipulation in his lease relieve him upon his paying to the lessor the rent accrued due, interests and costs; upon this principle that as the right of entry was intended merely as security for the rent, the lessor thereby received full compensation and was put in the same situation as if the rent had been paid to him when it was originally due. The principle was restated by the Lord Chancellor in *Sanders* v. *Pope*(2) with an explanation at page 289 as to the origin of the covenant which is as follows:—

"The obvious intention of the clause is to secure payment of the rent that the landlord may not be put to his action of debt coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving the tenant paying the rent and all expenses, and placing his landlord in exactly the same situation."

In a later case *Hill* v. *Barclay*(3), the Lord Chancellor distinguishes the case of forfeiture arising out of a covenant to repair on the ground that in some cases it might not be possible to put the landlord in exactly the same position by ordering the tenant to make the necessary repairs. The doctrine is stated in Story's Equity Jurisprudence as founded on the theory that the right of entry is deemed to be intended to be a mere security for the payment of rent, and in paragraph 1316, the learned editor states as follows: "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act) that, if he omits to do the act, he shall suffer enormous loss, wholly disproportionate to the injury to the other party."

(1) (1784) 1 Bro. Ch., 418, s.c., 2 White and Tudor's Leading Cases, 8th Edn., 264.

(2) (1806) 12 Ves. J., 282. (3) (1811) 16 Ves. J., 56.

APPAYYA SHETTY v. MAHAMMAD BEARI.

NAPIER, J.

It seems to me that we should apply these principles in India and I find nothing in the cases and nothing in the principles on which they are founded to support the view that the insertion of days of grace in a lease will oust the jurisdiction of the Court to relieve. The origin of the covenant and its purpose are enunciated in the above cases. We have to apply it to the present case. This is a permanent lease, a lease very common on the West Coast of India, one by which the lessor deprives himself of any possibility of increase of rent for all time.

He has reserved nothing to himself but his *muli* right. The lease-holder has a permanent and alienable right in the property, a position infinitely stronger than that of the agricultural lessee, in England for a term of 7—14 or 21 years. In relieving against the forfeiture we can therefore give to the janmi "all that he expected or desired" in the words of the Lord Chancellor in *Peachy* v. *Duke of Somerset*(1), i.e., the rent reserved and in my opinion we should be very slow to refuse to do this, in these circumstances. Neither the fact that there were days of grace nor that the rent is three years in arrears should operate to prevent the application of the doctrine. I recognize that this could lead to a systematic refusal to pay rents until after a suit to enforce the forfeiture clause; but I think that the injury is exaggerated. Such practice will bring its own punishments for it would lead to the discontinuance of permanent leases by mulgenidars and compel them to grant mulgeni chits for short terms only as is done in many cases. I would add that legislative authority was given to this doctrine of relief in 4 Geo. III, cap. 28, and its extent curtailed by the Common Law Procedure Act of 1852, section 210. I do not think it necessary however to refer to the specific provisions of the Act as I would prefer to base my judgment on the principles enunciated by the Courts of Chancery apart from the Act.

N.R.

(1) (1724) 1 Str., 447; s.c., 2 White and Tudor's Leading Cases, 235.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Ayyangar.

A. V. SUBRAMANIA AYYAR (DEFENDANT—RESPONDENT), PETITIONER,

1915.
September 7.

v

SELLAMMAL (PLAINTIFF—APPELLANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 110—Right of appeal to His Majesty in Council—Amount or value of the subject matter of the suit, less than ten thousand rupees—Valuation for appeal, mode of—Mesne profits from date of suit to date of petition for certificate to appeal, if can be added—Value with mesne profits, more than ten thousand rupees—"Involve directly" in section 110, Civil Procedure Code, meaning of—Privy Council Appeals Act (VI of 1874).

Where the amount or value of the subject matter of the suit in the Court of First Instance was less than ten thousand rupees, but the amount or value of the subject matter in dispute in the appeal to His Majesty in Council exceeded that sum owing to the addition of the claim for mesne profits for the period between the institution of the suit and the filing of the petition for a certificate to appeal,

Held, that the case did not satisfy the provisions of either the first or the second paragraph of section 110 of the Code of Civil Procedure, and that leave to appeal to His Majesty in Council could not be granted.

Per WALLIS, C.J.—The words "involve directly," contained in the second paragraph of section 110 of the Code, cannot be read as including cases which involve nothing but the actual subject matter in dispute in the appeal.

Moti Chand v. *Ganga Prasad Singh* (1902) I.L.R., 24 All., 174 (P.C.); s.c., 29 I.A., 40, followed.

Dalgleish v. *Damodar Narain Choudhry* (1906) I.L.R., 33 Calc., 1286, and *Basanta Kumar Roy* v. *Secretary of State for India in Council* (1910) 6 I.C., 792, dissented from.

Mohideen Hadjiar v. *Pitchey* (1893) A.C., 193, explained.

Per SRINIVASA AYYANGAR, J.—If the operation of the decision is confined only to the particular object matter, clause (2) of section 110 does not apply, and unless the case satisfies the conditions in clause (1), there is no right of appeal.

If the decision, beyond awarding relief in respect of the particular object matter of the suit, affects rights in other properties, clause (2) would apply; also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause (2) may apply.

* Civil Miscellaneous Petition No. 1682 of 1915.

SUBRAMANIA AYYAR v. SELLAMMAL.

PETITION praying the High Court to grant leave to appeal to His Majesty in Council from the decree of the High Court in Appeal No. 284 of 1912 preferred against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 93 of 1910.

In this case, the original suit was for recovery of possession of a portion of a house with mesne profits from the defendant. The plaintiff alleged that he was in possession of a portion of the house and sued for recovery of the other portion. The market value of the whole house together with the mesne profits claimed in the plaint up to the date of the suit was much less than ten thousand rupees. It was stated by the defendant that the value of the whole house together with the mesne profits claimed by the plaintiff up to the date of the decree in appeal, would amount to over ten thousand rupees. The defendant filed a petition in the High Court for leave being granted to him to appeal to His Majesty in Council against the decree of the High Court. The defendant contended first that the value of the subject matter of the suit should be taken to be over ten thousand rupees on the ground that the subject matter of the suit should be deemed to include mesne profits subsequent to the institution of the suit, and secondly, that whether the value of the subject matter in the suit was above ten thousand rupees or not, the final decree of the High Court involved a claim to property of over ten thousand rupees in value on account of the addition of the value of mesne profits from the date of the suit to the date of the decree of the High Court, that consequently the provisions of the second paragraph of section 110 of the Civil Procedure Code were satisfied and that leave to appeal ought to be granted to him The plaintiff, who was the respondent in the petition, contended that the case did not satisfy the conditions laid down either in the first or the second paragraph of section 110 of the Code, and that consequently leave to appeal to His Majesty in Council could not be granted to the petitioner.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for petitioner.

R. Kuppuswami Ayyar for respondent.

WALLIS, C.J.

WALLIS, C.J.—In this case the amount or value of the subject matter of the suit in the Court of First Instance was less than Rs. 10,000 but the amount or value of the subject

matter in dispute in appeal to His Majesty in Council exceeds that sum owing to the claim for mesne profits for the period between the institution of the suit and the petition for a certificate. It is clear that the case does not satisfy the provisions of the first paragraph of section 110, Civil Procedure Code, but we are asked to grant the certificate on the ground that in the circumstances the decree of the High Court involves "directly or indirectly some claim or question to or respecting property of like amount or value" within the meaning of the second paragraph. If this contention be accepted, a certificate must be granted in any case in which the amount or value of the subject matter in dispute on appeal to His Majesty in Council is not less than Rs. 10,000, whether or not the amount or value of the subject matter of the suit in the Court of First Instance fell below Rs. 10,000, and this provision becomes wholly nugatory. In a case where the value of the subject matter was less than Rs. 10,000 in the Court of First Instance but the value of the subject matter on appeal to the Privy Council exceeded that sum owing to the accrual of interest in the meantime their Lordships held that the appellants had not brought themselves within the section—*Moti Chand* v. *Ganga Prasad Singh*(1), and I do not think it can make any difference whether the original deficiency in value is subsequently made up by the accrual of interest, or by a claim for mesne profits for the intervening period or by costs. The decision in *Dalgleish* v. *Damodar Narain Chowdhry*(2) proceeded on the authority of *Mohideen Hadjiar* v. *Pitchey*(3), a case under the Ceylon Ordinance No I of 1889 which does not impose any condition as to the amount or value of the subject matter of the suit in the Court of First Instance. This condition was first imposed in India by the Privy Council Appeals Act of 1874 (Act VI of 1874). The order of 10th April 1838 had prescribed that the amount or value of the subject matter in dispute in appeal to His Majesty in Council must be Rs. 10,000 or upwards. The alternative which now forms the second paragraph of section 110, Civil Procedure Code, was introduced in clause (39) of the Letters Patent which contained a proviso "that the sum or matter at issue is of the amount or value of

(1) (1902) I.L.R., 24 All., 174 (P.C.), s.c., 29 I.A., 40.
(2) (1906) I.L.R., 33 Calc., 1256.
(3) (1893) A.C., 193.

SUBRAMANIA AYYAR v. SELLAMMAL. WALLIS, C.J.

not less than Rs. 10,000 or that such judgment, decree or order shall involve directly or indirectly some claim, demand, or question to or respecting property amounting to or of the value of not less than Rs. 10,000." So far the amount or value of the subject matter of the suit in the Court of First Instance did not in any way affect the right of appeal, but it is clear to my mind that in 1874 the legislature intended to alter this and by the new provision inserted in the section to impose an additional restriction with reference to the amount or value of the suit when filed. It is of course necessary to read the whole section together and to give effect to every part of it; and when doing so it becomes necessary in my opinion in order to give effect to the new provision in the first paragraph to put a restrictive construction on the general words of the second paragraph which are reproduced from section 39 of the Letters Patent, and to read them in their present collocation as applying only to cases which involve some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal and to be taken into account therewith in making up the appealable value. Something might be said for this construction of the alternative provision as it stood in clause (39) of the Letters Patent, and I think that it is imperatively required in the present section 110, Civil Procedure Code(1), which first appeared as section 5 of the Act of 1874, if the provision in the earlier part of the section is not to be rendered nugatory. Some difficulty is no doubt occasioned by the retention in the second paragraph of the words "involve directly," but I think my learned brother in his judgment which I have had the advantage of reading has shown how effect may be given to the word "directly" consistently with this construction; and in any case I think that in the section as it now stands the words "involve directly" cannot be read as including cases which involve *nothing* but the actual subject matter in dispute in the appeal. Cases which involve nothing else are in my opinion governed exclusively by the first paragraph. The petition is dismissed with costs.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—This is an application for leave to appeal to His Majesty in Council. The original suit was to recover possession of a portion of a house with mesne profits from

(1) Act V of 1908.

the defendant. Though the plaintiff claims the whole house he does not sue for the remaining portion as he is in possession of it. It is however admitted that the market value of the whole house, together with the amount claimed for mesne profits up to the date of the institution of the suit is much less than ten thousand rupees. It is stated that the value of the whole house together with the mesne profits as claimed by the plaintiff up to the date of the decree in appeal would amount to over ten thousand rupees. Two points are taken for the petitioner, first that the value of the subject-matter of the suit in the Court of First Instance should be taken to be above ten thousand rupees, second that whether the subject-matter of the suit in the Court of First Instance was above ten thousand rupees or not, the final decree of this Court involves a claim to property of over ten thousand rupees in value. As regards the first point, petitioner contends that the subject-matter of the suit in the Court of First Instance includes mesne-profits subsequent to the date of the suit. If this contention is right, mesne profits subsequent to the date of the institution of the suit up to the date of the final determination by the Judicial Committee, or even beyond, till the delivery of possession of the property, or three years after the date of the final decree, whichever event first occurs, would be the subject-matter of the suit, and its value would vary with the length of time during which the suit may be pending in the Courts. This construction renders the enactment of this portion of the clause perfectly useless for there can be no case in which the matter in dispute on appeal to His Majesty in Council would be of the appealable value in which the subject-matter of the suit would not at least be of the same value. Prior to Act VI of 1874, it was well settled that interest on money claims and mesne profits of immoveable property subsequent to the date of the institution of the suit actually awarded by the decree appealed against may be added in computing the value of the matter in dispute in appeal to His Majesty in Council, but not interest accruing subsequent to the decree and if that amount was over Rs. 10,000 or over a party was entitled to appeal though the value of the subject-matter of the suit in the Court of First Instance was less, *Gooroopersad Khoond* v. *Juggutchunder*(1) and *Doorga Doss Chowdry* v. *Ramanauth*

(1) (1860) 8 M.I.A., 166 at p. 168

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SRINIVASA AYYANGAR, J.

Chowdry(1), *Goorodoss Roy* v. *Gholam Moulah*(2) and *Bank of New South Wales* v. *Owston*(3). Act VI of 1874 for the first time enacted that the value of the subject-matter of the suit in the Court of First Instance should also be ten thousand rupees or upwards, and imposed an additional restriction on the right of appeal. I think except in British India and Straits Settlements no such restriction is to be found in the laws of the other colonies or British Possessions. In *Moti Chand* v. *Ganga Prasad Singh*(4) the Judicial Committee expressly decided that when the amount claimed in the suit was less than ten thousand rupees, no appeal lay to His Majesty in Council, though the amount of the matter in dispute in appeal by the addition of interest subsequent to the institution of the suit came to ten thousand rupees or upwards. This decision is conclusive on the question, and I am unable to draw any distinction between interest and mesne profits in this respect. The petitioner relied on *Dalgleish* v. *Damodar Narain Chowdhry*(5) and *Basanta Kumar Roy* v. *Secretary of State for India in Council*(6) in support of his contention. In the first of the above cases it seems to have been assumed that future mesne profits formed part of the subject-matter of the suit and reliance was placed on the judgment of the Judicial Committee in *Mohideen Hadjiar* v. *Pitchey*(7). That was a case from Ceylon and the attention of the learned Judges of the Calcutta High Court was apparently not drawn to the provision of the Ceylon Ordinance which contains no clause similar to the first portion of clause (1) of section 110 of the Code of Civil Procedure. Though *Moti Chand* v. *Ganga Prasad Singh*(4) was cited in the argument there is no reference to it in the judgment. In the second case it is said that "as the Court could provide in the decree for the payment of mesne profits from the institution of the suit, until the delivery of possession or until the expiration of three years from the date of the decree, such mesne profits can legitimately be regarded as part of the subject-matter of the suit." So also can the Court award interest from the date of the institution of the suit up to the date of payment or realisation. There is no

(1) (1860) 8 M.I.A., 262 at p. 264. (2) (1863) Marshall's Rep., 24.
(3) (1879) 4 A.C., 270 at p. 274.
(4) (1902) I.L.R., 24 All., 174 (P.C.), s.c., 29 I.A., 40.
(5) (1906) I.L.R., 33 Calc., 1256. (6) (1910) 6 I.C., 722.
(7) [illegible]

reference in the judgment to *Moti Chand* v. *Ganga Prasad Singh*(1). In the case of future mesne profits, the cause of action, it must be remembered, does not accrue even at the date of the institution of the suit. With the greatest respect to the learned Judges I am unable to follow these decisions. I therefore disallow the first contention. As to the second point, petitioner contends that, inasmuch as the decree of this Court directs him to surrender possession of the house and pay mesne profits, the decree necessarily involved a claim to property of over the appealable value. This construction renders the whole of the first clause nugatory. It must be remembered that provisions similar to these are to be found in the laws of a large majority of the colonies (see the table in Burge's Colonial Laws, volume I, page 362) and it is impossible to construe the second clause of section 110 of the Code of Civil Procedure so as to render the first perfectly useless. If the second clause stood by itself (see Wheeler's Privy Council Practice, page 094) it would be legitimate to construe it in the manner suggested, as the word "involves" is sufficiently wide to cover direct adjudication in respect of the subject matter in dispute. In this case we have to take both the clauses together so as to give a meaning to both. In my judgment the first clause applies to cases where the decree awards a particular sum, or property of a particular value or refuses that relief (i.e.) to cases where the object matter in dispute is of a particular value. In fact the words "objects in dispute" are used in the provisions relating to appeals from Guernsey. If the operation of the decision is confined only to the particular object matter, clause (2) does not apply, and unless the case satisfies the conditions in clause (1) there is no right of appeal. If the decision beyond awarding relief in respect of the particular object matter of the suit affects rights in other properties, clause (2) would apply: also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause (2) may apply. A few illustrations from the decided cases would make the matter plain. In *Sri Mutty Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy*(2), the plaintiff sued to establish his right to enhance

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(1) (1902) I.L.R., 24 All., 174 (P.C.), s.c., 29 I.A., 40.
(2) (1860) 8 M.I.A., 165.

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the rent of a holding in the possession of the defendant, which the defendant claimed to hold at a fixed rent of Rs. 65. The plaintiff obtained a decree establishing his right to enhance the rent to Rs. 800 or thereabouts. The question was raised whether the value of the subject matter in appeal to the Privy Council was the capitalised value of this Rs. 800 which would be the amount by which the value of the defendant's estate would be diminished. Their Lordships found it difficult to bring the case within the words of the Order in Council of April 10, 1838, but gave special leave to appeal on the ground that the decision involved a claim to property of more than ten thousand rupees in value I may draw attention to the fact that this decision was given in the year 1860 and the present second clause was introduced into the Letters Patent in the year 1862

In *Amar Chandra Kundu* v. *Shoshi Bhushan Roy*(1) the plaintiff a tenant-in-common sued for a mandatory injunction directing the defendant another tenant-in-common to demolish buildings erected by him on a plot of common land. The subject-matter of the suit was for purposes of Court fees valued at Rs. 1,500 The plaintiff obtained a decree in the High Court the result of which was to oblige the defendant to remove buildings worth more than ten thousand rupees. Leave to appeal to the Privy Council was applied for and granted. In a similar case in Madras, *Sreemuth Devasikamoney Pandarasannadhi* v. *Palaniappa Chettiar*(2) the plaintiff obtained in the High Court a decree for possession of a piece of land worth at the most Rs 2,000, the defendant had built on the land and the buildings were valued at over Rs. 20,000 and he had to remove them. Leave to appeal to the Privy Council was applied for by the defendant and granted.

In *Muttusawmy Jagavera Yettapa Naiker* v. *Vencataswara Yettia*(3) a decree was passed by the Civil Court of Tinnevelly in appeal awarding Rs. 2,500 a year for maintenance that being the highest sum which the first Court had jurisdiction to give and this decree was confirmed by the High Court. An application for special leave was made to Her Majesty in Council. In discussing the question whether the application should not have been made to the High Court first, their

(1) (1904) I L R., 31 Calc. 305 (P C).

(2) (1911) I.L R, 34 Mad., 535.

(3) (1865) 10 M.I.A., 313.

Lordships came to the conclusion that it could not have been made there on the ground that the matter in dispute was below Rs. 10,000. It must however be noted that the facts of that case were peculiar.

In *Sauvageau* v. *Gauthier*(1) *A* who had obtained an assignment of certain choses in action from *B* sued one of the debtors *C* to recover the debt due by him. The assignor had become an insolvent and his assignee in bankruptcy intervened in the suit and claimed the sum as against *A* the private assignee contending that the assignment was void as against him. His contention was disallowed and he applied for leave to appeal to the Privy Council The Privy Council declined to give leave; but they say this, that if he had instituted a suit against the private assignee for a declaration that that assignment was bad, the subject-matter of the suit would have been over the appealable value, but inasmuch as his claim was limited to only one of the debts, he was not entitled to leave; they declined to grant special leave on the ground that that decision need not necessarily affect the title to the other debts.

In *Ajuas Kooer* v *Mussamut Luteefa*(2), where the suit was to establish the plaintiff's rights to take water from a channel to irrigate his land, MARKBY, J., held that the value of the subject matter in dispute was the amount by which the value of the land would be diminished if the right to take the water was not granted. The learned Judge drew a distinction between "the value of the relief" and "the value of the subject-matter."

In *Macfarlane* v. *Leclaire*(3), the plaintiff sued for a sum of money being the debt due to him from *X*. He applied for attachment before judgment and attached certain properties in the hands of *Y* on the ground that *Y* was holding those properties on behalf of *X*. *Y* claimed the properties as his own under a conveyance from one *P* who himself obtained the properties from *X* Plaintiff replied that the conveyance from *X* to *P* and *P* to *Y* were fraudulent as against the creditors of *X*. The plaintiff succeeded The amount of debt due to him for which he obtained a decree was less than the appealable value, but as the adjudication was also that the purchase by *Y* was not valid as against the creditors of *X*, the decision involved a question of

(1) (1874) L.R., 5 P.C., 494 at p. 498.
(2) (1872) 18 W.R., 21. (3) (1862) 15 M.P.C.C., 181.

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title to the property of over the appealable value. The Privy Council in the absence of a clause like the second clause were obliged to bring it within the words "matter in dispute in appeal to the Privy Council."

The above cases except *Amar Chandra Kundu* v. *Shoshi Bhushan Roy*(1) and *Sreemuth Devasikamoney Pandarasannadhi* v. *Palaniappa Chettiar*(2), were decided when the order in Council dated 10th April 1838 or provisions similar thereto were in force. They afford instances of cases in which the subject-matter of the suit was incapable of a real or accurate valuation or when the value of the subject-matter of the suit was below the appealable value, but the decision directly involved a claim or question respecting property of over ten thousand rupees in value Even if the words "subject-matter of the suit" or "matter in dispute in appeal" do not mean the object matter, but connote the jural relationship between the parties—see *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3) and *Kaveri Ammal* v. *Sastri Ramier*(4)—the present case would clearly come within the first clause and the second clause would have no application whatsoever. In some cases it may be difficult to determine under which clause a particular case falls—see *Ram Kirpal Shukul* v. *Rup Kuar*(5), and *Bhagwat Sahai* v. *Pashupati Nath Bhose*(6)—but I do not think that this would in any way affect the decision as I think that in all cases in which the final decision involves a claim or question to property of a particular value, the decision of the first Court also would merely involve a claim or question in respect of property of the same value. The following cases are instances in which the decision involves *indirectly* a claim or question to or in respect of property of the appealable value: *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai*(7), *Ko Khine* v. *Snadden*(8), *Joogulkishore* v. *Jotendro Mohun Tagore*(9). *In the matter of the petition of Khwaja Muhammad Yusuff*(10), *Sri Kishan Lal* v. *Kashmiro*(11), I am supported in the construction which I have adopted by the decision in *De Silva* v. *De Silva*(12), and a case

(1) (1904) I.L.R., 31 Calc., 305 (P.C.). (2) (1911) I.L.R., 34 Mad., 535.
(3) (1903) I.L.R., 26 Mad., 760 at p. 763.
(4) (1903) I.L.R., 26 Mad., 104 at p. 103.
(5) (1881) I.L.R., 3 All., 633. (6) (1905) 3 C.L.J., 237.
(7) (1860) 7 M.I.A., 548. (8) (1868) L.R., 2 P.C., 50
(9) (1882) I.L.R., 8 Calc., 210. (10) (1896) I.L.R., 18 All., 196
(11) (1913) I.L.R., 35 All., 445.
(12) (1904) 6 Bom. L.R., 403 (O.C.J.).

from the Colonies—*Gardner* v. *McCulloch*(1)—cited in Wheeler's Privy Council Practice, page 604. In *Dalgleish* v. *Damodar Narain Chowdhry*(2), already cited a different view was taken, but no reasons were given for the conclusion. I am unable to follow it. On the other hand in *Moti Chand* v. *Ganga Prasad Singh*(3), already referred to the Judicial Committee proceed on the assumption that the second clause was inapplicable to cases of this sort. I would therefore disallow this contention also.

K R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

DAVULURU VIJAYA RAMAYYA (FIRST DEFENDANT), APPELLANT,

v.

DAVULURU VENKATASUBBA RAO AND THREE OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

1914. October 5 and 6 and 1915. September 6 and 16.

Civil Procedure Code (Act V of 1908), O XXXII, r 7—Arbitration, reference to—Minors, parties—Guardian ad litem, *submission by, without leave of Court—Award—Decree, validity of—Appeal against, if competent—Compromise, decree on—Leave of Court, not obtained—Decree, if voidable—Suit to set aside decree, if competent—Partition Suit—Setting aside of decree, effect of—Suit, if re-opened and against whom*

A suit can be brought on behalf of minors to set aside a decree passed on compromise in another suit or appeal in which the minors were parties, on the ground that leave of Court under Order XXXII, rule 7 of the Civil Procedure Code was not obtained by their guardian *ad litem* to enter into the compromise on their behalf.

Leave of Court under Order XXXII, rule 7 must be obtained by a guardian *ad litem of minors for agreeing on their behalf to refer through Court the subject-*matter of a suit to arbitration; where no such leave was obtained, a decree passed on an award is not binding on the minors and a suit can be instituted on behalf of the minors to obtain a declaration that the decree does not bind them.

The avoidance of a decree in a partition suit will have the effect of re-opening the whole suit in respect of all the parties thereto, and on an application being made to the Court, it will proceed with the trial of the suit.

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(1) (1876) 2 V.L.R 128 (Law) (2) (1906) I.L R, 33 Calc., 1256.
(3) (1902) I.L R, 24 All, 174 (P C.); s c, 29 I.A., 40.

* Second Appeal No. 1192 of 1913.

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It is next argued that although the compromise was entered into without the leave of the Court, it is only voidable by plaintiffs if they can show that it was prejudicial to their interests. Reliance is placed on *Aman Singh* v. *Narain Singh*(1). We have carefully considered that ruling and do not think it is of any use to the appellant. In that case the Court appears to have considered the propriety of the compromise from the point of view of the minors' interests and to have sanctioned it; though this was after and not before it was entered into. It is not suggested that anything of the kind was done here; the Court simply recorded the compromise under section 375 of the old Code of Civil Procedure and passed a decree in accordance therewith This does not amount to sanction: vide *Kalavat* v. *Chedi Lal*(2). So far as appears, the propriety of the compromise from the point of view of the minors' interests was never considered at all by the Court. We must therefore hold that the compromise is voidable by the plaintiffs in this case.

Lastly it is urged that the decree directing the return by the appellant alone of a portion of the items received by him under the compromise decree is inequitable; and that his claim to plaint item No. 3 embodied in issue 4 must be decided. This appears to be so.

In order to frame a proper decree (apart from the portion declaring the *razinama* and decree in Appeal No. 504 of 1907 to be not valid and binding on plaintiffs) we must call for findings on the evidence on record on issues 4, 7 and 9. Two months are allowed for submitting findings, and seven days for filing objections.

In compliance with the above order of this Court, the Subordinate Judge submitted the following

FINDINGS —As directed by the High Court, I beg to record the following findings on issues Nos. 4, 7 and 9:—

Fourth issue.—Item No 3 (1 acre and 14 cents in Survey No. 93) is admitted by the first defendant to be the ancestral property of himself and plaintiffs' late father—vide his deposition. There is no proof that it was plaintiffs' father's exclusive property.

In 1906, first defendant, who was the karnam, sued plaintiffs' father for recovery of some lands including the one in question, on

(1) (1898) I.L.R., 20 All., 98. (2) (1895) I.L.R., 17 All., 531.

the ground that they were service inams, and could not therefore be held by a non-office-holder, vide Exhibit A; and it was then decided that the land had lost the nature of "service inam" and was held by the plaintiffs' father as "seri" under the zamindar. Even if it was a service inam on the date of its transfer by plaintiffs' father to first defendant under the compromise, the transfer was not valid in view of section 5 of Madras Act III of 1895, and even if the inam was enfranchized subsequent to the alienation, first defendant is not entitled to the land as against the plaintiffs, vide 19 Indian Cases, page 881. When a service inam is enfranchized it becomes family property. I therefore find the fourth issue for plaintiffs.

Seventh issue.—It has been held in *Lakshmana Chetti* v. *Chinnathambi Chetti*(1), that an award passed on a reference made to arbitrators in a pending suit would not bind the minors, when leave of the Court was not obtained under section 462 of the old Code of Civil Procedure. The first defendant's vakil relies on *Hardeo Sahai* v *Gauri Shankar*(2) to the contrary affirmed recently in *Lutawan* v. *Lachya*(3) I am bound to prefer the Madras ruling and therefore find that the award is not binding on the plaintiffs.

Ninth issue.—Even if the award was not superseded by the decree in appeal, plaintiffs can claim the suit properties, as the award as well as the compromise are not binding on them ; *Ganesha Row* v. *Tuljaram Row*(4) I find accordingly on this issue

This Second Appeal coming on for final hearing, the Court delivered the following judgments :—

TYABJI, J.—The present plaintiffs who are minors were parties to Original Suit No. 416 of 1905 which had been instituted by the present first defendant for partition. That suit was in the first Court referred to arbitration (by orders in November 1906 and March 1907). The award was dated 9th April 1907 and a decree passed in accordance with it. The present plaintiffs' father appealed from the decree passed on the award (Appeal No. 504 of 1907). The appeal was compromised and a decree was purported to be passed therein by the consent of the parties. The present suit is to have it declared that the consent decree does not bind the plaintiffs, to have it set aside, to obtain possession of the properties mentioned in the plaint, and other reliefs.

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(1) (1901) I L R., 24 Mad , 326
(2) (1906) I L.R , 29 All., 35 (3) (1914) I.L R. 36 All., 69 (F.B.).
(4) (1913) I.L.R., 36 Mad., 295 (P.C).

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It is admitted that neither the reference to arbitration nor the consent decree was with leave of the Court under Order XXXII, rule 7 (section 462 of the Civil Procedure Code, 1882). I shall in the rest of my judgment refer only to the Code of 1908 though most of the decided cases are of course on the Code of 1882. At an earlier hearing it was held by this Court that the compromise was on this ground voidable by the plaintiffs, and findings were called for. The finding on the fourth issue is admitted to be one of fact which we cannot question in second appeal The other findings are contested.

It is contended for the appellant that as the consent decree in appeal is inoperative, the decree passed in the original Court must revive, and that, as that decree was passed on an award, it cannot now be set aside, but has become final.

The respondent in answer contends in the first place that the decree on the award was finally and effectively set aside by the appellate consent decree, notwithstanding that the plaintiffs elect to avoid the latter. But the plaintiffs having elected to avoid the consent decree must do so *in toto* so far as they are concerned and cannot, after avoiding it, rely upon it for the purpose of rescinding the decree which it purported to supersede, and which it would have superseded only if it had been of any legal effect.

The real point on which the parties are at issue is, the appellate consent decree being out of the way, to what extent is the decree on the award binding on the minors? The appellant's argument is based on two cases decided by the Allahabad High Court which are directly in point: *Hardeo Sahai* v. *Gauri Shankar*(1) and *Lutawan* v. *Lachya*(2). The grounds on which the first of these decisions proceeds are—

(a) that Schedule II to the Civil Procedure Code, 1908, relating to arbitration proceedings, contains special proceedings which are not subject to Order XXXII, rule 7;

(b) that there is nothing in schedule II requiring the Court to give leave to the parties to make the application for a reference to arbitration where minors are concerned;

(1) (1906) I.L.R., 28 All., 35. (2) (1914) I.L.R., 36 All., 69 (F.B)

(c) that an application made under schedule II, paragraph 1, is very different from an agreement or compromise contemplated by Order XXXII, rule 7; and

(d) that assuming that Order XXXII, rule 7, applies, and has been violated, once a decree is passed in accordance with the terms of an award, it can only be impeached on one of the grounds mentioned in schedule II, paragraph 16, that is only if, and in so far as, (i) the decree is in excess of or (ii) not in accordance with the award.

In the second case above alluded to—*Lutawan* v. *Lachya*(1), RICHARDS, C.J., and RYVES, J., approve of the decision in *Hardeo Sahai* v. *Gauri Shankar*(2); BANERJI, J., proceeds on a different basis.

I shall deal for the present only with the first three reasons above stated which are cognate to each other.

With all deference I cannot agree that arbitration proceedings can be considered to be special, in the sense that acts of the guardian *ad litem* or next friend of a minor—I shall include both in the term guardian *ad litem*—in regard to those proceedings, are unaffected by Order XXXII, rule 7, which defines the powers of guardians. The first step in arbitrations is that the parties should agree to refer; it is also contemplated that they agree upon the arbitrator (schedule II, paragraphs 11, 2, 7, 17). See *Ghulam Khan* v. *Muhammad Hassan*(3) and *Luxumibai* v. *Hajee Widina Cassum*(4). Where the parties are before the Court as plaintiffs and defendants in a suit, and any of them is a minor, such agreements on behalf of the minor can be entered into only at the instance of the guardian *ad litem*: Order XXXII, rule 5. It would be supererogation to expect that whenever any enactment contemplates the doing of any act by the guardian *ad litem* (e.g., entering into an agreement on behalf of the minor) the provisions contained in Order XXXII, rules 6, 7, which define the powers of a guardian *ad litem* should be repeated in that enactment. To say that those provisions are not to be given effect to unless they are repeated in every other Act is to make them a dead letter where they stand. If the provisions contained in the Civil Procedure Code are not to govern arbitration proceedings as laid down in a schedule to the same Act

(1) (1914) I.L.R., 36 All., 69 (F.B.) (2) (1906) I.L.R., 29 All., 35.
(3) (1902) I.L.R., 29 Calc., 167 at p. 173 (P.C.) (4) (1899) I.L.R., 23 Bom., 629.

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what force can they have in regard to any independent enactment? See *Mahadeo Balkrishna* v. *Krishnabai*(1) referred to in *Vithaldas* v *Dattaram*(2), during arguments.

Here I may refer to an argument of RICHARDS, C.J., and RYVES, J., in *Lutawan* v. *Lachya*(3), viz., that in schedule II, paragraph 1, the expression "agree" is to have no different force from the term "desire," the latter word being what was contained in section 506 of the Code of 1882. But where a particular word is altered in a provision which is in other respects re-enacted, it is hardly permissible to interpret the later provision on the basis that in spite of the alteration, the enactment will have the same force as if the original word had been retained. It seems to me that the legislature substituted for the vague expression "desire" the more definite expression "agree," which is legislatively defined, and frequently interpreted judicially. But in the present case reading the word "desire" for "agree" cannot support the argument based upon it. For the desire of a minor to refer to arbitration must in the first instance be communicated to the other parties concerned and then to the Court through an application made by his guardian *ad litem*, and as the order granting the application can be made only by the consent of the parties, it must be sanctioned by the Court on behalf of the minor; *Ghulam Khan* v. *Muhammad Hassan*(4), and *Luxumibai* v. *Hajee Widina Cassum*(5).

The learned Subordinate Judge followed *Lakshmana Chetti* v. *Chinnathambi Chetti*(6), considering it to be directly opposed to the Allahabad decisions above mentioned. *It is there* decided that as the award therein was not made after a reference by the Court, it could only be taken cognizance of (if at all) as an adjustment of the suit (Order XXIII, rule 3). The Court assumed without deciding, the correctness of the view expressed by STARLING, J., in *Samibai* v. *Premji Pragji*(7), that "an agreement to refer coupled with the award resulting from the reference may be treated as an adjustment." *Venkatachalla Reddi* v. *Rangiah Reddi*(8). The grounds for making this assumption have become stronger since *Lakshmana Chetti* v.

(1) (1898) Printed Judgments, Bom. H C., 609.
(2) (1902) I L R., 26 Bom., 298
(3) (1914) I.L.R., 36 All., 69 (F B).
(4) (1902) I.L.R., 29 Calc., 167 at p. 173 (P.C.).
(5) (1899) I L R., 23 Bom., 629.
(6) (1901) I.L.R., 24 Mad., 326.
(7) (1898) I.L.R., 22 Bom., 321 [illegible]
(8) (1911) 21 M.L.J., 460 at p. 2[illegible]

Chinnathambi Chetti(1) was decided as a similar decision is given by JENKINS, C.J., and STARLING, J., in *Pragdas* v. *Girdhardas*(2), and it is not rejected in *Tincowry Dey* v. *Fakir Chand Dey*(3) and *Venkatachalla Reddi* v. *Rangiah Reddi*(4).

The result of *Lakshmana Chetti* v. *Chinnathambi Chetti*(1) in the light of the later cases may be taken to be that (1) where there is an agreement to refer to arbitration, followed (without the intervention of the Court) by an award, the two together may form "such an agreement, compromise or satisfaction" as has to be recorded by the Court under Order XXIII, rule 3, and in accordance with which a decree has to be passed: and (2) that in such a case it is necessary if any minors are concerned that leave of the Court should be obtained under Order XXXII, rule 7, either before the submission to arbitration or after the award. otherwise the award cannot take effect as such agreement, compromise or satisfaction. Hence unless leave has been obtained, the minor is not bound by it: the Court must proceed with the suit so far as he is concerned, and cannot merely pass a decree in accordance with the award.

In the present case we have a reference through the Court, and the gist of this part of the appellant's argument is that such a reference is not an agreement or compromise within Order XXXII, rule 7. The decision of this question depends in the first instance upon the provisions of the law relating to references through the intervention of the Court, to which I shall presently refer more fully.

It seems to me however a legitimate argument on the side of the respondents to rely upon the following words in *Lakshmana Chetti* v. *Chinnathambi Chetti*(1) · "The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors, and to leave such adjudication to a private tribunal. Such an agreement seems to us to be clearly one falling within section 462 (Order XXXII, rule 7) of the Civil Procedure Code" Thus a submission to arbitration without an order of the Court pending a suit, was considered by the Court to be an agreement of the nature referred to in Order XXXII, rule 7. The opinion so expressed is opposed to the view

(1) (1901) I.L.R., 24 Mad., 326.
(2) (1902) I.L.R., 26 Bom., 76.
(3) (1903) I.L.R., 30 Calc., 218.
(4) (1911) 21 M.L.J., 990 at p. 996.

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taken in *Hardeo Sahai* v. *Gauri Shankar*(1), unless it can be shown that there is nothing common between such a submission and a submission through the Court. But the preliminary agreement to refer (on which an application to the Court under schedule II, paragraph 1, is subsequently based) must be exactly of the same nature as that which the Court was considering in *Lakshmana Chetti* v. *Chinnathambi Chetti*(2). This preliminary agreement must always be entered into out of Court. It is only after such an agreement has already been arrived at that the parties may follow or make a departure from the provisions of schedule II: (1) they may apply to the Court for an order of reference, or (2) proceed with the arbitration without such an order. If *they* choose to apply to the Court, does their agreement to *submit to* arbitration become (at the hearing of the application) *something other than* an agreement, merely by reason of their *application?* It may be argued that after the Court makes an order upon the agreement, its original character merges in the order of the Court. The answer is that by reason of schedule II, paragraphs 2 and 3, the order of the Court is entirely based on the agreement The Court does not in referring the matter *to the* arbitrator exercise any judicial discretion, and the passing of such an order on the agreement is hardly more than a ministerial act. The analogy between an order passed on an agreement to refer to arbitration, and a decree passed on compromise falling under Order XXIII, rule 3, is complete. *Where a* compromise on behalf of a minor has not been sanctioned by the Court under Order XXXII, rule 7, it acquires no validity by reason of a decree having been passed on it; *Ganesha Row* v. *Tuljaram Row*(3): equally it seems to me that where an order is passed on an agreement to refer, the order has no more *validity* in regard *to* the sanction of the Court, than the agreement *itself*.

As against these considerations the decision in *Ghulam Khan* v. *Muhammad Hassan*(4) was relied upon by the appellant. Lord MACNAGHTEN there said: "In cases *falling* under head I, the agreement to refer and the *application* to the Court founded upon it must have the concurrence *of all parties* concerned and the actual reference is *the order of the Court*,

(1) (1906) I.L.R., 28 All., 35. (2) (1901) I.L.R., 24 Mad., 326.
(3) (1913) I.L.R., 36 Mad., 295 at p. 303 (P.C.).
(4) (1902) I.L.R., 29 Calc., 167 at pp. 183 and 184 (P.C.).

so that no question can arise as to the regularity of the proceedings up to that point." In the sentences immediately following he describes an application under paragraph 17 or 20 as a "litigious proceeding," in the sense that "cause may be shown against the application." Reading the whole of the paragraph together it seems to me that nothing more is meant than that when the parties have agreed to a proceeding they cannot object to it. The words "no question can arise as to the regularity of the proceedings up to that point" cannot imply that the validity of "the agreement to refer" [which, as Lord MACNAUGHTEN expressly says, "must be the agreement of all the parties to the suit" (page 182) and "must have the concurrence of all parties concerned" (page 183)] can never be questioned, or that if questioned before a Court competent to decide upon it, then the provisions of the Civil Procedure Code are not to be considered for determining whether the guardian was entitled to bind the minor—this question being involved in the question whether the agreement to refer had the concurrence of all the parties concerned.

His Lordship however also stated that "there did not appear to have been any substance in any of" the objections raised against the award—the first of these being that the defendant's guardian had agreed without leave of the Court to refer the case to arbitration. It was argued that this expression of opinion must be taken to mean that leave is unnecessary.

But this does not seem to be so. The allegation that at the time of the reference leave of the Court had not been obtained, was apparently brought to the notice of the Subordinate Judge —see *Ghulam Khan* v. *Muhammad Hassan*(1)—and he nevertheless pronounced judgment in accordance with the award. As implied in *Lakshmana Chetti* v. *Chinnathambi Chetti*(2) the leave may be obtained either at the time of agreeing to refer or after the award. Their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1) point out that the award was a fair and reasonable settlement. Therefore the objection was characterised as one in which there was no substance. It is also noticeable that their Lordships refer (page 184) to the objection

(1) (1902) I.L.R., 29 Calc., 167 at pp. 171 and 185 (P.C.).
(2) (1901) I.L.R., 24 Mad., 326.

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that the award was bad because the Court had no jurisdiction and dispose of this objection by saying that the Court will not sit as a Court of Appeal on awards in respect of matters of fact, or of law and cite *Adams* v. *Great North of Scotland Railway Co.*(1). But there is no reference to the point whether the minors were bound by the award; see also *Jones* v. *Powell*(2) and *Wrightson* v. *Bywater*(3).

In my opinion therefore the agreement contemplated in schedule II, paragraphs 1 et seq., is an "agreement with reference to the suit" under Order XXXII, rule 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without *the leave of the Court* expressly recorded and thus exceeds the authority given to him by the said rule.

The last ground (*d*) mentioned above must now be considered. It was contended that the decision of the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan*(4) is a direct authority in its favour.

Before dealing with this aspect of the case it is necessary to refer to the relevant provisions of the Code with particular reference to the question whether any means are available to a minor for rectifying an order of reference made without leave of Court under Order XXXII, rule 7.

The first stage in arbitration proceedings under schedule II is, as I have already said, to agree to refer. Next comes the application to the Court under paragraph 1. The leave of the Court under Order XXXII, rule 7, may then be obtained. Where this is omitted to be done, the arbitration proceeds independently of the Court, unless the Court is asked to make an incidental order subserving the course of the arbitration proceedings, which it is empowered to make in regard to the following matters:—

(1) fixing or enlarging the time for making the award—paragraphs 3 (1), 4 (2) and 8;

(2) providing for the course to be followed in cases of disagreement between two or more arbitrators (when

(1) (1891) A.C., 31.

(2) (1838) 6 Dowl. Pr. Cas., 483 at p. 485; s.c., 19 R.R., 728 at p. 729.

(3) (1838) 3 M. & W., 199 at pp. 204-205.

(4) (1902) I.L.R., 29 Calc., 167 at pp. 183 and 184 (P.C.).

the parties are not able to agree)—paragraph 4 (1) (*d*);

(3) appointing an arbitrator or umpire—paragraph 5 (2);

(4) giving leave to the arbitrator to state a case—paragraph 11.

Apart from these incidental orders, the powers of the Court that has made an order of reference, as well as of the Appellate Court over the litigation or the arbitration are restricted [paragraph 3 (2)] to making one of the following six classes of orders —

(i) The Court making the reference may make an order superseding the arbitration, but only where there has been failure (*a*) to appoint an arbitrator or umpire or (*b*) to make the award, in time—paragraphs 5, 8.

(ii) It may modify or correct the award if (*a*) it deals with a matter not referred to, or contains some, (*b*) formal or (*c*) obvious or (*d*) clerical mistake, etc.—paragraph 12.

(iii) It may remit the award to the reconsideration of the arbitrator if (*a*) some matter that ought to be determined by him has been left undetermined, or (*b*) vice versa, or (*c*) if it is indefinite, or (*d*) there is an objection to its legality apparent on the face of it—paragraph 14.

(iv) It may supersede the arbitration and proceed with the suit after setting aside the award in the circumstances mentioned, or implied in paragraph 15, viz.—

(*a*) for corruption or misconduct of the arbitrator;

(*b*) for fraudulent concealment, etc.;

(*c*) the award having been made—

(1) after an order of supersession by the Court (under paragraph 5 or 8);

(2) after the expiration of the period allowed by the Court;

(3) being otherwise illegal;

(*d*) the award having been remitted and the arbitrator or umpire having failed to reconsider it (paragraph 15, first sentence);

(v) it may pronounce judgment in accordance with the award (paragraph 16).

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(vi) From a judgment pronounced by the Court making the reference under the last-mentioned provision there is no appeal except in so far as the decree is (a) in excess of, or (b) not in accordance with the award.

It will be observed that the first class of orders may be made before, and the rest after the award has been made; the fifth is merely to give effect to the award; the first five are powers to be exercised by the Court making the reference; the sixth class alone refers to the powers of the Appellate Court, which (so far as the provisions now under consideration are concerned) are defined only in regard to cases where the Court making the reference has passed an order under the fifth head; there are no provisions regarding the Appellate Court's powers where the Court making the reference has exercised any of its powers under the first four heads.

These powers do not, it is apprehended, affect the Court's powers of reviewing its own judgment. But the power of review need not now be considered. I now come to deal with the decision in *Ghulam Khan* v. *Muhammad Hassan*(1).

The argument before the Privy Council was that the award was not a valid and legal award—(1) having been made without jurisdiction—jurisdiction having been taken away from the Civil Courts by the Punjab Tenancy Act, and (2) the agreement to refer to arbitration having been without leave of the Court under Order XXXII, rule 7.

The question directly decided was whether there was any ground, (1) on which an appeal lay, or (2) on which the Chief Court of the Punjab could have exercised its powers of revision. Each head of this question was answered in the negative for the reasons—

(1) that no appeal lies except in so far as the decree is in excess of or not in accordance with the award (sixth head above) and this was not alleged,

(2) that revision was not permissible, as (a) it would lay the finality of an award open to question, (b) being avowedly an application to set aside the award it was barred by limitation, and (c) even if it were not barred, the Subordinate Judge had in the events that had

(1) (1902) I.L.R., 29 Calc., 167 (P.C.).

happened, no option but to pass a decree in accordance with the award, and had strictly followed the course prescribed by the Code.

Their Lordships' decision therefore referred directly only to the powers of the Appellate Court in cases where the Court making the reference has proceeded under the fifth head and consequently where the Appellate Court's powers are subject to the sixth head above.

Previous to this decision it had been held by the Privy Council (approving the trend of decisions in India) that the finality of a decree on an award depends upon the award itself being valid and legal and that therefore an award may be shown in appeal to be illegal in which case the decree on the alleged award would be set aside and suits ordered to be proceeded with; *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(1). See also *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree*(2), referred to in *Nandram Daluram* v. *Nemchand Jadavchand*(3).

I need not consider such cases as *Achuthayya* v. *Thimmayya*(4), which had held that on appeal from the final decree passed after an award has been set aside, the propriety or otherwise of setting aside the award may be considered by the Appellate Court. Those cases have reference to the powers of the Appellate Court when they are not restricted by the sixth head above. In *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(1), their Lordships of the Privy Council approved of this view, and proceeded further. For, reversing the decrees of both Courts in India, they set aside a decree based on an award which was shown to have been made after the expiry of the time fixed for the making of the award, thus in effect enlarging the powers of the Appellate Court under the sixth head, by adding to it the power to set aside a decree passed in accordance with the award when it is found that the award itself was illegal on one of the grounds mentioned in paragraph 15. On this point there seems to be a conflict between *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(1) and *Ghulam Khan* v. *Muhammad Hassan*(5). In the judgment in *Ghulam Khan* v. *Muhammad*

(1) (1891) I.L.R., 13 All., 300 (P.C.). (2) (1875) 23 W.R. (C.R.), 429.
(3) (1893) I.L.R., 17 Bom., 357. (4) (1905) I.L.R., 31 Mad., 345.
(5) (1902) I.L.R., 29 Calc., 167 (P.C.).

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Hassan(1) however the point (though argued in appeal) was not alluded to. The decision in *Raja Har Narain Singh* v *Chaudhrain Bhagwant Kuar*(2) was apparently not cited to the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1) nor is it alluded to in the judgments of the Punjab Chief Court

The conflict between *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(2) and *Ghulam Khan* v. *Muhammad Hassan*(1) is explained in *Rajarani Dassi* v. *Ganesh Prosad Mohapatra*(3), by the fact that in the earlier case the question of the competence of a Court of appeal was not raised, but it is noticeable that Lord MORRIS said in the beginning of his judgment that the case had to be decided upon the construction of sections 508, 514 and 522 of the Civil Procedure Code; and in the absence of express reference to *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(2) in *Ghulam Khan* v. *Muhammad Hassan*(1) we cannot proceed on the basis that that case has been overruled; and we must as far as possible give effect to both pronouncements of the Judicial Committee.

The two decisions can be partially reconciled if *Ghulam Khan* v. *Muhammad Hassan*(1) is taken as deciding that the matter on which the decision of the Court making the reference is final (provided it upholds the award) must be connected with the proceedings before the arbitrator (see paragraphs 14 and 15). That something to this effect was in the minds of their Lordships is indicated by the following expressions: "The Court makes an order of agreement" (which must be the agreement of all the parties to the suit). "In cases falling under head I the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." Thus they assume that the regularity of the proceedings up to that point is not in question. Their Lordships also cite *Adams* v. *Great North of Scotland Railway Co.*(4), the first portion of the headnote to which seems to me to represent correctly the views expressed by Lords HALSBURY and WATSON in the following terms: "The Act of Regulations of 1695, which provides that 'for the cutting off of groundless processes in time

(1) (1902) I.L.R., 29 Calc., 167 (P.C.). (2) (1891) I.L.R., 13 All., 300 (P.C.).
(3) (1910) 14 C.W.N., 626. (4) (1891) A.C., 31.

coming the lords of session sustain no reduction of any decreet arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery, or falsehood to be alleged against the judges arbitrators' was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits; but not to prevent the Courts from setting aside an award where the arbitrator has exceeded his jurisdiction or has disregarded any one of the expressed conditions of the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award."

This view of *Ghulam Khan* v. *Muhammad Hassan*(1) seems also to have been taken in *Walji Muthuradas* v. *Ebji Umersey*(2) by JENKINS, C J., and BATCHELOR, J., who referring to *Nandram Daluram* v *Nemchand Jadavchand*(3) say: "But the Bombay case only decides that an appeal lies where the award is illegal *ab initio*, or, in other words, where in law there is no award. Obviously if there is no award, there is no basis for the decree." *Ghulam Khan* v. *Muhammad Hassan*(1) is cited by them at the end of the judgment. *Surya Narayana Rao* v. *Sarabhaiah*(4) may seem at first sight to be against the view I am taking, but the question referred to the Full Bench shows that the objection to the award was that on the refusal of two arbitrators to act and on their subsequent death the Court had appointed new arbitrators in their stead and three of the old and the two new arbitrators had made the award. This was clearly an objection to the proceedings in arbitration, on all of which the Court making the reference has to decide finally under the new Code. The CHIEF JUSTICE (with whom AYLING, J., agrees) at page 277 distinguishes *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(5) from *Ghulam Khan* v. *Muhammad Hassan*(1). KRISHNASWAMI AYYAR, J., does the same and points out (pages 278-279) one kind of invalid awards which would not be covered by paragraph 16.

In the case before us the award is not said to be invalid for any corruption or misconduct on the part of the arbitrator or of the parties to it during the arbitration. The Court is not asked

(1) (1902) I.L.R., 29 Calc., 167 (P.C.).
(2) (1905) I.L.R., 29 Bom., 285 at p. 289. (3) (1893) I.L.R., 17 Bom., 357.
(4) (1911) 21 M.L.J., 263. (5) (1891) I.L.R., 13 All., 300 (P.C.).

VIJAYA RAMAYYA v. VENKATASUBBA RAO. — TYABJI, J.

as a "Court of Appeal to examine whether or not the conclusion at which the arbitrator had arrived was sound in point of law or in point of fact": *Adams* v. *Great North of Scotland Railway Co.*(1) per Lord HALSBURY. What we are asked to pronounce upon is quite distinct, whether the proceedings not of the arbitrator, but of the Court bind the minors or are voidable by them.

It seems to me therefore though not without hesitation that the principle of finality which finds expression in the Code—*Ghulam Khan* v. *Muhammad Hassan*(2)—does not affect matters which are outside the arbitration proceedings. The objection in the present case is therefore not barred.

It has not been contended before us that the minors could in the present case have avoided the arbitration proceedings except by instituting a suit to have it declared that the decree which purports to bind them is a nullity.

For these reasons in my opinion it was competent to the minors to institute the present suit and to obtain a declaration that the decree on the award does not bind them.

AYLING, J.

AYLING, J.—I agree.

After delivering the above judgment, *their Lordships* allowed the appeal to stand over to hear arguments as to the form of the order to be passed in the case.

This Second Appeal coming on for further hearing the following judgment of the Court was delivered by

AYLING AND TYABJI, JJ.

TYABJI, J.—On a previous occasion, we delivered our judgment holding that the minor was entitled to avoid the decree against him. We let the appeal stand over in order that the learned vakils might address us on the exact form in which our order should be framed.

It has been argued before us today that the decree which the minor seeks to avoid is of such a nature that it cannot be avoided only as against him and not as against the other parties to it. It is a partition decree under which the property is divided into two moieties. We have referred to the terms of the decree and to the facts of the case and we are satisfied that the contention is correct. In our opinion it would be quite impracticable and highly inequitable to allow the minor to avoid the decree only in part. His avoidance of it must be entire as his rights

(1) (1891) A.C., 31 at p. 39. (2) (1902) I.L.R., 29 Calc., 167 (P.C.)

and liabilities under the decree are not separable from the rights and liabilities of the other party to the partition.

It was then argued by Mr. Nagabhushanam that we cannot in the present appeal order that the original suit which has been compromised in the decree that has now been declared to be voidable should proceed. We accede to the contention. We are not seized of that suit and we cannot pass any orders with reference to it. Formally our order will merely be that the minor is entitled to avoid the decree and we shall (should the minor exercise that option) record the fact that he has exercised the option but we cannot further give any directions in regard to the previous suit.

It is, however, a part of Mr. Nagabhushanam's argument not only that we cannot in our decree give any such directions as aforesaid to the Court seized of the other suit, but that our order will not have the effect of reviving that other suit. This is a point concerned with the effect and interpretation of our order and we have heard arguments on the point and consider it imperative on us to give a decision on it. We are of opinion that the effect of our order is that the minor has the option of avoiding the decree *in toto*, but that he has no option (even if it were possible to be done in the circumstances of this case) to avoid the decree in part only. Should then the minor avoid the decree the appellant will be able in our view to go to the Court of the District Munsif of Gudivada where the original suit was instituted and ask the Court to proceed on the basis that there is no decree in the suit, inasmuch as the minor has been declared to be entitled to avoid the decree and has exercised that option. On this we expect that the Court will proceed with the trial of the suit, as after the avoidance of the decree the suit will be without any proper or final adjudication.

Mr. Nagabhushanam relied upon *Bhimaji Govind* v. *Rakmabai*(1), in which the Court refused to have the suit restored to the file. We do not intend to lay down that the Court may not on occasions do that. The avoidance by the minor of a decree against him may in some cases *ipso facto* be tantamount to an adjudication of the suit; in others it may be possible and proper for the Court merely to avoid such a part of

(1) (1886) I.L.R., 10 Bom., 338 at p. 340.

NARAYANA-SWAMI NAIDU v. SESHAGIRI ROW.

PHILLIPS, J.

The facts of the case appear from the judgment of PHILLIPS, J.

P. Nagabhushanam for the appellant.

The Honourable Mr. *B. N. Sarma* for the respondents.

PHILLIPS, J.—The appellant brought a suit for recovery of the suit lands and for rent against a tenant and valued his suit for purposes of jurisdiction according to the market value of the land in accordance with the provisions of section 14 of the Madras Civil Courts Act (III of 1873) and section 7 (v) (*d*) of the Court Fees Act (VII of 1870). He accordingly presented the plaint before the Subordinate Judge, but it was returned for presentation before the District Munsif on the ground that if valued under the provisions of section 8 of the Suits Valuation Act, the value of the suit would be below Rs. 2,500 and the question has now come up in Letters Patent Appeal as to which provision of law should be applied in valuing the suit for purposes of jurisdiction.

The Court Fees Act was amended by Act VI of 1905 and a new category of suits was added to section 7 of the Court Fees Act as clause (xi) (*cc*), i.e., for the recovery of immoveable property from a tenant. Undoubtedly the present suit comes under this category and the effect of the amendment is to remove such a suit from section 7, clause (v) to section 7, clause (xi) of the Court Fees Act. All suits falling under section 7 (v) of the Court Fees Act are excluded from the provisions of section 8 of Suits Valuation Act (VII of 1887) which provides that the valuation of suits for the computation of Court fees shall be the same as for purposes of jurisdiction. The suits excluded from the provisions of section 8 are those falling under section 7, clauses (v), (vi), (ix) and (x) (*d*) of the Court Fees Act, and until the passing of Act VI of 1905 a suit for the recovery of immoveable property from a tenant would not have been valued in accordance with section 8 of the Suits Valuation Act, but in accordance with section 14 of the Civil Courts Act. Section 14 has not been expressly repealed and the only question we have to determine now is whether it has been impliedly repealed by Act VI of 1905 in respect of suits under section 7 (xi) (*cc*). This latter Act is only an amendment of the Court Fees Act, and only incidentally affects the Suits Valuation Act by creating a new category of suits falling under section 8 of that Act, and impliedly removing such suits from

the provisions of section 14 of the Madras Civil Courts Act. In the Suits Valuation Act it is expressly laid down in section 6 that when rules are framed under section 3, section 14 of the Civil Courts Act shall be repealed. From this it is obvious that the Suits Valuation Act when passed was not intended to repeal section 14 until a certain event happened and that event has not happened, but by enacting Act VI of 1905 the legislature has not only amended the Court Fees Act, but has incidentally withdrawn a certain class of suits, the one under consideration, from the provisions of section 14, Civil Courts Act, and added it to those falling under section 8 of the Suits Valuation Act. Whether the legislature intended Act VI of 1905 to have this effect or not, it is clear that the effect has been caused, and consequently the law must be deemed to have been changed by the later enactment The fact that the Civil Courts Act is an Act applicable only to the Presidency of Fort St. George whereas the amending Act applies to the whole of India, does not in my opinion affect the question, for the greater contains the less, and the law laid down in the amending Act is applicable to Madras as well as to other parts of India. The ruling in *Chalasamy Ramiah* v. *Chalasamy Ramasami*(1) has very little bearing on this case, for it does not deal with section 7, clause (xi) (*cc*), and all that can be said is that some of the observations in the judgment to a certain extent support appellant's line of argument. The ruling in *Nandan Singh* v. *Debi Din*(2) is, if anything against him. I would therefore dismiss the appeal with costs.

Letters Patent Appeal No. 276 follows.

SADASIVA AYYAR, J.—I concur in dismissing the appeals with costs.

S.V.

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(1) (1912) 11 M.L.T., 155. (2) (1914) 12 A.L.J., 933

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napi

1915. September 21 and 22.

DHARMARAJA AYYAR AND ANOTHER, APPELLANTS,

v.

K. G SRINIVASA MUDALIAR AND FOUR OTHERS, RESPONDE

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 8, proviso—Prelim mortgage-decree by Appellate Court—Power to extend time for payment, for first Court—Order of extension by Appellate Court—Appeal against, maintainability of—Civil Procedure Code (Act V of 1908), sec. 148, no; to extend time under.

No appeal lies from an order extending time for payment of the mort amount due under a decree, such an order is not a decree within secti clause (2) of the Code of Civil Procedure.

Even in cases where the preliminary mortgage-decree is passed by Appellate Court, it is only the Court of First Instance that can extend tim payment under Order XXXIV, rule 8, proviso, of the Civil Procedure ((Act V of 1908).

Venkatakrishna Ayyar v. Thiagaraya Chetti (1900) I.L.R, 23 Mad., *Sheonarain v Chunni Lal* (1901) I L R, 23 All., 88 and *Ram Dhani Sah Lalit Singh* (1909) I L R., 31 All, 328, followed.

Section 148 of the Civil Procedure Code (Act V of 1908) does not enab Court to extend time for doing acts allowed by a decree.

Het Singh v. Tika Ram (1912) 9 A L.J, 381 and *Suranjan Singh v. R. Bahal Lal* (1912) 17 I.C, 912, followed

PETITION under section 115 of the Code of Civil Proced (Act V of 1908), praying the High Court to revise the order A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge Kumbakonam, in Original Petition No. 927 of 1912 in App No. 653 of 1909, preferred against the decree of the Distr Munsif of Mannargudi in Original Suit No. 136 of 1908.

The material facts appear in paragraph 4 of the judgment.

S. Varadachariyar for *T. R. Venkatarama Sastriyar* for t appellants.

G. S. Ramachandra Ayyar for the respondents.

The following judgment of the Court was delivered l

SADASIVA AYYAR AND NAPIER, JJ

SADASIVA AYYAR, J.:—There is a preliminary objection tak that no appeal lies against the order of the lower Co

* Civil Revision Petition No. 711 of 1915. Subsequently converted into Civil Miscellaneous Appeal No. 213 of 1913.

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extending the time for payment of the mortgage-amount, an order passed under the proviso to Order XXXIV, rule 8, and under section 148 of the Civil Procedure Code; (as regards that portion of the order of the lower Court which effected an addition of parties under Order XXII, rules 10 and 11, we were told that this appeal was not directed against that portion).

We think that the preliminary objection is sound. The order extending time does not come within the definition of a decree (see section 2, clause (2) of the Civil Procedure Code). We are clear that it does not determine any question coming within section 47 as was ingeniously contended by the appellant's learned vakil Mr. S. Varadachariyar.

We, however, allow this appeal to be converted into a revision petition under section 115, Civil Procedure Code.

The question for consideration on this footing will be whether an Appellate Court which passed the preliminary decree in a mortgage-suit (which was treated as a combined suit for redemption as regards a prior mortgagee and for sale as regards the mortgagor) has jurisdiction to entertain an application for extension of time under Order XXXIV, rule 8, proviso and section 148.

As regards section 148, we concur with the decisions in *Het Singh* v. *Tika Ram*(1) and *Suranjan Singh* v. *Rama Bahal Lal*(2) that that section does not apply to the extension of time for doing acts allowed by decrees.

As regards Order XXXIV, rule 8, we agree with *Venkatakrishna Ayyar* v. *Thiagaraya Chetti*(3), *Sheonarain* v. *Chunni Lal*(4), *Ram Dhani Sahu* v. *Lalit Singh*(5) and *Shamuldhun Dutt* v. *Lakhimani Debi*(6), that it is the Court of First Instance to which the suit was remitted after the preliminary decree was passed by the Appellate Court which has the exclusive jurisdiction to deal with an application under Order XXXIV, rule 8, proviso. Section 37 quoted by the respondents' learned vakil has no relevancy as Order XXXIV, rule 8, proviso, does not contain the expression "Court which passed a decree" or "words to that effect" but only the one word "Court" occurring in that

(1) (1912) 9 A.L.J., 381.
(2) (1912) 17 I.C., 912.
(3) (1900) I.L.R., 23 Mad., 521.
(4) (1901) I.L.R., 23 All., 58.
(5) (1909) I.L.R., 31 All., 328.
(6) (1911) 13 C.L.J., 459.

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expression. But it is argued that the word "Court" me from the context in the former portions of that rule 8, only "Court which" (actually) "passed the decree" even if t Court be the Appellate Court. But even if the word "Cour has that meaning in the former portions, we do not see that single word "Court" constitutes the expression "Court wh passed a decree" or "words to that effect" when that sing word is not followed by any words corresponding to the wor "which passed a decree." The said words "Court" in t clauses (1), (2) and (4) of that rule 8 which relates to the passi of final decrees in mortgage suits would no doubt mean the sa thing as the expression "Court which passed a decree" whe the Court which passed the preliminary decree was (as it woul ordinarily be) the Court of First Instance. But to argue therefor that the word *must* mean in all cases "the Court which passe the decree" even if that Court was the Appellate Court and no the Court of First Instance and that therefore the word "Court" in the proviso also means only the Appellate Court if that is the Court which passed the decree and does not include the Court of First Instance except by a reference to section 37 seems merely to beg the question in issue. Further section 37 includes the Court of First Instance only where proceedings have to be taken "in relation to the execution of decrees" in certain contingencies The application now in question does not, in the first place, relate to the execution of any decree and, in the second place the decree-holder seeks, not to include the Court of First Instance on the strength of section 37 but to either include or to mean only the Appellate Court.

In the result, we allow the revision petition and direct the Sub-Court to return the petition so far as it prays for an extension of time, to be presented to the Court of First Instance. Costs hitherto will abide. A fair copy of the petition might be attached to the original petition (which is really a combination of two separate petitions); when the latter is represented to the Court of First Instance, the words "may be pleased to add them as plaintiffs Nos. 3, 4 and 5" being omitted from the fair copy so attached

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

VELAYUTHAM PILLAI (THIRD DEFENDANT), APPELLANT,

v.

SUBBAROYA PILLAI AND THREE OTHERS (PLAINTIFF AND DEFENDANTS Nos. 2, 4 and 5), RESPONDENTS.*

1914. December 21 and 1915. September 17 and 23.

Adverse possession—Co-owners—Notice of hostile claim, if necessary—Possession, hostile at commencement—Subsequent accrual of title as co-owner—Possession continued, not hostile—(Indian) Limitation Act (IX of 1908), Sch. II, arts. 134 and 144.

The plaintiff and the third defendant were the reversionary heirs of one *C* who had mortgaged the suit properties to one *P*. The third defendant's father purchased the properties from *P* in 1893 without notice of the mortgage and has been in possession of the same ever since The widow of *C* died on the 6th September 1900 The plaintiff brought this suit on the 2nd September 1912 to redeem the properties. The third defendant pleaded that the suit was barred by limitation

Held, that the suit was not barred by limitation.

Possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim.

Though possession was hostile when it commenced, still such possession would not continue to be hostile on the accrual of a peaceful title before the completion of the adverse possession

SECOND APPEAL against the decree of P. AYYASWAMI MUDALIYAR, the temporary Subordinate Judge of Cuddalore, in Appeal No. 20 of 1913, preferred against the decree of T. KRISHNAN NAYAR, the District Munsif of Vriddhachalam, in Original Suit No. 910 of 1912.

The properties in dispute in the suit originally belonged to one *C*. He sold the properties to one *P* and obtained from him an agreement to reconvey the properties to him. *P* sold the properties in 1893 to the father of the third defendant who was put in possession on that date, and after his death, the lands continued in the possession of the third defendant. On the death of *C*, the plaintiff, as one of the reversionary heirs of *C*, brought a suit in 1885 (Original Suit No. 371 of 1885) against *C*'s widow

* Second Appeal No. 70 of 1914.

VELAYUTHAM v. SUBBAROYA.

and the purchaser P for a declaration that the transaction with P was only a mortgage and not an absolute sale and obtained a decree that he was entitled to redeem the properties as on a mortgage to P in case the widow of C should not do so in her lifetime The widow died on the 6th September 1900 without redeeming the properties. On her death, the plaintiff and the third defendant were the heirs of her husband. Plaintiff instituted this suit for redemption on the 2nd September 1912. The third defendant pleaded inter alia that the suit was barred by limitation, that as he and his father were in possession since 1893 under a sale from a mortgagee (P), they had perfected their title by prescription against the plaintiff at the date of the suit and relied on article 134 of the Limitation Act. The lower Appellate Court decreed the claim, holding that the suit was not barred by limitation. The third defendant preferred a second appeal. The High Court called for a finding on the following issue:—"Had the defendant's adoptive father any actual or constructive notice of the decree obtained by the plaintiff in Original Suit No. 371 of 1885 against the widow or of the nature of the right of his vendor under the sale deed and the counter-agreement referred to in the pleadings in this case?" The lower Appellate Court returned a finding in the negative. On the receipt of the finding, the High Court delivered the following judgment.

C. Padmanabha Ayyangar for the appellant.

C. V. Anantakrishna Ayyar for the first respondent.

Others were not represented.

The following judgment of the Court was delivered by

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

SESHAGIRI AYYAR, J.—The properties in suit belonged to one Chella Pillai. He sold the properties to one Palamalai and obtained an agreement to reconvey the properties. After the death of Chella Pillai, the plaintiff as one of the reversioners sued his widow and the purchaser Palamalai in 1885 for a declaration that the property was only subject to a mortgage and that the alleged sale did not pass an absolute interest to the purchaser. The decree in that suit was that the plaintiff was entitled to redeem the properties after the death of the widow in case she did not redeem the properties herself. After this decree, Palamalai sold the properties in 1893 to the father of the third defendant and put him in possession. The widow died in 1900. On her death, the heirs of her husband were the plaintiff and

the third defendant. Plaintiff instituted this suit for redemption. The third defendant pleaded among other things that as he and his father were in possession since 1893 under a sale from a mortgagee they had perfected their title by prescription against the plaintiff at the date of the suit. Article 134 of the Limitation Act was relied on. The District Munsif dismissed the suit on the ground that the legal representative of the original mortgagee was not impleaded. On appeal, the Subordinate Judge differed from the lower Court on this question and decreed the claim, holding that the suit was not barred by limitation. In Second Appeal, we called for a finding whether the father of the third defendant had knowledge of the decree obtained by the plaintiff in 1885 The finding is in the negative

We agree with the conclusion of the lower Appellate Court. It is true that the possession taken by the father of the third defendant, could have been perfected under article 134, as the property was sold to him by a mortgagee. But before twelve years were over, a new right accrued to the third defendant. He became the heir to the property with the plaintiff in 1900. The plaintiff, is entitled to say that when succession opened to him, a co-parcener of his was in possession and that that possession was not adverse to him unless and until he was excluded notoriously. If the third defendant wanted to rely upon his right as a purchaser from the mortgagee, he should have put that forward to the knowledge of the plaintiff. There are not many authorities bearing on the question.

In *Tarubai* v. *Venkata Rao*(1), BATTY, J., says: "In the second, when there has been no such ouster as to give notice of the adverse nature of the possession, it is incumbent on the person alleging that the title set up against him is barred by twelve years' adverse possession, to show, not only that his possession has lasted for twelve years, but that it has *all the time* been in open conflict with the title on which the plaintiff relies. The result is, as above indicated, if there has been no ouster or "open and notorious act of taking possession," then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so *irreconcilable with those claimable by the plaintiff*, as to give the plaintiff occasion

(1) (1903) I.L.R., 27 Bom., 43.

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SESHAGIRI AIYAR AND KUMARASWAMI SASTRIYAR, JJ.

to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) *throughout the twelve years next preceding the suit.*" The language of article 144 which speaks of possession "becoming adverse" supports this view. Reference may also be made to *Asanab Ravuthan* v. *Vamana Rau*(1) and *Moidin* v. *Oothumanganni*(2). The decision in *Ponnuswamy Iyer* v. *Permaye*(3) is in favour of this position. There is no doubt that possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim. The difficulty in this case arises from the fact that possession was hostile when it commenced. We have not been referred to any authority which shows that such a possession continues to be hostile notwithstanding the accrual of a *peaceful title* before the completion of the adverse possession. Possession should be *prima facie* attributed to a lawful title; we think the third defendant on the death of the widow must be deemed to have held the property on behalf of the plaintiff as well.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Srinivasa Ayyangar.

1915. September 24 and 28.

MURUGESA MUDALY AND TWO OTHERS (RESPONDENTS NOS. 2, 3 AND 5), PETITIONERS,

v.

RAMASAMI CHETTY (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3 and 8—Extension of time for paying mortgage amount only upon good cause—Non-passing of a fore-closure decree, not a good cause for extension—Civil Procedure Code (Act V of 1908), sec 115—No interference, even with an order passed without jurisdiction, if justice does not require.

Extension of time for payment of the mortgage amount due under a decree in suits instituted either by the mortgagor or the mortgagee can be given only where good cause is shown therefor and a party is not entitled to it as a matter of right, under Order XXXIV, rules 3 and 8, of the Code of Civil Procedure.

(1) (1878) I.L.R., 2 Mad., 223. (2) (1888) I.L.R., 11 Mad., 416.
(3) (1914) 16 M.L.T., 530.

* Civil Revision Petition No. 1076 of 1914.

MURUGESA MUDALY *v.* RAMASAMI CHETTY.

An extension of time cannot be granted on the sole ground that no order for foreclosure absolute has been passed.

The High Court is not bound to interfere in revision with an order for extension of time wrongly passed.

English practice referred to.

PETITION under section 115 of the Code of Civil Procedure praying the High Court to revise the order of G. R. SUBBARAYA AYYAR, the District Munsif of Dharmapuri, in Original Petition No. 563 of 1914 in Original Suit No. 28 of 1911.

The facts of the case appear from the judgment.

T. R. Ramachandra Ayyar for the petitioners.

Dr. S. Swaminathan for the respondent.

SRINIVASA AYYANGAR, J.

JUDGMENT.—This is an application to revise the order of the District Munsif of Dharmapuri extending the time fixed for payment of the mortgage money by a decree *nisi* in a suit for redemption by a puisne mortgagee. The Munsif thinks that the reasons given by the plaintiff in the suit for non-payment of the mortgage money within the time fixed were insufficient and unsatisfactory, but all the same he gave the extension prayed for on the ground that the plaintiff was entitled as a matter of right to redeem until there is a decree for foreclosure absolute even though the time fixed by the decree *nisi* had passed.

The power to extend the time for payment of the mortgage money is now regulated by Order XXXIV, rules 3 and 8, and under the rules, the Court can only extend the time upon good cause shown. This is in accordance with the settled practice in England. Even in cases where the mortgagee sues for foreclosure, extension of time for payment is not given as a matter of course, and the mortgagor is not entitled to redeem as of right after the time fixed for payment although no order for foreclosure absolute has been passed: see *Faulkner* v. *Bolton*(1), *Nanny* v. *Edwards*(2), *In re Parbola, Limited: Blackburn* v. *Parbola, Limited*(3), Seton on Judgments, page 1913 and Fisher on Mortgages, section 1958, and in suits by a mortgagor to redeem, the time for payment is not extended except in cases of accident or mistake. See *Novosielski* v. *Wakefield*(4) and *Collinson* v *Jeffery*(5). Inasmuch as the

(1) (1835) 7 Sim., 319. (2) (1827) 4 Russ., 124. (3) (1909) 2 Ch., 437.
(4) (1811) 17 Ves. J., 417. (5) (1896) 1 Ch., 64.

MURUGESA MUDALY v. RAMASAMI CHETTY.

SRINIVASA AYYANGAR, J.

lower Court extended the time for payment when it had no power to do so, this Court has power to interfere with the order in revision as one passed without jurisdiction; but I do not think that the justice of the case requires that I should interfere with the order.

The suit was instituted by the puisne mortgagee against the first mortgagee who had also purchased the equity of redemption. The puisne mortgagee, it is now settled, would be entitled to institute a suit for the sale of the property subject to the first mortgage: see *Mulla Vitti Seethi* v. *Achuthan Nair*(1). But at the time when the suit was instituted there was some doubt on the point and the puisne mortgagee seems to have instituted the suit for the redemption of the first mortgage and for sale of the whole of the mortgaged properties for the sums due on both the mortgages. At any rate that was the decree passed. The sum which the plaintiff had to deposit on account of the first mortgage was nearly Rs. 2,000, and he made the deposit within a month after the date fixed and he paid also interest on that sum at 12 per cent. The amount due to him was nearly Rs. 1,161, and it is reasonable to suppose that the mortgage property was worth considerably more than the amount due on the first mortgage. The first mortgagee suffers no hardship; while on the other hand, if I interfere with the order, the puisne mortgagee would lose the whole of the amount due to him. I therefore dismiss this petition, but under the circumstances without costs.

N.R.

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(1) (1911) 21 M.L.J., 213.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Phillips.

NARASAMMAL (PLAINTIFF), APPELLANT,

1915.
September
24 and 28.

v

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF TRICHINOPOLY
(DEFENDANT), RESPONDENT.*

Income-Tax Act (II of 1886), Part IV, sch. II, sec. 3, cl. (5)—Annuity in Mysore Province—Annuitant resident in British India—Remittance by agent to her in British India—'Income,' meaning of—Income, if taxable in British India.

Where a person was enjoying an annuity in Mysore Province, instalments of which were remitted by her agent to her while she was resident in British India, the remittances were "income" under Part IV of schedule II of the Income-Tax Act, and these sums were "received in British India" within the definition contained in section 3, clause (5), of the Act and therefore taxable.

SECOND APPEAL against the decree of C. KRISHNASWAMI RAO, the Subordinate Judge of Trichinopoly, in Appeal No. 296 of 1913, preferred against the decree of T. JIVAJI RAO, the District Munsif of Srirangam, in Original Suit No. 86 of 1912.

The facts of the case appear from the judgment.

C. S. Venkata Achariyar and *N. C. Vijayaraghavachariyar* for the appellant.

The Government Pleader for the Crown.

The following judgment of the Court was delivered by

SPENCER AND PHILLIPS, JJ.

SPENCER, J.—This appellant was enjoying an annuity in Mysore Province, instalments of which were remitted by her agent to her while she was resident in British India.

We agree with the Subordinate Judge that these remittances were "income" under Part IV of schedule II of the Income-Tax Act(1).

It is argued that after collection by the agent, the money ceased to be income, that the act of the agent in receiving the money in Mysore was tantamount to an act of the principal, and that having once been received in Mysore, it could not again be received in British India when the agent sent it on to

* Second Appeal No. 1017 of 1914. (1) Act II of 1886.

NARASAMMAL v. THE SECRETARY OF STATE FOR INDIA. — SPENCER AND PHILLIPS, JJ.

his principal. "Income" means "what comes in"—a def which will clearly embrace sums derived from a source lik and it is incontestable that in this case these sums were " ed in British India" within the definition in section 3, (5) of the Income-Tax Act(1), and were therefore taxable.

This second appeal is dismissed with costs.

K

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Phillips.

1915 September 28 and 29.

THE CROWN PROSECUTOR, APPELLANT,

v.

GOVINDARAJULU, ACCUSED.*

Madras City Police Act (III of 1888), sec. 75—Place of public resort, meani Madras harbour if, a place of public resort—Disorderly behaviour in h premises, if an offence under section 75—Public place, meaning of—R public to go, if necessary—Madras Port Trust Act (II of 1905), bye-la meaning of.

The Madras harbour is a place of public resort within the terms of se 75 of the Madras City Police Act.

Though the bye-laws passed under the Port Trust Act provide fo prosecution as trespassers of persons who enter the harbour premises wit having business there or with the ships lying in the harbour, yet the bye were not intended to exclude respectable members of the public who have freely allowed to enter the harbour premises.

A legal right of access by the public is not necessary to constitute a p place.

A public place is one where the public go, no matter whether they a right to go or not.

The Queen v. *Wellard* (1884) 14 Q.B.D., 63 followed.

Kiston v. *Ashe* (1899) 1 Q.B., 245 referred to.

APPEAL under section 417 of the Code of Criminal Proced (Act V of 1898) against the acquittal of the above-named accu by P. NARAYANA MENON, the Third Presidency Magistr Georgetown, Madras, in Calendar Case No. 6575 of 1915.

A complaint was preferred in the Presidency Magistrat Court against the accused in this case under section 75 of

(1) Act II of 1886

* Criminal Appeal No. 470 of 1915.

WHITTON v. MAMMAD MAISTRY

AYLING, J.

advance for which he is unable to supply labour or to prove that it has been legitimately expended.

On this reading, the conviction was justified, and also the direction which was passed on 18th November 1913, under section 35 on counter-petitioner's apprehension after release from the first term of imprisonment.

Admittedly this direction was not complied with; counter-petitioner promised to return the balance of money due, but failed to do so, or to do any more work.

Now what was the effect of this? The Act nowhere makes non-performance of a contract punishable in itself. Section 24 renders punishable three specified failures in connexion with a contract. It says: "Any maistry who (*a*) fails without sufficient cause to present himself at an estate upon the date specified in his contract; or (*b*) having contracted to remain upon an estate for a specified time fails without sufficient cause so to remain; or (*c*) fails to account for the money advanced to him by a planter in consideration of his contracting to supply labourers to work on an estate shall be punishable with imprisonment which may extend to three months or with fine which may amount to five hundred rupees or with both; and the Magistrate may award to the planter out of the fine such compensation as he may deem fit."

Section 35 runs thus: "On the expiry of any sentence of imprisonment on a maistry or labourer for any offence under this Act the maistry or labourer shall, if the planter or employer so requests, be produced before the Magistrate, who shall direct such maistry or labourer to complete the performance of his contract on pain of further prosecution and punishment in case of his refusal to do so, and no conviction under this Act or imprisonment under such conviction shall have the effect of releasing any maistry or labourer from the terms of his contract or labour contract, as the case may be.

"Provided that no such direction shall be given in the case of a labourer, if more than twelve months have elapsed since the date on which his original labour contract would have *determined.*"

We cannot take this as constituting disobedience of the contract a distinct offence, if only for the simple reason that no punishment is specified for it. Mr. Barton admits that the words

"on pain of further prosecution" can only be taken to refer to a fresh prosecution under section 24.

This is the view taken by the Magistrate who in Calendar Case No. 580 of 1914 has convicted counter-petitioner of the same offence under section 24 (c)—failure to account for the advance. The question is whether this was legal—or whether counter-petitioner was entitled to plead "autre-fois convict."

That the contract was still in force cannot, I think, be disputed. As already pointed out, petitioner had the option of extending the period for performance up to 20th December 1915, and section 35 itself provides that the previous conviction should not operate as a release.

Mr Barton in supporting the legality of the second conviction relies on two English cases—*Unwin* v. *Clarke*(1) and *Cutler* v. *Turner*(2)

Both these cases are of workmen absenting themselves from work contrary to the terms of a contract: and it is held that in such circumstances though the workman did not return to work after his first conviction and imprisonment, yet, as the contract continued, he was guilty of a fresh offence, and could be again convicted. The question is whether the principle of these rulings applies to a case of failure to account for an advance. After careful consideration I am inclined to think it does. The contract and with it the liability to account for the advance is still in force: and counter-petitioner is by the option of the employer given a fresh chance of accounting for it, in either of the ways in which he could have accounted for it originally. His failure to do so is just as much a fresh offence as the workman's failure to resume work in the English cases. I can find no valid ground of distinction.

No argument has been addressed to us to the contrary.

The conviction in Calendar Case No. 580 of 1914 was therefore correct: and there only remains the question of whether the Magistrate was justified in refusing the second direction. The wording of the section appears to leave him no option; and I can see nothing in the Act, which is opposed to the issue of repeated directions. I have carefully considered the judgment

(1) (1866) 1 Q B., 417. (2) (1874) 9 Q B., 502.

WHITTON v. MAMMAD MAISTRY. — AYLING, J.

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(1) (1866) 1 Q.B. 417. (2) (1874) 9 Q.B. 502.

WRITTON v. MAMMAD MAISTRY.

AYLING, J.

in *Re Panga Maistry*(1). I am not without some sympathy for the view which the learned Judge seems to have taken: but we have to construe the statute as it stands, and, with all respect, I am unable to agree that the Magistrate can issue only one direction. It seems to me unfortunate that the Magistrate is given no discretion regarding the issue of directions: and in this as in other respects, the Act seems to call for amendment. The Magistrate has of course discretion as to the imposition of punishment on conviction and would presumably exercise it where the Act was being vindictively used. But this is only a partial safeguard against the possibility of oppressive use of the section. As the law stands, in the present case, the Magistrate should have issued the direction: and I would now direct under section 423, Code of Criminal Procedure, that a direction should issue.

PHILLIPS, J.

PHILLIPS, J.—I need only add that I agree in the view taken by my learned brother of the meaning of section 35 of the Act. The section itself does not limit the number of directions to fulfil the contract that can be made, but it does say that action taken under the section does not put an end to the contract. If the contract is still in force there can undoubtedly be a fresh breach of such contract, and for each breach (coming within the provisions of section 24) the offender renders himself liable under section 35. This view is in accordance with the interpretation put upon similar statutes in England—*Unwin* v. *Clarke*(2) and *Cutler* v. *Turner*(3).

I therefore concur in the order proposed.

K.R.

(1) (1913) I.L.R., 36 Mad., 497. (2) (1866) 1 Q.B., 417.
(3) (1874) 9 Q.B., 502.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Phillips.

Re M. MUTHAYA (ACCUSED), PETITIONER.*

1915,
October 27.

Abkári Act (Madras Act I of 1886), ss. 56 and 64—Offence under section 56 not by licensee but by his depot-writer—Conviction, legality of.

Sections 64 and 56 of the Abkári Act (Madras Act I of 1886) should be read together and not only the licensee but also the actual offender is liable to prosecution for offences under section 56 of the Act.

Re Sudalaimuthu (1886) 1 Weir's Cr. R., 647, followed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of Rao Bahadur C. GOPALAN NAYAR, Sub-Divisional Magistrate of the Mangalore Division, in Criminal Appeal No. 100 of 1914, preferred against the judgment of M. ANANTAN NAYAR the Stationary Second-class Magistrate of Mangalore Taluk, in Calendar Case No. 301 of 1914.

The following facts of the case are taken from the judgment of the lower Appellate Court :—

" Appellant is the depot-keeper of Mulki and prosecution witness No 3, the shop-keeper's assistant of shop No. 4, Karaad. Prosecution witness No. 3 paid for two gallons of arrack and the depot-keeper issued arrack which was seized by the Sub-Inspector, prosecution witness No 1, on the road twenty-five yards away from the shop. The seals were intact and the arrack was measured and tested and found to be 1 gallon 45 drams of arrack of 32 1 strength, whereas the permit which accompanied it showed that the appellant sold only one gallon. The contents of the cask from which the arrack was sold, were tested and the strength was found to be 31 7.

" The Sub-Magistrate convicted the depot-keeper for not issuing a proper permit for transport of arrack. The shop-keeper's man (prosecution witness No. 3) paid for two gallons and got a gallon 45 drams and yet in the permit only one gallon is mentioned. The only inference is that diluted arrack was issued for sale to the public and a smaller quantity shown in the permit so that the excess issued may not be found out by reference to the accounts ".

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* *Criminal Revision Case No 261 of 1915* (Criminal Revision Petition No. 212 of 1915).

Re MUTHAYA.

The Appellate Court confirmed the conviction The accused thereupon preferred this revision petition.

K. Ramnath Shenai for the petitioner.

P. R. Grant for the Public Prosecutor for the Crown.

AYLING AND PHILLIPS, JJ.

The following Order of the Court was delivered by AYLING, J.—It is argued that petitioner being merely the depot writer and not the licensee, is not liable to prosecution under section 56 of the Abkāri Act. It has been held by a bench of this Court in an unreported case—*Re Sudalaimuthu*(1)—that sections 64 and 56 must be read together, and that not only the licensee, but the actual offender (in this case the petitioner) is liable to prosecution for an offence under section 56. Following this, we must reject petitioner's contention.

No other ground for interference is shown. The petition is dismissed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915
October 22
and
November 1.

RANGA AYYANGAR AND SIX OTHERS (PLAINTIFFS), APPELLANTS,

v.

NARAYANA CHARIAR *alias* CHAKRAVARTHI VIJAYA RAGHAVA CHARIAR AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), ss. 60, 67—93—Suit for redemption—Previous suit by mortgagee for sale—Decree for sale—Decree in favour of mortgagor as defendant, for redemption and recovery of possession in execution—Decree, not executed by mortgagee or mortgagor—Suit for redemption by mortgagor, maintainability of—*Res judicata.

Where a mortgagee sued for sale on a mortgage bond of 1861 and obtained a decree in 1872 which contained a provision, in favour of the mortgagor who was a defendant therein for redemption and recovery of possession of the mortgaged lands in execution of the decree but the decree was not executed by either party.

Held, that a fresh suit instituted by the mortgagor for redemption of the mortgage was barred by the rule of *res judicata*.

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(1) (1886) 1 Weir's Cr. R., 617.

* Second Appeal No. 329 of 1914.

Velayeratti v. Vallathe Valiya Raja (1902) I.L.R., 25 Mad., 390 (F.B.) and *Adiparanam Pillai v. Gopalasami Mudali* (1908) I.L.R., 31 Mad., 354, referred to

Rama v. Bhagchand (1915) I.L.R., 39 Bom., 41, dissented from.

SECOND APPEAL against the decree of D. VENKOBA RAO, the acting District Judge of Tanjore, in Appeal No. 750 of 1912, preferred against the decree of P. G. RAMA AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 473 of 1911.

The facts of the case appear from the judgment of SADASIVA AYYAR, J.

T. M. Krishnaswami Ayyar for the appellants Nos. 1—3 and 5—7.

C. V. Anantakrishna Ayyar and *R. R. Rangaswami Ayyangar* for the first respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiffs are the appellants. The first plaintiff's father, Sreenivasa Aiyangar, mortgaged the plaint properties with possession to the defendant's ancestor, Srinivasa Chariar in 1864. The Othi deed contained also a covenant by the mortgagor to pay the mortgage money personally. The defendant's ancestor brought a suit against Sreenivasa Aiyangar's sons in 1867, for recovery of the Othi amount of Rs. 136, on the charge of the mortgaged property. (The plaint itself was not filed in the records but the suit might be taken as having contained the usual prayers for sale on default and for recovery of the balance if any from the defendants therein to the extent of their ancestral properties.) In April 1872 the decree (Exhibit A) was passed, of which the operative portion is as follows:—

"The plaintiff obtain from the defendants the suit amount and all the costs of the suit, that the Othi property be sold in order to satisfy the decree in case the decree amount be not paid, within six months from this day, that the plaintiff is entitled to obtain interest on costs at 12 per cent per annum from this day and *that the defendants are entitled to obtain possession of the Othi land in execution through Court* (வசப்படுத்தி) after satisfying the decree."

This decree passed in favour of the present defendant's ancestor primarily but in which the present plaintiffs were also granted a right to redeem the property and to obtain the possession of it from the present defendant's ancestor in execution on payment of the amount decreed was not executed by

were passed. The decree (Exhibit A) as I said before gives the present plaintiffs who were the defendants in that suit a right to obtain possession of the plaint land through the Court in execution on condition of their satisfying the decree passed in the present defendant's (then plaintiff's) favour. In *Vedapuratti* v. *Vallabha Valiya Raja*(1), there occur several dicta in the long and exhaustive judgment of Sir BHASHYAM AYYANGAR, J. At page 301, he says "Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption there is in each a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the date fixed." "Decrees for specific performance, decrees respecting rights of easement and similar decrees are often made conditional but they are not the less final judgments, having the force of *res judicata*. This, I venture to state, is equally so under the English Law and all decrees whether conditional or unconditional are to be worked out and enforced in execution" I entirely and respectfully agree with these observations; no doubt the learned Judge was referring to decrees for sale and for redemption passed under the Transfer of Property Act, but his observations apply to this decree of 1872 also which contains a conditional decree in favour of the mortgagors for redemption though it was a mortgagee's suit for sale. In *Adipuranam Pillai* v. *Gopalasami Mudali*(2), the following passage occurs at page 360: "The reason on which is based the decision of the Full Bench in *Vedapuratti* v. *Vallabha Valiya Raja*(1) renders it at least doubtful *whether a suit for redemption could* be obtained by a mortgagor who has failed as defendant in a suit for sale on the same mortgage." It seems to me that the doubt so expressed is (if I may say so with respect) a very proper doubt and I think that the reasoning of the decision in *Vedapuratti* v. *Vallabha Valiya Raja*(1) does prevent a mortgagor who as defendant in the mortgagee's decree for sale got a conditional decree for redemption from afterwards maintaining a suit of his own for redemption and possession of the mortgaged property instead of executing the conditional decree for redemption passed in the first suit. A decree for redemption is almost invariably a conditional decree

(1) (1902) I.L.R., 25 Mad., 300. (2) (1908) I.L.R., 31 Mad., 354

RANGA AYYANGAR v. NARAYANA CHARIAR.

SADASIVA AYYAR, J.

whether it is passed in a mortgagee's suit for sale or a mortgagor's suit for redemption. No doubt where it is passed in a mortgagee's suit for sale, it is not usually passed on the invitation of the mortgagor (defendant) and in the language used in *Adipuranam Pillai* v. *Gopalasami Mudali*(1), "the defendant is a decree-holder in spite of himself, an involuntary decree-holder," but I do not see how this could on principle make any difference in the decision of the question whether the mortgagor-defendant who has been given such a decree is entitled only to execute that decree, or whether he is entitled to bring a fresh suit for redemption, despite the doctrine of *res judicata*. As I said before the decree of 1872 is a decree in favour of the mortgagor also, as it empowers him to recover possession of the property in execution. The legislature in Act IV of 1882 has enacted that decrees passed in mortgage suits whether brought by the mortgagor or mortgagee should (if necessary) be made to contain a direction that the mortgagee shall put the mortgagor in possession of the mortgaged property on the mortgagor, paying up the amount mentioned in the decree as due to the mortgagee. [See sections 86, 88 and 89 of the Transfer of Property Act now repealed by the Civil Procedure Code, which however re-enacts very similar provisions in Order XXXIV, rule 2, clause (c), rule 4, clause (1) and rule 5, clause (1) (c).] The decree of 1872 contains the same direction. Mr. Krishnaswami Ayyar laid much stress upon what he argued was a material difference between the language of section 60 of Act IV of 1882 which deals with the right of the mortgagor to redeem and the language of section 67 which refers to the right of mortgagee to obtain an order for foreclosure or sale. In section 67 the right of the mortgagee to obtain an order for foreclosure or sale is restricted to the period "before a decree has been made for the redemption of the mortgaged property." These words "before a decree has been made for the redemption of the mortgaged property" or the correlative words "before a decree has been made for sale of the property" do not appear in section 60. He therefore argued if I understood him aright, that a decree for sale in a mortgagee's suit, though it may also contain a decree for redemption in favour of the defendant-mortgagor does not bar a

(1) (1908) I.L.R., 31 Mad., 354 at p. 359.

separate suit by the mortgagor for redemption whereas a decree for redemption in a mortgagor's suit will bar a separate suit by the mortgagee for sale afterwards. I do not think that the insertion of the words "before a decree has been made for redemption of the mortgaged property" in section 67 and the absence of corresponding words in section 60 necessarily lead to any such conclusion as is contended for by the learned vakil. These words had to be inserted in section 67 in order to indicate that the power given under section 93 of the Transfer of Property Act to the mortgagee as defendant to apply for sale of the property in a mortgagor's suit for redemption *ought* to be exercised in the same suit by the defendant-mortgagee, if he wants a sale of the property for realizing his amount and that he could not reserve it for a fresh suit as an optional remedy which he might or might not take advantage of in the mortgagor's suit. It will be seen that under section 93, paragraph 2, Order XXXIV, rule 8, clause (1), the order for sale at the instance of the mortgagee-defendant is not an order passed as a part of the decree but an order passed on a separate application on the mortgagor (plaintiff) committing default whereas section 89 read with sections 86 and 88 makes the order for redemption in the defendant-mortgagor's favour in the mortgagee's suit for sale, a part of the original decree itself. So being made in the latter case a part of the decree itself, it was unnecessary to state in section 60 that when a decree has been made for redemption or for sale the mortgagor has no right to again redeem the mortgaged property. After the passing of such a decree, as is said, the right had been adjudicated upon in the suit itself, and has become *res judicata* whether the suit was a suit by the mortgagor for redemption or by the mortgagee for foreclosure or sale.

No doubt *Rama* v. *Bhaychand*(1) quoted by the appellant's learned vakil is in his favour. But with the greatest respect, I am unable to agree with that decision. As said in the critical notes in pages 7 and 8 of the Madras Law Journal, volume 29, in the words of section 11, Civil Procedure Code, has not the matter directly and substantially in issue in the second suit, viz., the plaintiff's right of redemption been in issue, and also heard and

(1) (1915) I.L.R., 39 Bom., 41

RANGA AYYANGAR v. NARAYANA CHARIAR.

SADASIVA AYYAR, J.

decided in the former suit? What new point, right or question has the Court to hear or decide in the second suit? It will be impossible to contend that for the application of the rule of *res judicata* to suits (as distinguished from issues) the persons should on both occasions be arrayed alike whether as the plaintiffs or as defendants." The mortgagor was entitled in the former suit itself (of the mortgagee) to redeem the property not only within the six months given in the decree to pay up the decree amount but he was entitled under the Civil Procedure Code [as decided in *Adipuranam Pillai* v. *Gopalsami Mudali*(1)] to pay it up even after the six months and at any time before a sale in execution and so prevent a sale. The Court need not be solicitous to help a negligent mortgagor at any cost. The fact that the mortgagee has to bring a suit for sale within twelve years of the date when the mortgage money became payable, whereas a mortgagor has got sixty years under article 148 for his suit for redemption is not a sufficient or logical ground for allowing the mortgagor to obtain a fresh decree for redemption in his own suit after he had obtained one decree already in the mortgagee's suit for sale.

In the result I would dismiss the Second Appeal with costs.

NAPIER, J.

NAPIER, J.—I agree. In *Vedapuratti* v. *Vallabha Valiya Raja*(2) the late CHIEF JUSTICE stated the proposition thus. The matter in issue in a redemption suit is aye or no: "*Is the mortgagor entitled to the decree which if he succeeds* the Court is required under section 92 to make?" In my view the same matter is in issue in a mortgagee's sale suit whether the suit be under English Law or the Transfer of Property Act and whatever difference in form has been made by the provisions in the new Code. In that view this suit is *res judicata* and the appeal must be dismissed.

K.R.

(1) (1908) I.L.R., 31 Mad., 354 at p. 359. (2) (1902) I.L.R., 25 Mad., 300.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1915, November 10, 11 and 15.

TERRIKULAPPA CHETTY (COUNTER-PETITIONER), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Plaintiff's right over the deposit—No charge for the decree-amount—Right of the Official Assignee.

When, on an application made by the plaintiff under Order XXXVIII, rule 5, of the Code of Civil Procedure for attachment before judgment of certain properties belonging to the defendant, the Court issued summons to the defendant to furnish security for a certain amount or to show cause against it and further ordered that certain goods belonging to the defendant should be attached until further notice, and the defendant paid into Court the amount specified in the summons but subsequently became an insolvent,

Held, that the plaintiff had no charge on the money paid into Court as against the Official Assignee of the insolvent.

APPEAL against the order of BAKEWELL, J., in the insolvency jurisdiction in Insolvency Petition No. 214 of 1913.

The material facts of the case appear from the judgment of WALLIS, C.J.

T. R. Venkatarama Sastriar and *P. Venkataramana Rao* for the appellant.

D. Chamier for the respondent.

WALLIS, C.J.—In this case the appellant took out a summons (Exhibit A) for attachment of certain properties before judgment under Order XXXVIII, rule 5, of the Code of Civil Procedure, and by the terms of the warrant to the sheriff (Exhibit B) the defendant was called upon either to furnish security for Rs. 4,150-5-0 or such other sum as may be found sufficient to satisfy the decree which may be passed against him or to show cause why he should not furnish security, and it was further ordered that the goods at his house should be attached until further notice. On this the bailiff returned that the defendant had paid Rs. 4,150-5-0 and that amount had been paid

* Original Side Appeal No. 115 of 1914.

Order in the new Code. *Sorabji Coovarji* v. *Kala Raghunath*(1) is the nearest approach to a decision in favour of the appellant. In that case the attachment was after decree and a sale was ordered. On that date the judgment-debtor satisfied the decree by paying money into Court. It was held that the applications for rateable distribution by the other decree-holders were infructuous, as the attachment ceased to exist by payment into Court. Speaking for myself, I am not sure whether the position taken by the learned Judges in the Bombay case is correct. However that may be, I am not prepared to extend the ruling to cases where the law directs that the security shall be at the disposal of the Court. The decision in *Re Pollard*(2) enunciates the true principle applicable to such cases. The sequestration under which the money was brought into Court in that case corresponds to attachment under our law. Lord Justice ROMER says: "In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on a specific part of the property To my mind these propositions are now free from doubt. Therefore, in an ordinary case like the present, the fact that the sequestrators had sequestrated money owing to the debtor by a banker would not give the creditor any right to say that the money was his property or that he had any special charge thereon." These observations apply *mutatis mutandis* to the present case. The first contention must therefore be overruled.

It was next argued that the appellant obtained priority by reason of the order of the 29th January which directed "that Rs. 2,000 be retained in Court pending the suit in view of the admission in paragraph 5 of the written statement." This is not an order in favour of the appellant or for payment to the credit of his suit. It was intended to enable the debtor to take away a portion of the money on certain conditions. The reservation of the Lords Justices in the case already cited would not apply to such an order. I agree in the order proposed by the learned Chief Justice.

Attorney for the respondent.—*P. Kandaswami.*

K.R.

(1) (1912) I.L.R., 36 Bom., 156. (2) (1903) 2 K.B., 41.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

1916.
February 23
and
March 15.

OTTAPURAKKAL THAZATH SUPPI AND TWO OTHERS (PETITIONERS IN CIVIL REVISION PETITION NO 772 OF 1912), APPELLANTS,

v.

SAYID ALABI MASHUR KOYAUNA KOYA KUNHI KOYA (RESPONDENT IN CIVIL REVISION PETITION NO. 772 OF 1912), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (r) and O XXXIX, r. 2, cl (3)—Interlocutory injunction, disobedience of—Order declining to arrest or attach property—Appealability—Petition to commit while suit pending—Order thereon after dismissal of suit, legality of—Imprisonment, order of, without first ordering attachment, illegal.

An appeal lies under Order XLIII, rule 1, clause (r) of the Civil Procedure Code (Act V of 1908), from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction and the Appellate Court can on appeal pass the order which the lower Court should have passed.

Where the injunction was disobeyed and the application to commit was put in while the suit was pending the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for the breach

The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment.

APPEAL under clause 15 of the Letters Patent against the judgment and order of OLDFIELD, J., in Letters Patent Appeal No. 10 of 1913, preferred against the judgment and order of MILLER, J., in Civil Revision Petition No. 772 of 1912, preferred against the order of S. G. ROBERTS, the District Judge of North Malabar, in Civil Miscellaneous Appeal No. 10 of 1912 against Civil Miscellaneous Petition No. 82 of 1911 in Original Suit No. 952 of 1909 on the file of L. R. ANANTHANARAYANA AYYAR, the District Munsif of Badagara.

The following facts of the case are taken from the judgment of OLDFIELD, J.—"The District Munsif granted a temporary injunction and the appellants as they eventually admitted, disobeyed

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* Letters Patent Appeal No. 315 of 1914.

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it. Whilst the suit was still pending and the injunction was still in force, the District Munsif was moved to deal with their disobedience, but at the request of the parties he adjourned the petition with the suit until the latter had been disposed of, when on the 30th September 1911 he dismissed it on the ground that whether or no disobedience had taken place the case was not one for punishment. On appeal the District Judge remanded it for readmission and disposal. The District Munsif then considered it sufficient to express his grave disapproval and order the appellants to pay the respondent's costs. The District Judge S. G. ROBERTS imprisoned the appellants for one month."

MILLER, J., declined to interfere on revision. Against this order, Letters Patent Appeal No. 100 of 1913 was preferred.

OLDFIELD and TYABJI, JJ., differed and the appeal was dismissed. Thereupon the present Letters Patent appeal was filed.

J. L Rosario for the appellants—Four questions arise: (1) Is there any appeal against an order refusing to commit under Order XXXIX, rule 2 (3)? (2) If there be an appeal, has the Appellate Court power to pass an order under rule 2 (3)? (3) Can either the first Court or the Appellate Court pass an order under rule 2 (3) in this case? (4) Can the Court pass an order for committal without directing an attachment? Before dealing with these questions a preliminary question arises whether the power given under rule 2 (3) is in the nature of a provision for punishment for disobedience or in order to enforce obedience to the injunction.

Under Order XXXIX, rule 2, clause (3), the power was intended to be exercised for enforcing obedience of the injunction —the wording of that clause makes this clear. It may be said that by omitting the words "may be enforced" which appear in section 493 of the old Code the legislature intended that under rule 2 (3) the power was to be exercised by way of punishment; but if sub-rules (3) and (4) be examined it will be found that the power is to be exercised only when the injunction is in force; for clause (4) says that the attachment is to remain in force for one year only; at the end of which time if the disobedience continue the property is to be sold, etc. [illegible] the attachment is to be by way of punishment why should the [illegible]'e at the end of the year be dependent on the disobedience [illegible]inuing? So also why should the Court have power in

the case of committal to direct release of the offender before expiry of the term of punishment? Both these circumstances point to the fact that the power was to be exercised to enforce obedience. In this case the injunction had been dissolved by dismissal of the suit before the Munsif passed his order refusing to commit. There was therefore no injunction in force which the party was bound to obey. Further it is curious that this power is given under rule 2 (3). There is no similar provision for disobedience of an injunction granted under Order XXXIX, rule 1. Under the old Code, section 493, clause(3), applied to both sections expressly and that express provision has been taken away from the corresponding provision under the new Code. If this provision be one of a punitive nature, why this difference?

Order XLIII, rule 1 (*r*), provides for an appeal against orders passed under Order XXXIX, rules 1, 2, 4 and 10, and the argument is that this being an order under rule 2 (3) is an order under rule 2 and therefore appealable. Here again rules 1 and 2 say that the Court may "by order" grant the injunction —the words "by order" do not appear in sub-rule (3). Why is this?

Further section 104 (1) (*h*) gives an appeal in cases of orders directing the arrest or detention in the civil prison of any person, and an order passed under this section is final under section 104 (2). If therefore any appeal is allowed against an order of committal under Order XXXIX, rule 2 (3), and the Appellate Court passes an order for arrest or detention, that order is final, and the party aggrieved has no appeal. Why should there be this anomaly?

Section 107 lays down the powers of an Appellate Court, and those powers are subject to such conditions and limitations as may be prescribed. Under Order XXXIX, rule 2 (3), the power to pass the order of committal is vested in the Court granting the injunction, and it has been held can only be exercised by that Court alone. Therefore the power of the Appellate Court is limited thereby, and this is only in consonance with the view that the Court against which the contempt has been committed is the best judge as to how its authority can be vindicated. Reading the Appellate Court's powers in this way would obviate the anomaly referred to above.

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This depends on the question whether the power is punitive. If it is not but is intended only for the enforcement of the injunction, then as there was no injunction to be obeyed at the date when the Munsif passed the order no such order could be made.

The language of sub-rule (3) shows that the Court can only order committal in conjunction with an order for attachment—power is not given to order attachment—or arrest and committal or both And this strengthens the view that the power given is not intended as punitive but as one intended to compel obedience.

A. Sundaram for the respondent —An appeal lies even from an order *refusing* to arrest. see *Lachmi Narain* v. *Ramcharan Das*(1). Compare *Venkatasami* v. *Stridevamma*(2). The change of wording in the new Code does not show any real departure from the old Code The Code gives an Appellate Court all the powers of the First Court and it passes only the order which the First Court should have passed. The Code which gives the power to punish contempts does not say that it ceases on failure of suit. The Code has given the Court both the powers and in the absence of any express provision to the contrary, "imprisonment" can be ordered before or along with "attachment."

WALLIS, C J

WALLIS, C J —The main question in this appeal is whether under Order XLIII, rule 1 (*r*), an appeal lay to the District Court from the refusal of the District Munsif to take action under Order XXXIX, rule 2 (3), for an alleged breach of a temporary injunction granted under Order XXXIX, rule 2 (2). It is quite clear that an appeal lay in a similar case under section 94 of Act VIII of 1859, and also under section 588 (24) of the Code of 1882 which corresponds to Order XLIII, rule 1 (*r*), and that such appeals lay not only from orders in exercise of the powers conferred by the section but also from orders refusing to exercise such powers. It is also clear that refusal by the Court to take action on the breach of an injunction might seriously prejudice the party in whose favour the injunction had been granted, and it is said to be unlikely that the legislature intended to affect such right of appeal when it recast the language of section 493 of the old Code when

(1) (1913) I.L.R., 35 All., 425. (2) (1887) I.L.R., 10 Mad., 179.

re-enacting it in the present Code. The alteration is that, whereas in section 493 it was provided generally that in case of disobedience the injunction might be enforced by imprisonment or attachment, it is provided in Order XXXIX, rule 2 (3), that the Court granting the injunction may order the attachment or imprisonment; and it is said that these words constitute a prescribed limitation under section 107 of the power which the Appellate Court would otherwise have under that section to pass the order which might have been passed by the Court of First Instance. In support of this contention attention was called to section 104 (*h*) which provides for an appeal from an order under any of the provisions of the Code imposing fine or detention otherwise than in the execution of a decree and to the provision in section 104 (2) that no appeal shall lie from any order passed in appeal under this section, which by virtue of sub-section (1) (*h*) includes orders made on appeal under Order XLIII, rule 1 (*r*), and it was suggested that the alteration in Order XXXIX, rule 2 (3), was introduced to prevent an order of imprisonment being made by the Appellate Court from which there is no further appeal under the section. If, however, this was the object of alteration, it goes further than was necessary, as the rule would equally prohibit appeals from a refusal to order attachment. Further if it had been desired to restrict the right of appeal from orders under Order XXXIX, rule 2, in this way, nothing would have been easier than to say so expressly in Order XLIII, rule 1 (*r*), which is the provision dealing with appeals from orders under the rule in question instead of in Order XXXIX, rule 2, which deals with original orders. It is not in my opinion permissible to read the words "the Court granting the injunction" as restricting the right of appeal, unless they would otherwise have no effect, whereas they may have the effect of preventing original applications in respect of breaches of the injunction being made to any other Court than that which granted the injunction, as for instance in the case of the injunction having been granted by the original Court and the breach having occurred after an appeal had been preferred or possibly after the case had been transferred.

As regards the other points taken, whereas here, the injunction was disobeyed and the application to commit was put in while the suit was pending but the order was made after the suit was dismissed, that does not in my opinion affect the powers of the

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Court to take action for the breach. Lastly, there is in my opinion no foundation for the contention that the Court can only make an order of imprisonment after an order of attachment.

I am therefore of opinion that the appeal lay to the District Judge and that he had the jurisdiction to pass the order. Mr. Justice MILLER has refused to revise that order and I am not prepared in this case to interfere in appeal with the exercise of his discretion. In the result the appeal is dismissed with costs

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I agree.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—Three points are raised by Mr. Rosario in this appeal: (1) that no appeal lies from the order of the District Munsif declining to order arrest or attachment of property for disobedience of an interlocutory injunction, (2) that when the Appellate Court interfered the injunction had ceased to exist by reason of the dismissal of the suit in the first Court, and (3) that the Court had no right to order arrest and imprisonment without first ordering attachment of property.

General jurisdiction to make interlocutory orders in pending suits is conferred by section 94 of the Code. Detailed provision for the exercise of such jurisdiction is to be found in Orders XXXVIII, XXXIX and XL. Order XXXIX relates to interlocutory injunctions. General jurisdiction to entertain appeals from orders is conferred by section 104 of the Code. Order XLIII, rule 1, makes provision for appeals from orders made under rules as provided for in clause (1) of section 104. Under clause (r) of rule 1 of Order XLIII, an appeal is allowed from an order under rule 2. The injunction in the present case was granted under Order XXXIX, rule 2, by the District Munsif. The application for arrest and attachment was also made under clause (3) of rule 2 to the Court which granted the injunction (i.e., the Munsif). The order in question passed by the Munsif declining to order arrest or attachment under clause (3) of rule 2 is obviously an order under rule 2 and would therefore be appealable. But it was argued that the introduction of the words "the Court which granted the injunction" in clause (3) of rule 2 showed that an order under that clause can only be passed by the Court which granted the injunction and no other Court even in appeal can do so. This construction ignores the fundamental rule that an Appellate Court only passes the order which the first Court should have passed. In many cases applications are made and

in all cases suits filed in trial Court whose duty it is to pass orders or make decrees. And in appeals where the Appellate Courts interfere they only pass such orders as the first Court should have passed (section 107, Civil Procedure Code). The introduction of the words "the Court which granted the injunction" in the new Code—words which are not to be found in the corresponding section 493 of the old Code—is merely due to the change in the method of drafting. It is to be observed that the words "may be enforced" found in section 493 have been omitted in the corresponding rule and the omission has necessitated the re-drafting of the rule in the form in which it now stands An order for attachment of the property or imprisonments of the person of a party guilty of disobedience of an injunction is not strictly speaking *enforcing the order of injunction.* It is really a punishment for past disobedience. That was probably the reason for the omission of the words. Full scope can be given to the words "Court granting the injunction" by construing them as applicable to the original petition. For example if an injunction is granted by an Appellate Court, pending an appeal from a decree, the application to enforce that injunction in the case of breach could be made only to the Appellate Court. For in that case the trial Court before whom no action is pending would not be in a position to entertain an application. That must be the result even under the old Code. It is clear that disobedience of an order of injunction passed in appeal could not be punished by the Court which tried the suit as section 36 or 37 corresponding to section 649 of the old Code does not apply. Where the business of one Court is transferred to another, the Court to which the business is so transferred may, I think under section 150, entertain an original application for attachment or arrest under clause (3) of rule 2 of Order XXXIX. Attention was drawn to section 104 which provides an appeal in cases of fine and imprisonments. That provision was made *in the body of the Code* in analogy to the similar provision in Judicature Act of 1894 (which allows an appeal without leave in all cases where the liberty of the subject is concerned) to prevent the right being taken away by rules passed by superior Courts by virtue of their rule-making power. In the absence of such a provision in the body of the Code it would be possible for the High Courts after consulting the Rule Committee to abolish the right of

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appeal in the cases provided for by Order XLIII, rule 1, including orders under Order XXXVIII, rule 4, and Order XXXIX, rule 2, clause (3). The argument of Mr. Rosario, if correct, leads to this result. That an order passed by the first Court for attachment of the property and its sale is not appealable as also orders declining to commit or attach property. In England it is now settled that an appeal lies in cases where the first Court declines to order committal or sequestration of property [see *Jarmain* v. *Chatterton*(1)], though of course the Appellate Court would not ordinarily interfere with the "discretion exercised by the first Court."

The view which I have set forth above is fully supported by a passage in High on injunctions, section 1431, where the learned author says. "An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as contempt, notwithstanding such appeal. And an appeal from an injunctional order does not deprive the Court granting the writ, of the right to punish for contempt for its violation and the lower Court and not the reviewing Court is the proper tribunal to entertain such proceeding. Where the Court of Appeals of the State has jurisdiction to grant a supersedeas to an order of an inferior Court dissolving an injunction and defendants after the granting of such supersedeas proceed to the commission of the act forbidden by the injunction such action is a contempt of the Court of Appeals and may be punished upon proceedings in that Court."

As regards the second question, the breach of the injunction occurred when the injunction was in force and also when the application was made. The dissolution of the injunction owing to the dismissal of the action which happened long after the application could in no way excuse the party who had already disobeyed it: see *Eastern Trust Company* v. *McKenzie Mann & Co., Ltd.* (2).

As to the third point, I think in spite of the difference in the language the meaning is the same. The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment. Mr. Rosario's contention leads to this result. That the Court has power to order attachment alone or

(1) (1882) 20 Ch.D., 493. (2) (1915) A.C., 750.

attachment and imprisonment but not imprisonment alone. It is to be observed that the contention is not that it is only if the attachment proves infructious in compelling future obedience, the writ of committal is to be issued. In England the usual order in cases of disobedience of an injunction by natural persons is attachment of the person or committal; while sequestration is the usual order passed in cases of disobedience by corporations (see Oswald on Contempt, page 223). The former practice seems to have been that unless there was a previous issue of *a writ of attachment* sequestration will not issue but now attachment and sequestration may issue concurrently. I therefore agree to the order proposed.

C.M.N.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1915. August 2 and 3.

PADMA KRISHNA CHETTIAR *alias* KRISHNA IYER (DEFENDANT), PETITIONER,

v.

NAGAMANI AMMAL (PLAINTIFF), RESPONDENT.*

Promissory note by guardian of minor, not signing as such, whether binding on minor's estate—Negotiable Instruments Act (XXVI of 1881), ss. 28 and 30, scope of.

A negotiable instrument executed by the guardian of a Hindu minor for purposes binding on the minor is enforceable against the minor's estate though the instrument was not signed by the executant in his capacity as guardian. The minor is not personally liable on the instrument

The case is governed by the principles of Hindu Law and sections 28 and 30 of the Negotiable Instruments Act (XXVI of 1881) are not applicable.

Subramania Aiyar v. *Arumuga Chetty* (1903) I.L.R., 26 Mad., 330, followed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Small Cause Suit No. 692 of 1913.

The facts of the case appear from the judgment.

K. Bhashyam Ayyangar for the appellant.

T. R. Venkatarama Sastriyar, *V. S. Govindachariyar* and *V. S. Kallabhiran Ayyangar* for the respondent.

* Civil Revision Petition No. 879 of 1913.

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appeal in the cases provided for by Order XLIII, rule 1, including orders under Order XXXVIII, rule 4, and Order XXXIX, rule 2, clause (3). The argument of Mr. Rosario, if correct, leads to this result. That an order passed by the first Court for attachment of the property and its sale is not appealable as also orders declining to commit or attach property. In England it is now settled that an appeal lies in cases where the first Court *declines to order committal or sequestration of property* [see *Jarmain* v. *Chatterton*(1)], though of course the Appellate Court would not ordinarily interfere with the "discretion exercised by the first Court."

The view which I have set forth above is fully supported by a passage in High on *injunctions, section 1431, where the* learned author says. "An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as contempt, notwithstanding such appeal. And an appeal from an injunctional order does not deprive the Court granting the writ, of the right to punish for contempt for its violation and the lower Court and not the reviewing Court is the proper tribunal to entertain such proceeding. Where the Court of Appeals of the State has jurisdiction to grant a supersedeas to an order of an inferior Court dissolving an injunction and defendants after the granting of such supersedeas proceed to the commission of the act forbidden by the injunction such action is a contempt of the Court of Appeals and may be punished upon proceedings in that Court."

As regards the second question, the breach of the injunction occurred when the injunction was in *force and also when the* application was made. The dissolution of *the injunction owing* to the dismissal of the action which happened long after the application could in no way excuse the party who had already disobeyed it: see *Eastern Trust Company* v. *McKenzie Mann & Co., Ltd.* (2).

As to the third point, I think in spite of the difference in the language the meaning is the same. The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance *to attach and then only* order imprisonment. Mr. Rosario's contention leads to this result. That the Court has power to order attachment alone or

(1) (1882) 20 Ch D., 493. (2) (1915) A.C., 750.

the finding of the Subordinate Judge that the debt was contracted by the mother in her capacity as guardian.

As we are not hampered by any legislative provision regarding documents executed on behalf of a minor, we must be guided by the principles of Hindu law in deciding such cases. The true test regarding the binding nature of a guardian's contract was laid down in the well-known case—*Hunoomanpersaud Panday* v. *Mussumut Babooee Munraj Koonweree*(1). Even where the relationship of principal and agent was found to exist in transactions entered into by managers of Hindu families, it was decided by a Full Bench of this Court that section 28 of the Negotiable Instruments Act did not affect the liability of the junior members. The true principle is that where the validity of a transaction has to be looked at from two standpoints, each of them should be regarded as supplementing the other. The doctrine of Hindu law is not to be ignored because a contract coming under its purview is also regulated by another provision of law. The decision in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*(2) does not differ from the ruling in *Krishna Aiyar* v. *Krishnasami Aiyar*(3). On the other hand the decision in *Subramania Aiyar* v. *Arumuga Chetty*(4) is directly in point Mr. Bhashyam Ayyangar sought to distinguish this case on the ground that the claim in it was for the debt evidenced by the note and not on the note itself. We do not think this distinction has any substance. Moreover, paragraph 4 of the plaint in this case refers to the binding character of the debt: vide *Sobhanadri Appa Rao* v. *Sriramulu*(5). We must, therefore, hold that the estate of the minor is liable for the debt.

We think the decree of the Court below must be modified, as there can be no personal decree against the defendant: *Sanka Krishna Murthi* v. *The Bank of Burma*(6).

Subject to modification the Civil Revision Petition will be dismissed with costs.

S.V.

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(1) (1856) 6 M.I.A., 393. (2) (1907) I.L.R., 30 Mad., 88.
(3) (1900) I.L.R., 23 Mad., 597. (4) (1903) I.L.R., 26 Mad., 330.
(5) (1894) I.L.R., 17 Mad., 221. (6) (1912) I.L.R., 35 Mad., 692.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr Justice Napier.

1915. August 4, 5 and 10.

KRISHNAN KIDAVU (MEPPAT PARKUM ANANDRAVAN) AND ELEVEN OTHERS (DEFENDANTS Nos. 2, 3 AND 8 TO 17), APPELLANTS,

v

RAMAN *alias* PUTHALATHUNNAVAL SHYLED KOTAKKAT PAÑIKKAR AND SIX OTHERS (PLAINTIFF AND DEFENDANTS Nos 1, 4 TO 7 AND 19), RESPONDENTS.*

Malabar tarwad—Karnavan becoming a stani—Succeeding karnavan incapable of business management—Karar vesting management in stani—Renewal of an otti deed by karnavan, validity of.

Per SESHAGIRI AYYAR, J.—(NAPIER, J., *dubitante*):—An arrangement among the members of a Malabar tarwad by which a previous *karnavan* who had become a *stani* was given certain specific powers of management in respect of the tarwad, without any express power to obtain renewals of mortgages in favour of the tarwad, does not deprive the actual *karnavan* however incapable he may be, of the power of renewing usufructuary mortgages in favour of the tarwad The renewal being binding on the members of the tarwad, they cannot set up adverse possession but must submit to a redemption by the mortgagor

The relation to the tarwad of a member who had become a *stani* discussed.

Chappan Nayar v *Assen Kutti* (1889) I.L.R., 12 Mad., 219, doubted.

SECOND APPEAL against the decree of M. G. KRISHNA RAO, the Subordinate Judge of Tellicherry, in Appeal No. 316 of 1912, preferred against the decree of K. GOPALAN NAYAR, the District Munsif of Quilandi, in Original Suit No. 348 of 1911.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J.

C. V. Anantakrishna Ayyar for the appellants.

C. Madhavan Nayar and *J. L. Rosario* for the first respondents.

V. Ramadas for the second respondent.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The facts of this case are not in dispute. Defendants Nos. 1 to 17 are members of a Malabar tarwad. The first defendant is the karnavan. The eighteenth defendant was the karnavan before him. This tarwad along with four others possesses three stanams. Succession to the stanams is by seniority. The eighteenth defendant became a stani. He was then succeeded in the karnavanship by the

* Second Appeal No. 1584 of 1914

first defendant. It was found that he was not capable of managing the tarwad affairs. Thereupon, he (the first defendant), the eighteenth defendant, the previous karnavan and the senior female member entered into a karar (Exhibit I) on the 12th May 1884. It is said there were other members. They were not parties to the karar.

Mr. Anantakrishna Ayyar says that they were all minors. The effect of the karar is to vest the management in the eighteenth defendant, although he was no longer a member of the tarwad. At the time of the karar, the defendant's tarwad had obtained an otti deed of the properties in suit from the predecessor in title of the plaintiff. This was in 1817 (Exhibit B) and the money was payable twelve years after. It is not disputed that the time for the redemption of this otti had not expired when Exhibit I was entered into. In March 1890 after the eighteenth defendant had been given the rights of management, the first defendant obtained a renewal of Exhibit B. It is exhibit A in this case. The plaintiff brings this suit for redemption. The plea of the defendants is that at the time of Exhibit A the first defendant had no right to obtain the renewal on behalf of the tarwad Consequently it did not affect the rights of the tarwad, and as plaintiff's right to redeem would be barred but for Exhibit A, the defendant's tarwad had acquired a title by prescription to the property. The Subordinate Judge held that Exhibit I did not deprive the first defendant of his right to obtain a renewal and decreed the plaintiff's claim. Hence this second appeal. The question is not free from difficulty; but after giving my very careful consideration to it, I have come to the conclusion that the lower Appellate Court is right.

Before dealing with the construction of Exhibit I, I may dispose of some of the contentions raised by Mr. Rozario for the respondents in support of the decree of the Subordinate Judge. The learned vakil contended that as the karar was entered into only by two of the members of the family with a person who ceased to belong to it by virtue of his having attained to one of the stanams, it had not the sanctity which attaches to family karars in Malabar. I am not satisfied that this position is correct. In *Ratinbarkara Cullabhan Chassan Rajah* v. *Kamabarma*(1) I had to examine the relationships to the tarwad of a

(1) (1916) 28 M.L.J., 669.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr Justice Napier.

1915, August 4, 5 and 10

KRISHNAN KIDAVU (MEPPAT PARKUM ANANDRAVAN) AND ELEVEN OTHERS (DEFENDANTS Nos. 2, 3 AND 8 TO 17), APPELLANTS,

v

RAMAN *alias* PUTHALATHUNNAVAL SHYLED KOTAKKAT PANIKKAR AND SIX OTHERS (PLAINTIFF AND DEFENDANTS Nos 1, 4 TO 7 AND 19), RESPONDENTS.*

Malabar tarwad—Karnavan *becoming a* stani—*Succeeding* karnavan *incapable of business management*—Karar *vesting management in* stani—*Renewal of an* otti *deed by* karnavan, *validity of*

Per SESHAGIRI AYYAR, J.—(NAPIER, J., *dubitante*) —An arrangement among the members of a Malabar tarwad by which a previous *karnavan* who had become a *stani* was given certain specific powers of management in respect of the tarwad, without any express power to obtain renewals of mortgages in favour of the tarwad, does not deprive the actual *karnavan* however incapable he may be, of the power of renewing usufructuary mortgages in favour of the tarwad The renewal being binding on the members of the tarwad, they cannot set up adverse possession but must submit to a redemption by the mortgagor

The relation to the tarwad of a member who had become a *stani* discussed.

Chappan Nayar v *Assen Kutti* (1889) I L R, 12 Mad, 219, doubted.

SECOND APPEAL against the decree of M. G. KRISHNA RAO, the Subordinate Judge of Tellicherry, in Appeal No. 316 of 1912, preferred against the decree of K. GOPALAN NAYAR, the District Munsif of Quilandi, in Original Suit No. 348 of 1911.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J.

C. V. Anantakrishna Ayyar for the appellants.

C. Madhavan Nayar and *J. L. Rosario* for the first respondents.

V. Ramadas for the second respondent.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The facts of this case are not in dispute. Defendants Nos. 1 to 17 are members of a Malabar tarwad. The first defendant is the karnavan. The eighteenth defendant was the karnavan before him. This tarwad along with four others possesses three stanams. Succession *to the* stanams is by seniority. The eighteenth defendant became a stani. He was then succeeded in the karnavanship by the

* Second Appeal No. 1184 of 1914

gave the management to the eighteenth defendant [illegible] ceased to be a member of the tarwad, it did not deprive [illegible] first defendant of any of his rights.

The main contention related to the construction to be placed on Exhibit I. In the first place, it must be noted that the document is not a renunciation of rights by the first defendant, but one which confers rights on the eighteenth defendant. Where specific powers are delegated it is against all rules of construction to sweep in other powers by general words appearing in the document. See *Rooke* v. *Lord Kensington*(1). Moreover the powers must be *generis* with those already [illegible] if the general authorization is regarded as granting powers other than those already enumerated.

It is a well-settled rule of law that powers of attorney [illegible] be strictly construed: *per* Lord MACNAUGHTEN in *Bryant, Powis and Byant, Limited* v. *La Banque du Peuple*(2). In *Harper* v. *Godsell*(3), BLACKBURN, J., points out that general words [illegible] rowing should be restricted to matters *ejusdem generis* [illegible] already stated. These are the words of the learned Judge [illegible] special terms of the first part of the power prevent the [illegible] words from having an unrestricted general effect. The [illegible] of the general words is cut down by the context in [illegible] with the ordinary rule of *ejusdem generis*." Every word [illegible] proposition applies to the facts before us. The Court [illegible] in affirming the judgment of FARWELL, J., laid down [illegible] proposition in *Jacobs v. Morris*(4). In the present [illegible] first paragraph of Exhibit I says that the eighteenth [illegible] ant "should look after the management as [illegible] Paragraph No 2 expressly deals with the granting [illegible] tenants and the obtaining of renewals from them [illegible] refer to renewals from janmis in favour of the [illegible] third paragraph relates to the collection of rent, [illegible] of receipts and to the maintenance of the members [illegible] In paragraph No. 4, there is a provision for paying [illegible] sum of money to the first defendant so long [illegible] karnavan. It is in this paragraph the clause [illegible] Mr. Anantakrishna Ayyar strongly relied. [illegible] "that except receiving the said account towards [illegible]

(1) (1856) 25 L.J., Ch., 795.
(2) (1893) [illegible]
(3) (1870) L.R., 5 Q.B., 422.
(4) (1902) [illegible]

KRISHNAN KIDAVU v. RAMAN

SESHAGIRI AYYAR, J.

and remaining quiet No. 2 should not interfere with the tarwad properties or with the affairs (thereof) beyond what was settled in the second paragraph." Paragraph 5 which deals with powers to conduct litigation speaks only of "getting properties surrendered, of collecting varam and pattam, etc." The right to obtain a *melcharth* is not covered by any of the above clauses. The very general words about the first defendant not interfering with tarwad properties should not be construed either as conferring powers on the eighteenth defendant other than those specifically mentioned or as taking away *from the first defendant* what he has not expressly granted to the agent. Having regard to the fact that the appointment of the eighteenth defendant was necessitated because of the supposed incapacity of the first defendant to manage the affairs, there was no reason for conferring on him the rights to obtain a renewal from a janmi which requires no special capacity to get it. In my opinion the general clause, even on the principle that it should confer all those powers which are *ejusdem generis* with those specified should not be read as authorizing the first defendant to obtain a renewal from the janmi. In this view, I think the first defendant had authority to obtain the renewal, and the attempt of the other defendants to defeat the janmi's right cannot be upheld; after having acquiesced in his act they have neither justice nor law on their side to support their contention. The suit to redeem is within time. The Second Appeal must therefore be dismissed with costs. Time for redemption is extended by three months from this date

NAPIER, J.

NAPIER, J.—I have had and still have doubts whether any powers to deal with the property were reserved to the karnavan under the karar but my doubts are not strong enough to make me dissent from the conclusion arrived at by my learned brother. I therefore agree that the appeal be dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

VARADARAJA MUDALI (RESPONDENT, JUDGMENT-DEBTOR), APPELLANT,

v.

MURUGESAM PILLAI AND FOUR OTHERS (FIRST RESPONDENT AND HIS MINOR SONS), RESPONDENTS *

1915, August 16 and 19.

(*Indian*) *Limitation Act (IX of* 1908), *art* 182—*Interpretation, principle of—Execution application—Article* 182, *clause* (6)—*Notice, issue of, whether, gives a fresh starting point.*

Article 182 of the Limitation Act should receive a fair and liberal but not too technical a construction, so as to enable the decree-holder to obtain the fruits of his decree.

The issue of notice referred to in clause (6) of article 182 of the Act need not be in respect of an application made in accordance with law. The words "in accordance with law" found in clause (5) should not be introduced into clause (6) when the legislature has not thought fit to do so.

Jamna Dut v *Bishnath Singh* (1909) 6 A L.J, 944 and *Deo Narain Singh* v. *Sri Bhagwat Naik* (1911) 10 I C, 411, followed.

A decision especially on procedure cannot be treated as *res judicata* when that procedure itself is changed by the Statute Law

APPEAL against the decree of H. O. D. HARDING, the District Judge of Trichinopoly, in Appeal No 632 of 1912, preferred against the decree of S SUBBAYYA SASTRI, the District Munsif of Namakkal, in Execution Petition No. 812 of 1912, the Original Suit No. 253 of 1894, on the file of K. RAMACHANDRA AYYAR, the District Munsif of Trichinopoly.

One of the applications for execution filed by the respondent who had obtained a money decree against the appellant on 7th March 1896, was on 13th September 1905, upon which notice was issued to the appellant on 22nd September 1905; but the petition was afterwards dismissed. Thereafter another petition for execution was filed on 4th March 1908 and the same was dismissed by the District Munsif as barred by limitation on the ground that the petition of 13th September 1905 was not one in accordance with law On appeal the District Judge reversed the same and remanded the application for disposal on merits. Against that the judgment-debtor filed the present appeal.

* Appeal against Appellate Order No 67 of 1914.

VARADARAJA MUDALI v. MURUGESAM PILLAI. —— SADASIVA AYYAR, J.

T. R. Venkatarama Sastriyar for the appellant.

K. S. Ganesa Ayyar for the respondents.

SADASIVA AYYAR, J.—The judgment-debtor is the appellant. His learned vakil T. R. Venkatarama Sastriyar has raised two contentions in his arguments before us, those two contentions being—

(*a*) that the application in execution made by the decree-holder dated 4th March 1908 was barred by limitation, and

(*b*) that the relief prayed for in that application could not be granted to the decree-holder, the matter *being res judicata* against the decree-holders by reason of a prior execution petition, dated 13th September 1905, praying for the same relief having been dismissed on the ground that by section 99 of the Transfer of Property Act the decree-holder could not bring to sale the attached property subject to the decree-holder's own mortgage in execution of the money decree, though that decree was obtained on a cause of action other than the mortgage document. (Some other contentions suggested before us need not be noticed as they have not been raised in the grounds mentioned in the memorandum or on decree of appeal.)

Contention (*a*) on the question of limitation is based on the argument that the application of 13th September 1905 was not in accordance with law as it prayed for a relief which could not be legally granted by the Court and that an application not in accordance with law cannot furnish a fresh starting point of limitation as the expression used in clause (5) of article 182 of the Limitation Act is the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order."

But the learned District Judge does not rely on clause (5) of article 182 but on clause (6) of the same article. Mr. Venkatarama Sastriyar, therefore, further argued that clause (6) though it used the wide phrase "the date of issue of notice to person against whom execution is applied for to show cause why the decree should not be executed against him" must be confined to the date of the issue of such notice *in respect of an execution application made in accordance with law* and ought not to be extended to the date of issue of notice in respect of an application not in accordance with law. (The execution petition of 1905 was dated 13th September 1905 and the date of the

issue of such notice seems to have been about a week later. I see no sufficient reason why the words " in accordance with law " found in clause (5), should be introduced into clause (6) when the legislature has not thought fit to do so. Mr. Venkatarama Sastriyar argued that if those words are not introduced the mere issue of a notice in respect of an execution petition which is itself barred by limitation might be contended to give a fresh starting point for limitation. The answer to this objection is that a fresh starting point can be given to a right to sue or to apply only when the right had not become barred on the date of the alleged fresh starting point and that a right to sue or to apply once barred by limitation cannot be revived. This was the answer made to a similar argument addressed for the judgment-debtor in *Jamna Dut* v. *Bishnath Singh*(1).

Next it was argued that the issue of notice in respect of an execution application not made to the proper Court might be contended to give a fresh starting point of limitation if the clause was given too wide an interpretation. The answer to the question is that an application made to a Court having no jurisdiction will be treated as waste paper and the notice issued on such an application by such a Court is also of no value in the eye of the law.

Article 182 should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. That the language of the article ought not to be strained in the judgment-debtor's favour has been held in numerous cases which are quoted at page 470 of Rustomjee's Book on Limitation.

In *Deo Narain Singh* v. *Sri Bhagwat Naik*(2), MOOKERJEE and CASPERSZ, JJ., held that the issue of a notice under section 248 of the old Civil Procedure Code was sufficient to save a decree from the bar of limitation under the old article 179 corresponding to present article 182 even though it was issued upon an application which was not in accordance with law.

In *Kamakshi Pillai* v. *Ramasamy Pillai*(3), MILLER and MUNRO, JJ., held the same view following *Nagi Reddi* v. *Subba*

(1) (1903) 6 A.L.J., 944. (2) (1911) 10 I.C., 411.
(3) (1908) 18 M.L.J., 14.

VARADARAJA MUDALI v. MURUGESAM PILLAI — SADASIVA AYYAR, J.

Reddi(1) and *Pachiappa Achari* v. *Poojali Seenan*(2). I am prepared to follow these two decisions and the decision in *Jamna Dut* v. *Bishnath Singh*(3), as the dangers alleged to arise by giving too wide an interpretation to clause (6) are not real dangers as I have already tried to point out. *Kamakshi Pillai* v. *Ramasamy Pillai*(4) does not expressly refer to clause (5) of article 179 of the old Code corresponding to clause (6) of the present article 182 and in some of the other cases quoted before us, the application for issue of notice was itself treated as a step in aid of execution so as to fall under clause (4) of article 179 of the old Code [corresponding to clause (5) of article 182 of the new Limitation Act]. However, the decisions in *Deo Narain Singh* v. *Sri Bhagwat Nath*(5) and *Jamna Dut* v. *Bishnath Singh*(3) refer to clause (5) of article 179 and are direct authorities which as I said I shall follow. I would therefore overrule the first contention as to limitation.

As regards *res judicata*, the dismissal of the earlier application of 1905 was based on the then existing law of procedure when properties are sought to be brought to sale after they are attached subject to a mortgage in the decree-holder's own favour A decision especially on a question of procedure cannot be treated as *res judicata* when that procedure itself is changed by the Statute Law , where substantive rights are decided in an order passed in execution proceedings, such decision is, no doubt, *res judicata* in subsequent execution applications: see *Vyapuri Goundan* v. *Chidambara Mudaliar*(6). The only judicial determination on the application of 1905 was that on the procedure law as it then stood, the decree-holder could not pursue the line of remedy which he then wanted to follow. The new remedy in execution given by the new statute created a new right to apply in execution for the remedy formerly disallowed and the dismissal of a former application on the ground that there was then no right to apply for that particular line of remedy cannot be *res judicata* when the new right to apply is relied on. A plaintiff can maintain a suit on a new cause of action which did not exist when he brought a former

(1) Civil Miscellaneous Second Appeal No. 87 of 1905.
(2) (1905) I.L.R., 28 Mad., 557.
(3) (1909) 6 A.L.J., 914.
(4) (1903) 18 M.L.J., 14.
(5) (1911) 10 I.C., 411.
(6) (1914) I.L.R., 37 Mad., 311.

suit for the same relief though that suit was dismissed on the ground that the plaintiff was not entitled to that relief on the cause of action on which he based it. A decree-holder can, therefore, it seems to me, similarly maintain an application for a new line of remedy granted by a new statute even though his former application for the same relief had been rejected before his right to the new relief arose. As was said by the Privy Council in *Amanat Bibi* v. *Imdad Hussain*(1): "But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right, merely because *at an earlier date*" (1853) "he may have had no right to the property at all?" (The respondent had brought a former suit for possession basing his right on an alleged proprietorship right created in 1853 and had failed in that suit) "The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit."

Let us again take a case where the brother of the husband of a childless Hindu widow sued during her lifetime for recovery of property in her hands on the ground that he and her husband were undivided in interest and she took an unlawful possession of the property and his suit was dismissed on the ground that he and his brother were divided in interest and the properties sued for belonged to his brother solely. If after the dismissal of such a suit, the widow conveyed the properties to him and he again sued for possession on the strength of that conveyance, his new claim cannot surely be defeated by the plea of *res judicata*. I see no difference in principle whether the second suit or application is based on a new cause of action or on a new right created in the plaintiff or applicant by new Statute law. The whole question has been elaborately considered by Sir V. BHASHYAM AYYANGAR, J., in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(2) and it is difficult to add anything useful to the considerations mentioned in his judgment as to the principles to be applied by a Court in coming to a decision on the plea of *res judicata*. [I would however just refer to the two cases — *Alimunnissa Chowdhurani* v. *Shama Charan Roy*(3) and *Baij Nath Goenka* v. *Padmanand Singh*(4) — in which it was held that a fresh suit

(1) (1888) 15 I.A., 106 at pp. 111 and 112.
(2) (1903) I.L.R., 26 Mad., 760. (3) (1905) I.L.R., 32 Calc., 749.
(4) (1912) I.L.R., 39 Calc., 848

VARADARAJA MUDALI v. MURUGESAM PILLAI.

NAPIER, J.

or application will lie even though a former suit or application of a similar nature was decided on an erroneous *view of the law* between the same parties]

I would, in the result, dismiss the appeal with costs.

NAPIER, J.—I agree.

S V.

APPELLATE CRIMINAL.

Before Mr. Justice Tyabji and Mr. Justice Phillips.

1915 August 26.

Re SUBBARAYA CHETTI (ACCUSED IN CALENDAR CASE No 242 OF 1915 ON THE FILE OF R. SARANGAPANI, THE STATIONARY SECOND-CLASS MAGISTRATE OF PALLADAM).*

Criminal Procedure Code (Act V of 1898), ss. 110 and 167—Proceedings under section 110—Power to remand under section 167.

In proceedings under section 110 of the Code of Criminal Procedure (Act V of 1898) the Magistrate has no power to remand an accused person to custody. Section 167 of the Code applies to proceedings under Chapter XIV and not to those undr section 110.

Emperor v. Basya (1903) 5 Bom. L.R., 27, referred to

CASE referred by A. R. CUMMING, the District Magistrate of Coimbatore, for orders of the High Court under section 438, Criminal Procedure Code (Act V of 1898).

Facts appear from the following letter of reference:—

"I have the honour to submit the following case for the orders of the High Court under section 438, Criminal Procedure Code:—

"One Subbaraya Chetti aged twenty years was arrested on suspicion by the police at Dharapuram on the 30th of March 1915 with a view to his being put up before the Sub-Divisional Magistrate, Erode, for being bound over to be of good behaviour under section 11, Criminal Procedure Code. On the 31st of the month the accused was produced before the Stationary Sub-Magistrate, Dharapuram, with a request that he should be remanded for four days for production before the Sub-Divisional Magistrate, Erode. The Stationary Sub-Magistrate accordingly remanded him till 3rd April 1915 On the afternoon of the same day, the Sub-Inspector of Police reported

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* Criminal Revision Case No. 410 of 1915 (Referred Case No. 46 of 1915).

to the Sub-Divisional Magistrate, Erode, through the Stationary Sub-Magistrate, Dharapuram, that witnesses from various parts had to be summoned to identify the accused and requested therefore that he should be remanded for ten days and retained in the sub-jail at Dharapuram instead of being taken to Erode. This report was received by the Stationary Sub-Magistrate at 4-30 P.M. and he remanded the accused accordingly in anticipation of orders and reported the fact to the Sub-Divisional Magistrate, Erode, for approval.

"On the 10th April the accused and one Annappillai who was also under remand in connection with a riot case were handed over to the police with orders to produce them before the Sub-Divisional Magistrate, Erode, on the 12th On the morning of the 11th the two escorting constables and the two accused arrived at Tiruppur on their way to Erode, and took their meals in a hotel When the constables were settling their accounts, etc., with the hotel-keeper the accused Subbaraya Chetti bolted. One of the constables pursued him but was not able to arrest him.

"About midnight on 11th April 1915 two constables of the Tiruppur station who were going on patrol duty saw some carts on the road, and suspecting that the accused of whose escape from custody they had already heard might be in one of them, started examining each cart. Just then a man jumped out of one of the carriages and ran away. The constables ran after him and arrested him and finding him to be the absconding accused, produced him before the officer in charge of the Police station at Tiruppur who charged the accused with an offence under section 225-B, Indian Penal Code, before the Stationary Sub-Magistrate, Palladam. The Stationary Sub-Magistrate found him guilty of the offence and sentenced him to rigorous imprisonment for six months on 21st May 1915 and committed him to the Central Jail, Coimbatore.

"Proceedings under section 110 (f), Criminal Procedure Code, were subsequently taken against Subbaraya Chetti and one Govinda Chetti and the Sub Divisional Magistrate, Erode, bound them over to be of good behaviour for one year and ordered them each to execute bonds in Rs. 100 with one surety for similar sum.

"I doubt the legality of the conviction of Subbaraya Chetti by the Stationary Sub-Magistrate, Palladam, for the following reasons:—

(i) The Stationary Sub-Magistrate, Dharapuram, had no power to remand the accused to custody and keep him in the sub-jail as a

Re SIRBARAYA CHETTI

prisoner with a view to proceedings being taken against him under section 110, Criminal Procedure Code

(ii) The remand and therefore the custody being illegal, the escape from custody was not illegal and so not an offence under section 225-B, Indian Penal Code, and consider that it should be set aside.

"Pending final orders of the High Court I have ordered the release of the accused on bail.

"The records of the cases are submitted duly indexed."

M. H. Hakeem for *the Public Prosecutor* for the Crown.

The accused did not appear either in person or by pleader.

The following Order of the Court was delivered by

TYABJI AND PHILLIPS, JJ.

TYABJI, J.—The Magistrate's Court had no power to remand the accused. Section 167 of the Criminal Procedure Code applies to proceedings under Chapter XIV and not to those under section 110; *Emperor* v. *Basya*(1). The conviction is therefore set aside and the bail bonds cancelled.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Coutts Trotter.

1915. July 16, 23 and 26 and August 27.

KARRI RAMAYYA AND OTHERS (DEFENDANTS Nos. 4 AND 5), APPELLANTS,

v.

VILLOORI JAGANNADHAN AND NINE OTHERS (PLAINTIFFS AND DEFENDANTS Nos 1, 3 AND 6 to 11), RESPONDENTS.*

(Madras) Proprietary Estates Village-service Act (II of 1894), ss. 5 and 10, cl. (2) —Service inam*—Emoluments, partition of, whether prohibited—Alienation, validity of—Subsequent suit for ejectment—Transfer of Property Act (IV of 1882), sec. 43—Ancestral property—Property inherited by maternal grandsons—Interests, nature of*

The enfranchisement of a service *inam* under section 10, clause (2) of the (Madras) Proprietary Estates Village-service Act (II of 1894) does not destroy the rights of any member of a joint family who has a hereditary interest in it.

The alienation of a service *inam* is void and though it is subsequently enfranchised, the alienee cannot invoke the aid of section 43 of the Transfer of Property Act in his favour.

(1) (1903) 5 Bom. L.R., 27.

* Second Appeal No. 1036 of 1912.

Ramasami Naik v. *Ramasami Chetty* (1907) I.L.R., 30 Mad., 255, *Narahari Sahu* v. *Siva Kosthan Naidu* (1913) M.W.N., 415 and *Bachu Ramayya* v. *Phara Satchi* (1913) M.W.N., 999, referred to

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Property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest by birth according to the Mitakshara law.

Cases reviewed

SECOND APPEAL against the decree of V. V. S. AVADHANI, the temporary Subordinate Judge of Vizagapatam, in Appeal No. 475 of 1911, preferred against the decree of T. SOMA RAO PANTULU, the District Munsif of Vizagapatam, in Original Suit No. 108 of 1910.

The facts of the case appear from the judgment.

Honourable Rao Bahadur *B. N. Sarma* for the appellants.

V. Ramesam for the first respondent.

The following judgment of the Court was delivered by

SPENCER AND COUTTS TROTTER, JJ.

SPENCER, J.—The suit was brought for the partition of a *bariki* service inam which was enfranchised in 1905 in the name of the first defendant. The contesting defendants were the purchasers from the first defendant and three of his sons by a sale deed executed in 1906. The plaintiff was a purchaser from the first defendant's elder son and two of his brothers in 1909. The brother's share in the joint family property being two-thirds and the first defendant's son's being one-fifteenth, the claim of the plaintiff was to recover eleven-fifteenths of the whole inam. He got a decree accordingly in the first Court which was confirmed in appeal.

The first question now raised is whether the defendants Nos. 2 and 3 had a saleable interest prior to enfranchisement. The short answer to this is that the sale, through Exhibit B, having been executed on 21st September 1909 subsequent to the enfranchisement, passed all the rights which they then possessed. There was a previous agreement to sell in 1906 which does not affect the question. At that date Chellamma, the mother of defendants Nos. 1 to 3, was, it is suggested, alive. The Subordinate Judge found that she died five or six years ago which comes to about 1906 or 1907. If she was alive at the time of the sale, it is argued that the defendants Nos. 2 and 3 had no right to convey the shares which were still in the holding of their mother. If the finding of the Subordinate Judge is correct, as

RAMAYYA v. JAGANNADHAN. SPENCER AND COUTTS TROTTER, JJ.

we must assume it to be, Chellamma was certainly not alive at the date of the sale in 1909. But reliance is placed on section 10, clause (2) of Madras Act II of 1894 which runs as follows:—

"The succession to all hereditary village offices shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India."

It is contended that this provision takes away the rights of any persons who claim any joint interest in the emoluments of the office. When the lands were enfranchised exclusively in the name of the first defendant after he had succeeded to the *barik* appointment as the daughter's son of the original male holder, it is contended that none of his brothers retained any interest therein.

We are clearly of opinion that the effect of enfranchisement is not to destroy the rights of any members of a joint family which has a hereditary interest in the inam.

This question was fully considered in *Gunnaiyan* v. *Kamatchi Ayyar*(1), and the conclusion arrived at was, that service inams which are enfranchised are impressed in the hands of the registered holder with the same character as if they had devolved upon him as ordinary property independently of the hereditary office and the registered owner will hold them as joint family property liable to partition. Section 10, clause (2) of Madras Act II of 1894, in terms, deals with the succession to village offices which it declares to be governed by the rule of primogeniture. There is nothing in the wording of the section to affect the family title to the lands which form the emoluments of the office, although in cases where the property gets into the hands of a stranger the Act contains provision for its recovery. Such was the case dealt with in *Venkata* v. *Rama*(2). The subsequent decision in *Gunnaiyan* v. *Kamatchi Ayyar*(1) places the rights of the members of a joint family claiming an interest to a hereditary village office on a sound footing. In the present case the history of the dealings of this family with the lands to which the lower Courts have referred does not admit of any question being raised at this stage as to the hereditary nature of the inam and the mirasi rights which the family possessed in it nor can we consider what the rights

(1) (1903) I.L.R., 26 Mad., 339. (2) (1885) I.L.R., 8 Mad., 249.

of the parties would be if the family had been divided when the succession opened as there was no evidence or admission of division and the point has not been taken in the memorandum of Second Appeal.

The next question that has been raised is whether property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest at birth according to the Mitakshara law. If this question is answered in the negative, the first defendant's son, who is the seventh defendant, had no right to sell a one-fifteenth share to the contesting respondents and all that they can rightly claim is the two-thirds share of the defendants Nos. 2 and 3. This question was definitely answered in the affirmative in *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar*(1), and the same question was answered in the negative in *Jamna Prasad* v. *Ram Partap*(2), and it is apparent from the notes to paragraph 275 in the seventh and eighth editions of Mayne's Hindu Law and Usage, that the learned author and editor felt doubts as to the correctness of the Madras decision. We have been asked to refer the matter to a Full Bench. But we do not consider that this case is of sufficient importance to warrant a reference, or that the state of the law is really in any uncertainty, so far as this Court is concerned.

It was pointed out by the learned Judges of the Allahabad High Court that, where the word "ancestral" (estate) is used in Colebrook's Mitakshara, the correct translation is grand-paternal and the word in the original text is "paternal grandfather's." They proceeded to discuss the meaning of the words "ancestral property" and decided that in the Mitakshara they were used in the limited sense of "property in which the sons acquire by birth a joint interest with their father"; and they observed: "It is a well-known rule of the Mitakshara law that property may be joint property without having been ancestral." They thus interpret the use, by the Privy Council, of the words "ancestral property" in *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu*(3) in the broad sense of property of a joint family to which the rule of survivorship applies.

In *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(4), the question again arose as to what might be regarded as ancestral

(1) (1904) I.L.R., 27 Mad., 382. (2) (1907) I.L.R., 29 All., 667.
(3) (1902) I.L.R., 25 Mad., 678. (4) (1904) I.L.R., 27 Mad., 300.

RAMAYYA v. JAGANNADHAN.

SPENCER AND COUTTS TROTTER, JJ.

property, and the Full Bench observed: "Under the Mitakshara joint family system there can be no joint family property in respect of which the male issue of the joint owners will not by birth become joint owners with their father: see *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1). If, therefore, we are to understand the expression 'ancestral property' in their Lordships' judgment otherwise than in its technical sense, according to which it is property in which a son on his birth becomes an equal owner with his father, the result of the ruling will be that a species of joint family property unknown to the Mitakshara will be brought into existence." Similar observations occur in *Munuswami Chetty* v *Maruthammal*(2) which was also a case decided by a Full Bench. It is urged that these observations are of the nature of *obiter dicta*. They may not have been necessary for the decision of the points arising in those cases, but they are sufficient to indicate a clear trend of decision by this Court in only one direction and that is in favour of grandsons taking an interest at birth in property which descends from their maternal grandfather. The Full Bench also supported their opinion by reference to certain texts in which a daughter's son is treated as being as good as a son's son for spiritual purposes. The earlier decisions in *Muttayan Chetti* v. *Sivagiri Zamindar*(3) and in *Sivaganga Zamindar* v. *Lakshmana*(4), cannot be allowed to influence our decision, seeing that they were considered and discussed in the Full Bench decision—*Karuppai Nachiar* v. *Sankaranarayanan Chetty*(5)—to which we have referred. Again it is argued that a later decision of the Privy Council in *Arar Singh* v. *Thakar Singh*(6) throws light on what they meant by the use of the word "ancestral" but we think that as their Lordships were here dealing with a case of Punjab customary law it would not be right to give the expressions employed the significance that they might otherwise bear.

The next argument put forward on behalf of the appellants is that they are entitled to remain in possession under a mortgage deed, dated 12th April 1900, until the mortgage is redeemed.

(1) (1902) I.L R, 25 Mad, 149 at pp. 155 and 156.
[illegible]
[illegible] Mad., 168
[illegible] 35 Calc., 1039

This question was not raised in the written statement, nor was there any issue on the point. It is sufficient answer to this contention to say that section 5 of Madras Act III of 1895 makes it unlawful to alienate the emoluments of village offices or to encumber them in any manner whatsoever, and it was held in *Narabari Sahu* v. *Siva Korithan Naidu*(1) and in *Bachu Ramayya* v. *Phara Satchi*(2) that the alienation of a service inam was wholly void and that though the inam was at a later date, enfranchised, the alienee could not invoke section 43 of the Transfer of Property Act in his favour. These decisions follow the decision in *Ramasami Naik* v. *Ramasami Chetti*(3) and make it clear that the appellants cannot set up any right on the strength of their usufructuary mortgage as against the purchasers under a valid sale deed.

The last contention is that Rs. 10 was the figure arrived at as the mesne profits of the total holding and that, therefore, the plaintiff should not have been given a decree for mesne profits of more than eleven-fifteenths of this sum. The District Munsif stated that the plaintiff claimed at the rate of Rs. 10 a year and that the contesting defendants did not object to it, and he found accordingly that Rs. 10 a year was the sum to which the plaintiff was entitled. The appellants cannot be allowed to raise the contention that by this finding of fact the District Munsif meant that the profits from the whole holding were only Rs 10.

The Second Appeal is, therefore, dismissed with costs.

S V.

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(1) (1913) M.W.N., 415.
(2) (1913) M.W N., 999
(3) (1907) I.L R. 30 Mad., 255.

ARUNACHELLAM CHETTIAR v. LAKSHMANA AYYAR.

COUTTS TROTTER AND PHILLIPS, JJ.

force and that section 14 of the Limitation Act expressly preserves his rights Section 14 of the Limitation Act is as follows:—"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence, another suit whether in a Court of First Instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it." It may be conceded for the purposes of this case, though it is not altogether clear, that there is no express finding against the plaintiff that he did not prosecute his suit in the other Court with due diligence The question then arises whether section 14 preserves his rights in a case where his suit has not been dismissed by the tribunal, but has been voluntarily abandoned by himself on discovery of a technical defect which would involve a failure. The matter is not free from difficulty and it has been decided in *Varajlal* v. *Shomeshwar* (1) that the section in question of the Limitation Act has no application to a case of withdrawal of the suit and can apply only to cases where the failure of the suit was due to the action of the Court The same result has been arrived at by the Calcutta High Court—*Upendra Nath Nag Chowdhury* v. *Surya Kanta Ray Chowdhury*(2). These are quite clear authorities for the position advanced by the respondent and we think they should be followed, particularly, when it is seen that by so construing the section of the Limitation Act there is no conflict between the two sections and no necessity to adopt a forced construction in order to reconcile them. If we treat the section of the Limitation Act as unconcerned with suits which are voluntarily abandoned or withdrawn, the sections do not need reconciling as each deals with a separate subject-matter. The Limitation Act deals with suits which are terminated by the action of the Court while the Civil Procedure Code deals, as the heading of the order shows, with cases where suits are withdrawn or abandoned by a voluntary act of the plaintiff.

We think that the appeal fails and should be dismissed with costs.

S.V.

(1) (1905) I.L.R., 29 Bom., 219 (2) (1913) 20 I.C., 205.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1915. September 20, 22 and 24

R. M. M. S. T. VYRAVAN CHETTY *alias* SOMASUNDARAM CHETTY (DEFENDANT IN ALL), APPELLANT IN APPEALS NOS 303 AND 304 OF 1913 AND RESPONDENT IN SECOND APPEAL NO. 1873 OF 1913,

v.

SRIMATH DEIVASIKAMANI NATARAJA DESIKAR (MATATHIPATHI, TIRUVANNAMALAI ADHINAM) (PLAINTIFF IN ALL), RESPONDENT IN APPEALS NOS. 303 AND 304 OF 1913 AND APPELLANT IN SECOND APPEAL NO. 1873 OF 1913 *.

Lessor and lessee—Suit for rent—Unliquidated claim for damages which has become barred—Equitable set-off, whether available, if possession disturbed.

In a suit by the lessor for rent, it is not open to the lessee to set up by way of equitable set-off an unliquidated claim for damages which was barred at the date of the suit.

English case law reviewed.

APPEALS against the decrees of T. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Rāmnād at Madura, in Original Suits Nos. 42 of 1913 and 90 of 1911; and Second Appeal against the decree of A. C. DUTT, the District Judge of Rāmnād at Madura, in Appeal No. 585 of 1911, preferred against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Rāmnād at Madura, in Original Suit No. 154 of 1910.

The father of the defendant obtained from the predecessor in title of the plaintiff in these suits a lease of certain villages for 18 faslis, from fasli 1306 to 1323. The rent for faslis 1318 and 1319 was not paid and when sued for the same the defendant set up by way of equitable set-off a claim for damages owing to disturbance of his possession in faslis 1313 and 1314. The lower court disallowed the set off on the ground that the claim thereto was barred by limitation on the date of the suit.

K. Srinivasa Ayyangar and *A. Krishnaswami Ayyar* for the appellant in Appeals Nos. 303 and 304 of 1913 and respondent in Second Appeal No 1873 of 1913.

* Appeals Nos 303 and 304 of 1913 and Second Appeal No. 1873 of 1913.

VYRAVAN CHETTY v. SRINATH DEIVASIKAMANI NATARAJA DESIKAR.

S. Venkatachariyar for the appellant in Second Appeal No. 1873 of 1913 and the respondent in Appeals Nos. 303 and 304 of 1913

WALLIS, C.J.

WALLIS, C.J.—The appellant in these cases when sued for rent in respect of faslis 1318 and 1319 set up by way of equitable set-off a claim against his lessor the plaintiff in respect of disturbance of possession in faslis 1313 and 1314. It is well settled in this Court that claims for unliquidated damages may be raised by way of equitable set-off if they arise out of the same transaction as the plaintiff's cause of action, but I cannot agree that in a case like this such claim can be so set up even if it was barred at the date of the suit. It would certainly not be equitable or in accordance with the equitable principle administered by the Court of Chancery to allow the provisions of the statute of limitations to be evaded in this way. The authorities are referred to in the judgment of my learned brother which I have had the advantages of reading. If *Chidambara Mudaliar* v. *Krishnaswami Pillai*(1) is inconsistent with the view, I am unable with great respect to follow it. As regards the present case the defendant was in full possession and enjoyment for the faslis in respect of which rent is sued for. Cross-claims on account as between mortgagor and mortgagee, trustee and *cestui que* trust and the like stand on a different footing and I do not wish my observations to be taken as applicable to such cases. Otherwise I agree in the order proposed by my learned brother.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The point for decision in these appeals is whether in a suit by the lessor for rent it is open to the lessee to plead by way of set-off an unliquidated claim for damages which has become barred by limitation arising from obstruction to quiet enjoyment in previous years. My answer is in the negative. Under Order VII, rule 6 of the Code of Civil Procedure, a set-off is not permissible if the money is not legally recoverable. This would include all unsustainable claims whether barred by limitation or otherwise. It is no doubt true that this rule applies in terms only to what is known as legal set-off. Although in this country it has been held in numerous cases that the Code of Civil Procedure does not prevent the defendant from claiming an equitable set-off in

(1) (1915) 28 M.L.J., 285.

respect of unliquidated damages claimable in connection with the transaction on which the suit is brought, I think that on the principle that equity follows the law, the plea will be available only in respect of sums legally recoverable. Lord NORTH states the principle very clearly in *Fitton* v. *Com' Macclesfield*(1): "For when the legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar." Lord REDESDALE in *Hovendon* v. *Lord Annesley*(2) expresses himself with equal clearness. "It is said that Courts of Equity are not within the Statutes of Limitations . . . I think it is a mistake in point of language to say that Courts of Equity act merely by analogy to the statutes, they act in obedience to them.

* * *

"I think, therefore, Courts of Equity are bound to yield obedience to the Statute of Limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions." The Indian legislature, it seems to me, has recognized this in Order XX, rule 19 of the Code of Civil Procedure. Clause (1) of that rule regards the claim to set-off as a plaint in a cross suit, and provides for a decree in favour of the defendant. Clause (3) says that this rule is applicable to the plea set-off under rule 6 of Order VIII or otherwise, thereby indicating that equitable set-off is also within the rule I am therefore of opinion that as the defendant's claim was barred by limitation, the plea of equitable set-off was not open to him. An exception to this rule has been recognized in some cases. Where there is a fiduciary relationship between the parties as in the case of trustee and *cestui que* trust and there is accountability even barred claims may be taken into account in passing the final accounts. This exception has been extended in some of the decided cases in India to mortgages, presumably on the ground that there is accountability between the parties. See *Parasurama Pattar* v. *Venkatachallam Pattar*(3), *Chidambara Mudaliar* v.

(1) (1684) 1 Vernon, 287; s.c., 23 E.R., 474.
(2) (1806) Sch. & Lef., 630.
(3) (1913) 25 M.L.J., 661.

VYRAVAN CHETTY v. SRINATH DEIVASIKAMANI NATARAJA DESIKAR.

SESHAGIRI AYYAR, J.

Krishnaswami Pillai(1) and *Ramdhari Singh* v. *Permanund Singh*(2). It is not necessary to say now whether these cases have been rightly decided. I see no reason for extending the exception to suits between a lessor and a lessee.

Regarding the memorandum of objections, we hink that the defendant is only entitled to simple interest at 9 per cent, but not to compound interest. The plaintiff is entitled to interest at 6 per cent on the arrears of rent due to him from the dates on which they fell due. We are also of opinion that the defendant is not entitled to interest on the sum of Rs. 5,130 found in the previous litigation to be binding on the mutt, prior to the death of Thandavaroya Desikar. The decree must be modified by awarding interest only from fasli 1312. These conclusions are applicable to Second Appeal No. 1873 of 1913. Subject to this modification, the Second Appeal is dismissed. Parties will pay and receive proportionate costs in the memorandum of objections to the two appeals and in the Second Appeal.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr Justice Phillips.

1915. October 25 and 27.

Re G. G JEREMIAH (PETITIONER—ACCUSED), APPELLANT.*

European British subject—Summary trial outside British India by Justice of Peace—Jurisdiction—Criminal Procedure Code (Act V of 1898), sec. 530.

The orders of the Governor-General in Council regulating the powers of the Justice of Peace beyond the limits of British India confer no power on a District Magistrate to try offenders summarily under section 260 of the Code of Criminal Procedure (Act V of 1898).

APPEAL against the order of A. R. Cox, the District Magistrate and Justice of the Peace of the Civil and Military Station of Bangalore, in Calendar Case No. 5 J.P. and petition under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of the said Magistrate in the said case.

(1) (1910) 20 M.L.J., 295. (2) (1913) 16 C.W.N., 1183.

* Criminal Appeal No. 497 of 1915 (Criminal Revision Petition No. 400 of 1915).

The facts of the case appear from the judgment.

Hon. Mr. *L. A. Govindaraghava Ayyar* for the appellant (accused).

The Acting Public Prosecutor for the Crown.

The following judgment of the Court was delivered by

AYLING AND PHILLIPS, JJ.

AYLING J.—Appellant, a European British subject, has been convicted by the District Magistrate of Bangalore, who is a Justice of the Peace, of an offence under section 8 of the Municipal by-law after a summary trial under section 260 of the Code of Criminal Procedure.

Mr. Govindaraghava Ayyar argues in his behalf that the Magistrate's proceedings are void under section 530 of the Code of Criminal Procedure inasmuch as the District Magistrate is not empowered to try a European British subject summarily. This appears to be so.

The Criminal Procedure Code does not apply primarily to Bangalore, which is no part of British India, and is only in force there by virtue of declarations of the Governor-General in Council in the exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902. The latest declaration is No. 732-D, dated 19th March 1913, but this provides with reference to the Code of Criminal Procedure. "Nothing in the Code as applied shall be deemed to apply to proceedings against European British subjects or persons charged jointly with European British subjects."

The effect of this is to refer us back to an earlier declaration under the same authority, No. 680 I.B., dated 19th March 1912, which is still in force, and which regulates the powers of Justice of the Peace beyond the limits of British India in regard to European British subjects. This notification [issued subsequent to the decision of this Court in *The Public Prosecutor, Bangalore* v. *Merchant*(1), confers on such officers certain specified powers among which the power of trying offenders summarily under section 260 of the Code of Criminal Procedure is not included and we must take it that the powers of the District Magistrate as Justice of the Peace as regards European British subjects are confined to those conferred on him thereunder.

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(1) (1911) I.L.R., 34 Mad., 348.

Re JEREMIAH.

AYLING AND PHILLIPS, JJ.

It follows that the trial of the appellant was void.

We set aside the conviction and direct the refund of the fine if paid. In view of the pettiness of the case, we do not order a retrial under the ordinary procedure.

S.V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1915. October 28 and November 2.

RAJA PARTHASARADHI APPA RAO SAVAI ASWA RAO BAHADUR, ZAMINDAR OF SANIVARAPPET, AND FIVE OTHERS (DEFENDANTS), APPELLANTS,

v

RAJA BOMMADEVARA SATYANARAYANA VARAPRASADHA RAO NAIDU BAHADUR, ZAMINDAR OF SOUTH VALLUR, MINOR BY THE MANAGER UNDER THE COURT OF WARDS (PLAINTIFF), RESPONDENT *

Madras Estates Land Act (I of 1908), sec. 6, sub-sec. (6) and sec. 8—Government lands under ryotwari tenure, purchased by zamindar—Release of revenue on such lands—Zamindari lands, acquired by Government under Land Acquisition Act (I of 1894)—Compensation—Substitution of ryotwari lands as zamindari lands—Suit to eject—Jurisdiction of Civil Courts—Acquisition by landholder of occupancy right—Acquisition by tenant of landholder's right, difference between.

Where a zamindar who had purchased some ryotwari lands from a Government ryot and obtained a release of revenue due on such lands in lieu of compensation payable to him for some other lands taken up by the Government under the Land Acquisition Act (I of 1894), brought a suit in 1911 in the District Court to recover such lands from a tenant who was in possession thereof since 1901, and the defendant contended that he had acquired occupancy right thereto and that the Civil Courts had no jurisdiction to entertain the suit,

Held :

(1) that, assuming that the suit lands were substituted as part of the zamindari, the plaintiff, who was a Government ryot of such lands prior to the substitution, had occupancy right therein and did not lose such right by becoming interested in them as a landholder, under the explanation to sub-section (6) of section 6 of the Madras Estates Land Act;

(2) that the provisions of section 8 (1) of the Act refer to the acquisition of occupancy right by landholders and not to the acquisition of landholders' right by ryots; and

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* Appeal No. 174 of 1914

(3) that in any event the general provisions of section 8 (1) cannot affect the special provisions of the explanation to sub-section (6) of section 6 of the Act.

ZAMINDAR OF SANI-VARAPPET v. ZAMINDAR OF SOUTH VALLUR.

APPEAL against the decree of F. A. COLERIDGE, the District Judge of Kistna, in Original Suit No. 109 of 1912.

The plaintiff was a half-sharer in the zamindari of Vallur. In 1887 certain lands included in the estate were taken up by the Government under the Land Acquisition Act. The Zamindar asked for some banjar lands instead of the lands taken from him and was allowed the lands in the village of Vallur which was a Government village, as he had purchased the same from a ryot in 1885. The Board accepted the selection and allowed the Zamindar to hold this land free of kist. Thereafter the lands were entered in the name of the Zamindar in the Government accounts and in the settlement accounts as zamindari land. In 1901, the Zamindar leased the lands to the defendants for five years under ijara tenure and at the end of the lease the defendants continued in possession on an oral lease till the end of fasli 1318 when the plaintiff gave the defendants a notice to quit. • The defendants refused to quit claiming occupancy right under the Estates Land Act as having been in possession of ryoti land of an estate at the time the Act came into force. The Zamindar brought this suit in the Civil Court to eject the defendants who pleaded that the Civil Court had no jurisdiction to entertain the suit and that they had acquired occupancy right to the suit lands. The lower Court decreed the suit in favour of the plaintiff, and the defendants preferred an appeal to the High Court.

T. Prakasam for the appellants.

Hon. Mr. *S. Srinivasa Ayyangar* for the respondent.

WALLIS, C.J., AND SESHAGIRI AYYAR, J.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—Assuming without deciding that the effect of the arrangement between the plaintiff and the Government was that the suit lands were substituted as a part of his zamindari for the zamin lands which were acquired under the Land Acquisition Act, it must be borne in mind that prior to the exchange the Zamindar as regards the suit lands was in the position of a Government ryot and owner of the kudivaram right. He had therefore, in our opinion, a right of occupancy in the lands within the meaning of the explanation to sub-section (6) of section 6 of the Madras Estates Land Act and

ZAMINDAR OF SANI-VARAPPET v. ZAMINDAR OF SOUTH VALLUR.

WALLIS, C.J., AND SESHAGIRI AYYAR, J.

therefore he did not by the terms of the explanation lose such occupancy right by becoming interested in the land as landholder, that is, by the land becoming part of his estate.

It is then said that this is opposed to the plain provisions of section 8 (1) which provide that in such a case the owner shall hold the land as a landowner and not as a ryot. The language of section 8 (1) is no doubt wide enough to cover such a case, but the rest of the section rather indicates that in framing it the legislature was thinking of the acquisition of occupancy rights by landholders and not of the acquisition of landholders' rights by ryots. But, however this may be, the general provisions of section 8 (1) must, we think, yield to the special provisions of the explanation as to this particular, on the principle *generalia specialibus non derogant*. For this reason, we think that the appeal fails and must be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

1915 November 17.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

MAHOMED KANNI ROWTHER (COMPLAINANT), PETITIONER,

v.

PATTANI INAYATHALLA SAHIB AND FIVE OTHERS (ACCUSED NOS. 4 TO 7, 9 AND 10), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 345—Compounding an offence—Complainant resiling before hearing, effect of.

Per ABDUR RAHIM, J. (AYLING, J. *dubitante*).—A composition arrived at between the parties of a compoundable offence is complete as soon as it is made; and it has the effect of an acquittal of the accused under section 345, Criminal Procedure Code in respect of that offence, though one of the parties, later on, resiles from the compromise and no statement or petition recording the compromise is filed in Court by the parties.

Murray v. Queen Empress (1894) I.L.R., 21 Calc., 103, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of J. R. KRISHNAMMA, the First-class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 38 of 1915, preferred

* Criminal Revision Case No. 445 of 1915 (Criminal Revision Petition No. 361 of 1915).

against the judgment of C. R. CHAKRAPANI AYYAR, the Stationary Second-class Sub-Magistrate of Papanasam, in Calendar Case No. 249 of 1914.

The facts appear from the judgment of ABDUR RAHIM, J.

Mir Sultan Muhi-ud-din for the petitioner.

T. Ranga Achariyar for the accused-respondents.

P. R. Grant for the *Public Prosecutor* for the Crown.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—In this case, it has been found upon the evidence that the parties compounded their disputes out of Court. There were three cases which arose out of the disputes between the petitioner and the respondents In the first of these cases, the petitioner was the accused and in the second case, which was a counter-case to the first, the petitioner was the complainant. In the third case, that is the one in question, the petitioner was the complainant. In the other two cases, the accused were convicted and sentenced to three months' rigorous imprisonment each. Then they appealed to the Joint Magistrate and while the appeals were pending, the parties entered into an arrangement that all the disputes between them should be settled. The Joint Magistrate has found that the arrangement settling the disputes extended to the case which was then pending in the Sub-Magistrate's Court. As a result of the compromise these two appeals in the Appellate Court were compounded with the permission of the Court and the accused acquitted. When, however, the accused in the present case submitted a petition to the Sub-Magistrate saying that this case also was the subject of the compromise, the complainant who is the present petitioner resiled from his former position and denied the composition. The Sub-Magistrate found that as a matter of fact the present case was not settled. The Appellate Court has however taken a different view and we have no doubt that this view so far as the finding of fact is concerned is correct. The question of law then arises whether the composition or arrangement which was arrived at outside the Sub-Magistrate's Court comes within the terms of section 345, Criminal Procedure Code. Clause (6) of that section says: "The composition of an offence under the section shall have the effect of an acquittal of the accused." It does not say as to what should be the procedure if one of the parties after they settled their disputes outside the Court refused to abide by it when the case comes on

ZAMINDAR OF SANI-VARAPPET v. ZAMINDAR OF SOUTH VALLUR.

WALLIS, C.J., AND SESHAGIRI AYYAR, J.

therefore he did not by the terms of the explanation lose such occupancy right by becoming interested in the land as landholder, that is, by the land becoming part of his estate.

It is then said that this is opposed to the plain provisions of section 8 (1) which provide that in such a case the owner shall hold the land as a landowner and not as a ryot. The language of section 8 (1) is no doubt wide enough to cover such a case, but the rest of the section rather indicates that in framing it the legislature was thinking of the acquisition of occupancy rights by landholders and not of the acquisition of landholders' rights by ryots. But, however this may be, the general provisions of section 8 (1) must, we think, yield to the special provisions of the explanation as to this particular, on the principle *generalia specialibus non derogant.* For this reason, we think that the appeal fails and must be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

1915 November 17.

MAHOMED KANNI ROWTHER (COMPLAINANT), PETITIONER,

v.

PATTANI INAYATHALLA SAHIB AND FIVE OTHERS (ACCUSED NOS. 4 TO 7, 9 AND 10), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 345—Compounding an offence—Complainant resiling before hearing, effect of.

Per ABDUR RAHIM, J. (AYLING, J. *dubitante*).—*A composition arrived at* between the parties of a compoundable offence is complete as soon as it is made; and it has the effect of an acquittal of the accused under section 345, Criminal Procedure Code in respect of that offence, though one of the parties, later on, resiles from the compromise and no statement or petition recording the compromise is filed in Court by the parties

Murray v Queen Empress (1894) I L R, 21 Calc, 103, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of J. R KRISHNAMMA, the First-class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 38 of 1915, preferred

* Criminal Revison Case No. 445 of 1915 (Criminal Revision Petition No. 361 of 1915).

petition or otherwise, one would expect that they would have said so. In the absence of any such express provision, the natural interpretation is that the composition is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court.

I would hold that there was a valid composition in this case and it had the effect of acquittal.

AYLING, J. AYLING, J.—The abstract question as to the effect of an agreement to compound come to by the parties out of Court from which one subsequently resiles is a somewhat difficult one on which my mind is not free from doubt. The wording of section 345, Criminal Procedure Code, throws little, if any, light on it and I should be loth to express a final opinion on the somewhat one-sided argument that has been addressed to us. The only authority quoted certainly supports the view contended for by Mr. Ranga Achariyar. But on the facts found by the Joint Magistrate, I am clearly of opinion that the case is one in which in the exercise of our discretion we may very properly decline to interfere. I concur in the order proposed by my learned brother.

S V.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

1915. November 24

K RANGAPPA AND TWO OTHERS (DEFENDANTS NOS. 1 to 3), APPELLANTS,

v.

KARNAM BHIMAPPA (PLAINTIFF), RESPONDENT.*

Religious Endowments Act (XX of 1863)—Change of village, from one district to another for revenue purposes—Religious institution in the village—Power of original committee of the original district to control the institution—No power for the committee of the new district to appoint trustees.

The Religious Endowments Act (XX of 1863) contemplates the creation of division or district committees once for all, soon after the passing of the Act, to take the place of the Board of Revenue and the local agents referred to in Regulation VII of 1817. It is only the committee that is originally appointed in that behalf or its successor that can exercise jurisdiction over a particular

* Second Appeal No. 265 of 1915.

KANNI ROWTHER v. INAYATHALLA SAHIB.

ABDUR RAHIM, J.

afterwards for hearing. There is only one precedent which covers this case. It is *Murray* v. *The Queen Empress*(1). There the learned Judges held or rather assumed as if the matter admitted of no doubt that it was competent for the Court in which the charge was pending to take evidence as to whether there was in fact a composition outside the Court. In that case, there was a dispute whether if there was a composition, it was valid one or not, having regard to the allegation whether the complainants acted freely and understood what they were doing. The section itself does not throw much light on the question raised before us. I am however inclined to take the same view as was taken in *Murray* v. *The Queen Empress*(1). Section 345, Criminal Procedure Code, lays down that certain offences, of which the offence of hurt is one, can be compounded by the parties and no leave of the Court is necessary for the purpose while of certain other offences such as grievous hurt, there can be no composition without the permission of the Court before which they are pending Where the parties have actually composed their disputes in the four classes of cases it is not clear, on principle, why it should be necessary for the validity of composition that any petition should be presented by the parties admitting the fact or why any of the parties should afterwards be allowed to withdraw from it. The composition spoken of in section 345 is in the nature of a contract though I do not think it requires monetary consideration. I may point out however that in this case there was some consideration because there were other cases between the parties then pending and if there was an arrangement, the consideration was that each party should refrain from pursuing the case or cases in which the other party was the accused. It is true that if a Court is bound to take cognizance of a composition arrived at outside the Court but which has been resiled from by one of the parties when the case came to be tried, the Court will be obliged to take evidence and that will necessarily result in the prolongation of proceedings. But if the legislature contemplated that a composition should be made in Court or that a composition arrived at would not be considered to be complete until both parties have expressed their assent in Court whether by means of a

(1) (1894) I.L.R., 21 Calc., 103.

vacancies will be filled by the appointment of other members, so that the original committee continues to have and that is the only committee which has jurisdiction over a temple in any particular division or district. Section 12 says that immediately after the appointment of the committee all the property of the mosque or temple or religious establishment shall be transferred to that committee and that all the powers that were exercised by the Board and the local agents might be exercised by such committee to whom such transfer is made. That makes it absolutely clear that it is the committee originally appointed in that b[illegible] or the successor of that committee, that can exercise jurisdi[illegible] over a particular institution and the properties vested [illegible] This no doubt may lead to certain inconveniences in ca[illegible] this where the boundaries of taluks are modified. But o[illegible] other hand if the contention of the respondent were conc[illegible] viz., that the jurisdiction of the committee shall vary wi[illegible] limits of the revenue unit, we will be landed in still [illegible] difficulties. For instance supposing a new taluk is carv[illegible] of two taluks, then according to the view that is propound[illegible] behalf of the respondent, for the new taluk there [illegible] committee to exercise jurisdiction or powers over religio[illegible] tution that may be included within its borders, for [illegible] Act there is no provision for appointing altogether a [illegible] mittee. The committees, whatever they were, were [illegible] once for all; and it has not been shown to us that the [illegible] ment have got any power to appoint a fresh committ[illegible]

That was really the only question to decide in [illegible] But the learned pleader for the respondent also [illegible] argue that even if the plaintiff was not appointed by [illegible] mittee that had the power to appoint dharmakar[illegible] devastanam in question, since the defendants the[illegible] trespassers, the plaintiff is entitled to succeed in thi[illegible] recover possession of the property. But the suit is [illegible] ment, the title of the temple is denied and if the [illegible] instituted the suit cannot show that he has any title [illegible] the suit, it must fail.

The decrees of both the lower Courts are set a[illegible] plaintiff's suit is dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915 November 11, 15 and 30.

RAMA AYYAR *alias* RAMASAMI AYYAR (PLAINTIFF), APPELLANT,

v.

GOVINDA PILLAI AND THREE OTHERS (DEFENDANTS, LEGAL REPRESENTATIVES), RESPONDENTS.*

Attachment before judgment, malicious procuring of an order for—No right of suit for damages therefor.

Procuring an order for attachment before judgment, however maliciously, does not of itself afford a cause of action for damages, as damage does not necessarily and naturally flow from an application for attachment before judgment.

Semble Petitions for adjudications in bankruptcy and for winding up of companies stand on a different footing.

SECOND APPEAL against the decree of M.R.Ry. D. VENKOBA RAO Avargal, the Acting District Judge of Tanjore, in Appeal No 893 of 1913, preferred against the decree of M.R.Ry. B. SUBBA RAO Garu, the District Munsif of Tiruvalúr, in Original Suit No. 256 of 1912.

The plaintiff who had dealings in the defendant's shop executed a promissory note for Rs. 107–4–11 to the defendant subject to the verification of the accounts. On that promissory note the present defendant instituted Small Cause Suit No. 750 of 1912 in the Subordinate Judge's Court of Negapatam to recover Rs. 107–4–11, due from the plaintiff and applied for attachment before judgment of plaintiff's moveables. The application was granted. Then the present plaintiff put in an application under section 95, Civil Procedure Code, claiming compensation to the extent of Rs. 100 for alleged wrongful attachment. The Subordinate Judge referred the petitioner to a regular suit. The District Munsif of Tiruvalur passed a decree for Rs. 50. The District Judge of Tanjore reversed the decree on the ground that in fact no attachment was actually made and that even if an attachment was made,

* Second Appeal No. 1393 of 1914.

though maliciously, it would not sustain an action for damages. The plaintiff preferred this Second Appeal.

T. V. Gopalaswami Mudaliyar for the appellant.

G. S. Ramachandra Ayyar for the respondents Nos. 2–4.

NAPIER, J.—This is an appeal from the judgment of the District Judge of Tanjore on appeal from the judgment of the District Munsif of Tiruvalur in a suit in which the plaintiff claimed damages from the defendant in respect of his action in applying for attachment before judgment and "coming to attach his moveables." The District Munsif gave judgment for the plaintiff, while the District Judge, holding that there was in fact no attachment, dismissed the suit on the ground that the taking out of notice gave no cause of action. It has been argued before us that this view is incorrect and that as the District Judge has found that there was no reasonable and proper cause for obtaining an order for attachment and that it was obtained maliciously, the plaintiff is entitled to recover damages in respect of that order. Great reliance has been placed on the decision of this Court in *Nanjappa Chettiar* v. *Ganapathi Goundan*(1). That was, however, a case where the attachment had been made and is of no assistance to us on this question. It was argued that the procuring of the order was an abuse of the process of Court and alternatively that, however, it may be termed, a suit lies where the application is malicious and without reasonable or probable cause. The first point may be shortly disposed of. Abuse of the process of Court does not mean an improper procuring of the process of Court but the applying of the process of Court in an improper manner and for improper purposes. The nature of this suit is clearly pointed out in *Grainger* v. *Hill*(2). There the defendants being desirous to possess themselves of a ship's register sued out a capias indorsed for bail in a certain sum and sent two sheriff's officers with the writ to the plaintiff who was lying ill in bed. The defendant accompanied the sheriff's officers and told the plaintiff that they had not really come to take him but to get the ship's register; but that if he did not hand over the ship's register or find bail, they must take him. The plaintiff being unable to procure bail and being much alarmed gave up the register." The Court held that this was an abuse of the process

(1) (1912) I.L.R., 35 Mad., 598 (2) (1838) 4 Bing. N.C., 212; 132 E.R., 769.

RAMA AYYAR v. GOVINDA PILLAI.

NAPIER, J.

of Court. BOSANQUET, J., puts the matter thus: "This is not an action for malicious arrest or prosecution or for maliciously doing that which the law allows to be done. The process was enforced for an ulterior purpose to obtain property by duress to which the defendants had no right. The action is not for maliciously putting process in force but for maliciously abusing the process of Court. And TINDAL, C.J., says: "The complaint of the plaintiff is that the process of the law has been abused to effect an object not within the scope of the process."

The other point is much more difficult. But a careful examination of the judgment in *Quartz Hill Gold Mining Co.* v. *Eyre*(1) leads to the conclusion that the suit will not lie. The allegation is one of malicious civil prosecution, and the circumstances under which such a suit will lie are exhaustively considered by the Court of Appeal in that case. The decision was that an action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts to wind up a trading company even though no pecuniary loss or special damages be proved; for the presentation of the petition is from its very nature calculated to injure the credit of the company. BOWEN, L.J. in that case starts with this proposition that the bringing of an action although falsely and maliciously and without reasonable or probable cause will not support an action by the person so sued. This proposition to my mind disposes of the case for reasons which will appear later. He adopts the doctrine of HOLT, C.J., in *Savile* v. *Roberts*(2) as follows:—"There are three sorts of damage, any one of which would be sufficient to support an action for malicious prosecution. Damage to a man's fame, damage to a man's person and damage to a man's property in that he is forced to expend his money in acquitting himself of the crime of which he is accused." The learned Lord Justice then goes on to point out that although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are certain legal proceedings which do necessarily and naturally involve damage and therefore do found an action, and he places under this head all ordinary indictments for ordinary offences. Then as to what other proceedings necessarily involve damage

(1) (1883) 11 Q.B.D., 674. (2) (1700) 1 Lord Raymond, 374.

he agrees with the decision in *Johnson v. Emerson*(1), that the false and malicious presentation without reasonable and probable cause of a bankruptcy petition against a trader gave rise to an action for malicious prosecution. He then proceeds to consider the question arising in the suit whether a petition to wind up a company maliciously and wrongfully brought does necessarily involve damage just as in the case of a bankruptcy petition, or does not in which latter case it would not justify an action for malicious prosecution. He points out that as a petition to wind up a company cannot be presented without being advertised in the newspapers, it necessarily follows that the petition must strike a blow at the credit of the company and thereby necessarily involve damage, and so decides that the action will lie for the reason that special damage is involved in the very institution of the proceedings BRETT, M.R., gave judgment to the same effect. This has invariably been followed and has lately been reaffirmed by the Court of Appeal. In *Wiffen v. Bailey and Ramford Urban District Council*(2), Lord Justice BUCKLEY says: "But as was pointed out by Lord Justice BOWEN in *Quartz Hill Gold Mining Co. v. Eyre*(3) it is in very few cases that an action for malicious prosecution will lie where the matter is one of civil proceedings And the Courts held that a complaint under the Public Health Act requiring a householder to abate a nuisance by stripping the paper off the walls, etc., was not a proceeding necessarily and naturally involving damage, and therefore a suit for damages for malicious prosecution did not lie. Reliance is placed on the decision of the Court of Appeal in *Clissold v. Cratchley*(4). But there the Court passed its judgment on the fact that the allegations supported an action for trespass, in that the sheriff's officer levied an exaction on the plaintiff's goods at his farm *Quartz Hill Gold Mining Co. v. Eyre*(3) was never referred to and it is clear that no observation in this judgment could have been intended to throw doubt on the earlier decision. In this view of the law how will this action lie? The bringing of the original action gives no cause of action however malicious: *vide Mohini Mohan Misser v. Surandra Narayan Singh*(5),

(1) (1871) L R., 6 Ex, 329.
(2) (1915) 1 K B, 600
(3) (1883) 11 Q B D, 674
(4) (1910) 2 K.B., 244
(5) (1915) I.L.R., 42 Calc., 550.

RAMA AYYAR v. GOVINDA PILLAI.

NAPIER, J.

where this doctrine is affirmed. An exception has been made to this broad rule in cases of bankruptcy petitions and windingup petitions. But no case has been shown to us where the procuring of the process of Court in interlocutory proceedings has been held to found an action. And I am unable to see on what principle a man is more entitled to damages for the action of a plaintiff in a suit in applying for attachment before judgment even though maliciously than he is for the action of the plaintiff in bringing a suit maliciously and without reasonable and probable cause on false allegations of fact. If the original suit is protected it seems to me clear that proceedings in the suit must be protected unless they constitute abuse of the process of the Court. Further even if there is a difference between the presenting of interlocutory applications and the bringing of a suit I am unable to see how the making of an application necessarily and naturally involves damage. I cannot see how a man's credit naturally suffers more in the one case than in the other. The decision as to bankruptcy and winding up are special cases arising out of the publication of the petitions. There is no such publication in an application for attachment. I cannot but think that it could be most ill-advised to introduce the principle that applications of an interlocutory nature in a suit can found an action however malicious. An application for discovery may result in far more damage, i.e., *damnum* to a party to a suit than the action itself and for this reason these applications are frequently taken to the Court of Appeal and have even resulted in settlement of the suit. But it has never been suggested that such an application, however malicious, would found an action. I would therefore dismiss this appeal both on the ground that an interlocutory application in a suit does not of itself found an action and also on the ground that damage does not necessarily and naturally flow from such an application. Appeal dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

CHANTAN (COUNTER-PETITIONER), PETITIONER,

1915.
December 1.

v.

C. MATHU (PETITIONER), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec 488—"Unable to maintain itself", meaning of—Child entitled to maintenance from its mother's tavazi not entitled to order for maintenance from father.

A child that possesses a right to maintenance from its mother's tavazhi is not entitled under section 488, Criminal Procedure Code (Act V of 1898), to an order for maintenance against its father.

Kariyadan Pokkar v. Kayat Beeran Kutti (1896) I.L.R., 19 Mad., 461, followed

In re Parathy Valappil Moideen (1913) M.W.N., 997, not followed

The words "unable to maintain" in section 488 are not confined to physical inability but include also pecuniary inability

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of T. H. HILL, the Acting Joint Magistrate of Tellicherry, in Miscellaneous Case No. 52 of 1915.

The respondent who was the wife of the petitioner applied to a Magistrate for an order for maintenance of his minor children alleging that the petitioner neglected to maintain them. Though the Magistrate found that the children were in fact being maintained by their mother's (respondent's) tavazhi and though the respondent admitted that she was entitled to some properties in her tavazhi and tarwad, the Magistrate made an order for maintenance on the ground that the petitioner neglected to maintain them. Hence this Revision Petition.

C. Kunhi Raman for the petitioner.

The respondent did not appear either in person or by pleader.

ABDUR RAHIM, J.—This petition raises a question of the interpretation of section 488 of the Criminal Procedure Code. It is contended before us by the learned pleader who appeared

ABDUR RAHIM, J.

* Criminal Revision Case No. 573 of 1915 (Criminal Revision Petition No. 456 of 1915)

CHANTAN v. MATHU. — ABDUR RAHIM, J.

for the petitioner that his client was not liable to any order for the maintenance of his four children because they are entitled to maintenance from their mother's tavazhi and are in fact being maintained; that section 488 compels the father to maintain his legitimate or illegitimate child "unable to maintain itself." The words "unable to maintain itself," it is pointed out, have been interpreted in this Court by SADASIVA AYYAR, J., in *In re Paratny Valappil Moideen*(1) to mean that the child should be physically unable to earn a livelihood, and that if the child is not of sufficient maturity to earn a livelihood, then even if that child belongs to a well-to-do tarwad which is liable for its maintenance, the liability of the father under section 488 is not taken away. With all respect to the learned Judge, I am unable to accept this narrow meaning of the words "unable to maintain itself." I think the ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained as in this case by some other person as to a child which is able to earn a living by its own exertions. This is a summary procedure provided by section 488, and it does not cover entirely the same ground as the civil liability of a father to maintain his child. It does not seem to have been within the contemplation of the legislature that a child which is well-to-do should be entitled under section 488 to an order for maintenance as against its father. This view derives some support from the decision in *Kariyadan Pokkar* v. *Kayat Beeran Kutti*(2) where the learned Judges seem to suggest that children who are actually being maintained by their mother's tarwad are not entitled to maintenance from their father under section 488 of the Criminal Procedure Code. In this view of the law, the order of the Joint Magistrate ordering the petitioner to maintain the children is wrong and should be set aside.

AYLING, J.

AYLING J.—I agree. I think that a child which possesses a legally enforceable right to maintenance from its mother's tarwad stands in the same position as a child which possesses property in its own right, and that neither can be regarded as "unable to maintain itself" within the meaning of section 488.

N.R.

(1) (1913) M.W.N., 947. (2) (1916) I.L.R., 19 Mad., 461.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

PUNUGU SUBBIAH (SECOND DEFENDANT), APPELLANT,

v.

NUKULAPATI RAMI REDDI AND FOUR OTHERS (PLAINTIFFS, NOS 2 TO 6), RESPONDENTS.*

1915. March 10 and 15, December 16 and 1916 January 12.

Transfer of Property Act (IV of 1882), sec. 65 (c)—Duty of mortgagor in possession to pay public charges, purely personal—Acquisition of equity of redemption by trespasser—Non-payment of public revenue and purchase by trespasser in revenue sale—Extinguishment of mortgage

The implied covenant on the part of the mortgagor in possession, mentioned in section 65, clause (c) of the Transfer of Property Act (IV of 1882), to pay all public charges is in the nature of a personal covenant and is not one arising by virtue of his being in possession of the mortgaged property. Hence if after the creation of a simple mortgage, a stranger acquires the equity of redemption by adverse possession as against the mortgagor, the acquirer is under no duty towards the mortgagee to pay the public revenue payable on the property; and therefore, if after allowing it to be sold for arrears of revenue he buys it himself, he holds it free from the mortgage.

The rule that no man can take advantage of his fraud does not apply to a case like this, where the party charged with fraud does not stand in any fiduciary relation to, or has a joint interest with, the person defrauded and is under no duty to protect his interests

Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1866) 10 M.I.A., 540, distinguished.

Quære. Whether an assignee for value from the mortgagor is affected by the mortgagor's covenant to pay public charges?

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Nellore, in Appeal No.170 of 1911, preferred against the decree of the District Munsif of Kavali, in Original Suit No. 450 of 1910.

The facts of the case appear from the preliminary order of remand and from the first paragraph of the final judgment.

A. Krishnaswami Ayyar and *A. N. Sitarama Sastriyar* for the appellant.

T. R. Ramachandra Ayyar for the respondents.

The following Order of the Court was delivered by

SESHAGIRI AYYAR, J.—Mr Krishnaswami Ayyar argues that no cause of action is disclosed in the plaint. This case has been

* Second Appeal No. 211 of 1914.

SUBBIAH v. RAMI REDDI.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

before the Courts during the last six years and yet this point was not raised hitherto; on that account we examined the pleadings carefully; it appears to us that *prima facie* the contention of the appellant is well founded. This appeal relates only to items 672-A and 674-B. The facts stated in the plaint are, that the plaintiff obtained a mortgage in respect of these items and other properties from certain persons who may be described as the Vavilla people. He brought a suit (Original Suit No. 708 of 1896) against the mortgagors. The right of the Vavilla people to mortgage the property was disputed by the twelfth defendant who claimed title from certain persons who may be called the Sarasvati people. The twelfth defendant conveyed his rights to one Nalluri Samiah. Nalluri Samiah was made the nineteenth defendant. Issues 14 and 15 raised the question as to whether the property belonged to the Vavilla or the Sarasvati people. The judgment of the Munsif is not very clear on this point. In effect he seems to have found in favour of the Vavilla people, he gave a decree to the plaintiff. This was confirmed on appeal by the District Judge. While a second appeal to the High Court was pending, the revenue payable to Government on the property fell into arrears; and the second defendant in this suit purchased the property at the revenue auction. The plaintiff now seeks to recover the property. His contention is that the second defendant is a *benamidar* for Nalluri Samiah, the nineteenth defendant in the first suit, and that, as it was the duty of the said Samiah to have paid the arrears, he must be deemed to have committed a fraud in allowing the property to be sold and in purchasing it in the name of the second defendant for his own benefit. In effect the contention is that the second defendant is a trustee for the plaintiff. It was contended by Mr. Krishnaswami Ayyar that there is no legal evidence on which the finding as to the second defendant being a name-lender to Samiah can be sustained. The Munsif refers to oral evidence relating to possession and to other circumstances in support of his finding: the lower Appellate Court has confirmed that finding: we are unable to say that there is no legal evidence to support it. But granting that the second defendant is a *benamidar* for Nalluri Samiah, it has to be proved that Samiah was under any legal obligation to pay the arrears of revenue due upon the lands. *Prima facie*, as we said before, the finding of the District Munsif

in the mortgage suit negatives any subsisting right in the Sarasvati people from whom Samiah derived title at the time of the revenue sale. But as the point has been raised for the first time in this Court we think it safe to call for a finding on the question "whether at the time of the purchase by the second defendant at the revenue sale, nineteenth defendant or the Sarasvati people from whom he claimed had such a subsisting interest in the property as made it obligatory on them to pay the revenue for non-payment of which the property was sold?" This question does not refer to the initial liability to pay the revenue by virtue of the patta standing in the name of any of the parties but to the question whether as between the plaintiff, the Vavilla people and the Sarasvati people, *inter se*, who was bound to protect the property from the revenue sale.

Both parties may adduce fresh evidence. The finding should be submitted within two months and seven days will be allowed for filing objections.

In compliance with the above order the District Judge of Nellore submitted the following

FINDING.

* * * *

"How the Sarasvati people originally came by the land seems to me still doubtful but it is perfectly clear that they were in possession and from them Bandepalli Venkatachelam got the land and from him Nalluri Samiah. It may be taken they were trespassers.

"My finding on the issue sent down to me is that at the time of the purchase by the second defendant at the revenue sale the nineteenth defendant or the Sarasvati people had no such subsisting interest in the property as made it obligatory on them to pay the revenue for non-payment of which the property was sold."

This Second Appeal coming on for final hearing after the return of the finding of the lower Appellate Court, the following JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The facts of the case have been fully stated in our order of remand. The finding in effect is that when the land was sold for arrears of revenue, the nineteenth defendant, who claimed to hold under the Sarasvati people, was in

SUBBIAH v. RAMI REDDI — SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

possession. The District Judge further finds that the Sarasvati people and those who derived title through them were trespassers. It is clear from the documents to which Mr. Ramachandra Ayyar has drawn our attention that the possession of the Sarasvati people commenced in or about 1882. Consequently at the time of the revenue sale in 1906, the nineteenth defendant had acquired title to the property by prescription. This title could not affect the right of the plaintiff who obtained his mortgage from the true owners, the Vavilla people, in 1884. As was pointed out in the recent Full Bench decision of this Court in *Vyapuri* v. *Sonamma Boi Ammani*(1), a person holding a simple mortgage is not deprived of his right to bring the mortgaged property to sale because as against the mortgagor a trespasser has been in possession over the statutory period. The point was not considered in the Full Bench ruling whether the trespasser is not entitled to stand in the shoes of the mortgagor, although the rights of the mortgagee remained unaffected. We are of opinion that the trespasser acquired by prescription the rights of the mortgagor. The nineteenth defendant by tacking on the possession of the Sarasvati people, acquired by adverse possession the equity of redemption in the property mortgaged to the plaintiff. The limited right in that equity which the mortgagor possessed passed to the trespasser. On these facts Mr. Ramachandra Ayyar contended that the conduct of the nineteenth defendant in allowing the property to be sold for arrears of revenue and purchasing it in the name of the second defendant was fraudulent and that the plaintiff was entitled to recover it. *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(2) was relied on for this position. The argument of the learned vakil presupposes that the nineteenth defendant was under a duty to pay the public charges under section 65, clause (*c*) of the Transfer of Property *Act*. The first question therefore is whether the duty cast on the mortgagor passes to the acquirer of the equity of redemption by prescription. The point is not free from difficulty and is not covered by authority in this country. Mr. Krishnaswami Ayyar quoted *Srinivasachari* v. *Gnanaprakasa Mudaliar*(3). It was held in that case that even a purchaser of the equity of redemption

(1) (1915) 29 M.L.J., 645. (2) (1866) 10 M.I.A., 540
(3) (1907) I.L.R., 30 Mad., 67.

will not be affected by the equities created in favour of the mortgagee SADASIVA AYYAR and NAPIER, JJ., in *Ramakrishnama Chetty* v. *Vuvarati Chengu Aiyar*(1) on the other hand point out that a provision in a statute which imposes a liability on a person binds his legal representatives and assigns also.

The authorities in England [see the cases cited in *Spencer's case*(2)] lay down that unless the assignee is named, in most cases, the covenant will not affect him. If we had to decide whether an assignee for value is affected by the covenant mentioned in section 65, clause (*c*), we would have referred the matter to a Full Bench. But the case of a person acquiring title not *from* but *against* the owner stands on a different footing.

The covenant created by the clause is in the nature of a personal covenant. Where a benefit is secured or a duty is cast on a person although it be by virtue of being in possession of real property, the covenant is said to be personal. Shepp. Touchstone, 161. In *Dewar* v *Goodman*(3), the House of Lords laid down that "a covenant to do an act not in respect of the demised premises but which will protect from forfeiture the estate of the lessee in the demised premises is not a covenant which runs with the land." Lord LOREBURN points out that such a covenant "does not touch and concern the estate" simply because the estate may come to an end, if the covenant is broken By parity of reasoning the duty cast on the mortgagor to pay the taxes, although its non-payment may result in the estate being sold for arrears of revenue is not a covenant which touches or concerns the property and as such runs with the land It is a personal covenant affecting the person in possession under the contract.

The decision in *In re Nisbet and Potts' Contract*(4) at first sight lends colour to the suggestion that a person coming into possession by virtue of prescription is bound by similar covenants. That was a case of a negative covenant The Court of Appeal considered that such a covenant was in the nature of a negative easement and that consequently it affected squatters on the land whether they acquired title to it or not COLLINS, M.R., says "It was admitted that a squatter could not take

(1) (1914) 27 M.L.J., 494.
(2) (1583) 5 Coke, 16, s.c., 1 Sm. L.C., 62 at pp. 75 to 77.
(3) (1909) A.C., 72.
(4) (1906) L.R., 1 Ch., 634

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land freed from an affirmative legal easement; and I understand it to be admitted also that if the right arising out of the restrictive covenant entered into by the former owner of the land was such as Sir GEORGE JESSEL, M.R., considered it, namely, analogous to a negative easement, then the squatter would take the land subject to the paramount right created by the obligation imposed by the covenant which adhered to the land, and the burden of that covenant would pass to those persons who might become assignees of the land or might acquire in any way a title to the land" This decision is no authority for holding that a person holding property adversely is bound by all the obligations which rested upon the owner in respect of the property. On the other hand, it was pointed out by Lord ESHER in *Tichborne* v. *Weir*(1). that the title of the true owner is not transferred to the adverse owner. "The statute does not convey but destroys the right." BOWEN, L J., quoting Dart's Vendors and Purchasers, was of opinion that the acquirer can in no sense be said to stand in the shoes of the original owner. The point decided in the case was that a covenant to repair did not bind the person who acquired title by prescription. *Brassington* v. *Llewellyn*(2) is to the same effect. See also Banning on Limitation, page 84. It is true that the decisions above quoted were given with reference to leases. We see no reason why the same principle should not apply to mortgages. We must therefore hold that the nineteenth defendant by virtue of having acquired the equity of redemption in the mortgaged property was not under a duty to pay the taxes under section 65, clause (c) of the Transfer of Property Act.

Mr. Ramachandra Ayyar's last contention was that apart from the statutory duty, any person who acquires property by fraud must restore it to the true owner; and he relied on *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(3), for this extreme position.

It may now be taken as settled that if there is a fiduciary relationship between the parties and one of them has committed a breach of duty, the person injured can compel the person benefited by the breach to restore the property he has acquired. That is really what was laid down in *Nawab Sidhee Nuzur Ally*

(1) (1892) 67 L.T., 735. (2) (1858) 27 L.J.Ex., 297.
(3) (1866) 10 M.I A., 540.

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Khan v. *Rajah Ojoodhyaram Khan*(1). We do not agree with Mr. Ramachandra Ayyar that this judgment is authority for the proposition that if anybody acquires property by fraud whether there is a fiduciary relationship between the parties or not, the true owner can recover possession. Sections 88 to 90 of the Trust Act show that the duty of restitution is cast only on persons occupying either a fiduciary position or who have a joint interest with the person defrauded. There is no authority for the broad proposition that no title can be acquired, if fraud has been used in its acquisition. We think the right to claim the benefit of a fraudulent advantage should be restricted to persons who are "under a duty to speak" or under some relationship as above indicated.

We must therefore hold that the plaintiff is not entitled to recover possession from the second defendant.

We must allow the appeal, reverse the decrees of the Courts below and dismiss the suit with costs of the second defendant in this Court. Parties will bear their own costs in the Courts below.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

1915 March 30, April 20 and 1916 January 16

MUTHU RAMAN CHETTY (DEFENDANT), APPELLANT,

v.

CHINNA VELLAYAN CHETTY *alias* CHINNA KARUPPAN CHETTY (PLAINTIFF), RESPONDENT.*

Negotiable Instruments Act (XXVI of 1881), ss. 30, 47, 59, 74 and 94—Hundi, payable to bearer—Surety—Contract of suretyship only between surety and creditor—Right of surety against principal debtor—Indian Contract Act (IX of 1872), ss. 126, 140, 141, 145, 69 and 70—Right of holder, not being holder in due course—Delivery of hundi payable to bearer, effect of—Holder, right of.

A person who becomes a surety without the concurrence thereto of the principal debtor, gets as against the latter, only the rights given by sections 140 and 141 of the Indian Contract Act (IX of 1872) and not those given by

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(1) (1866) 10 M.I.A., 540.

* Second Appeal No 9[illegible]0 of 1914.

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section 145. Such a person cannot invoke in h's favour the aid of sections 69 and 70 of the Act.

Hodgson v. *Shaw* (1834) 3 My. & K., 183 referred to.

A person obtaining by payment, after dishonour by the drawee, delivery of a negotiable instrument payable to bearer, acquires the rights of a holder thereof and can under section 59 of the Negotiable Instruments Act (XXVI of 1881) recover from the drawer, the amount due thereon, on proof of presentment and notice of dishonour as required by sections 74, 30 and 94 of the Act.

Gajapathi Kistna Chandra Deo v. *Srinivasa Charlu* Appeal No. 25 of 1909, referred to

Nanak Ram v. *Mehin Lal* (1878) I.L.R., 1 All., 487, distinguished.

SECOND APPEAL against the decree of R. GOPALA RAO, the Temporary Subordinate Judge of Sivaganga, in Appeal No. 429 of 1913, *preferred against the decree of* V R. KUPPUSWAMI AYYAR, the District Munsif of Paramagudi, in Original Suit No. 204 of 1912

One Yegappa Chetty owed a decree debt to one Chidambaram Chetty. The defendant with a view to help Yegappa Chetty who was his relation executed the suit hundi (Exhibit A) payable to bearer in discharge of the debt and drew it on one Raman Chetty and handed over the same to the plaintiff to be delivered to Chidambaram Chetty. But the latter wanted the plaintiff's guarantee for accepting the defendant's hundi and accordingly the plaintiff endorsed on the hundi that he stood surety for it It was found by the lower Courts that the contract of suretyship entered into between the plaintiff and Chidambaram Chetty was without the concurrence of the defendant. Subsequently the hundi was presented for payment to Raman Chetty who was the drawee but was dishonoured by him. Thereupon Chidambaram Chetty demanded payment from the plaintiff who paid the amount due and obtained delivery of the hundi from Chidambaram Chetty. The plaintiff brought the suit to recover the amount due on the hundi from the defendant who was the drawer. The defendant pleaded that the plaintiff could not recover the amount from him as he was not a party to the contract of suretyship said to have been entered into by the plaintiff with Chidambaram Chetty, and also that the plaintiff was not competent to recover the amount due on the hundi as he was not a holder in due course. The lower Appellate Court held that the plaintiff was not entitled to recover the amount on the basis of the contract of suretyship but passed a decree in his favour for the amount due

on the hundi on the ground that the plaintiff was a holder who had acquired the rights of the previous holder Chidambaram Chetty. Thereupon the defendant preferred this second appeal to the High Court.

C. V. Anantakrishna Ayyar for the appellants.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Ayyar* for the respondent.

This second Appeal coming on for hearing in the first instance before OLDFIELD and NAPIER, JJ., who delivered the following judgments:—

OLDFIELD, J.—The lower Appellate Court rejected plaintiff's contention based directly on his position as surety. It has however been relied on here, and therefore I deal with it before taking up the argument based on the negotiable character of Exhibit A, on which the lower Appellate Court decided in his favour.

The lower Appellate Court has adopted its findings of fact on this part of the case from the judgment of the Court of First Instance unreservedly. They are that defendant bound himself to pay part of his relative's debt to Chidambaram Chetty, that in order to do so he sent the suit hundi (Exhibit A) for delivery to Chidambaram Chetty by plaintiff, and that the latter created defendant's original liability by delivering it and (the distinctive feature in the case), made himself surety for its discharge by endorsing that fact on it. This entails, not only that defendant did not know of plaintiff's entering and did not ask him to enter into this contract of guarantee, but also that, if the consideration for it was anything done or promised for defendant's benefit, he had no opportunity to adopt or refuse to adopt it. The question is of the nature of his liability to plaintiff in these circumstances Is there a contract of indemnity between them? Or, as the lower Appellate Court held, is plaintiff's remedy only that open to the original creditor? And then is it subject to the restrictions imposed on the latter as holder of the hundi, in which his debt was embodied?

It is clear that the distinction involved will be without importance in the majority of cases For, unless (as here) recovery on the original security is trammelled by the requirements of a special law and unless (as I think is the case here) the establishment of a contract by the debtor to indemnify is

section 145 Such a person cannot invoke in his favour the aid of sections 69 and 70 of the Act

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C. V. Anantakrishna Ayyar for the appellants.

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This Second Appeal coming on for hearing in the first instance before OLDFIELD and NAPIER, JJ., who delivered the following judgments:—

OLDFIELD, J.—The lower Appellate Court rejected plaintiff's contention based directly on his position as surety. It has however been relied on here, and therefore I deal with it before taking up the argument based on the negotiable character of Exhibit A, on which the lower Appellate Court decided in his favour.

The lower Appellate Court has adopted its findings of fact on this part of the case from the judgment of the Court of First Instance unreservedly. They are that defendant bound himself to pay part of his relative's debt to Chidambaram Chetty, that in order to do so he sent the suit hundi (Exhibit A) for delivery to Chidambaram Chetty by plaintiff, and that the latter created defendant's original liability by delivering it and (the distinctive feature in the case), made himself surety for its discharge by endorsing that fact on it. This entails, not only that defendant did not know of plaintiff's entering and did not ask him to enter into this contract of guarantee, but also that, if the consideration for it was anything done or promised for defendant's benefit, he had no opportunity to adopt or refuse to adopt it. The question is of the nature of his liability to plaintiff in these circumstances Is there a contract of indemnity between them? Or, as the lower Appellate Court held, is plaintiff's remedy only that open to the original creditor? And then is it subject to the restrictions imposed on the latter as holder of the hundi, in which his debt was embodied?

It is clear that the distinction involved will be without importance in the majority of cases. For, unless (as here) recovery on the original security is trammelled by the requirements of a special law and unless (as I think is the case here) the establishment of a contract by the debtor to indemnify is

impossible, it will not matter on which foundation the suit is brought. *And perhaps it is for this reason that the two have* not, so far as has been shown us, been explicitly distinguished in any Indian case English authority however recognizes the distinction. For in *Hodgson* v. *Shaw*(1) it is said first "when a *person pays off a bond, in which he is either* co-obligor or bound *subsidiarie* he has at law an action against the principal for money paid to his use and he can have nothing more. The joint obligation towards the creditor is held to give the principal notice of his payment and also to prove his *consent* or authority to the making of that payment This is necessary for enabling any man, who pays another's debt, to come against that other, because a person cannot make himself the creditor of that other by volunteering to discharge his obligations." But the decision goes on "The case standing thus at law, do considerations of equity make any alteration in its aspect? The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor and have all the rights, which he has, for the purpose of obtaining his reimbursement." To apply this distinction to the relevant provisions of the Indian Contract Act, we have section 140 and the particular application of it in section 141 representing the principle stated in the second of these extracts, and section 145 representing that stated in the first, the two first mentioned sections being the basis of the lower Appellate Court's decision on Exhibit A in plaintiff's favour and *the last, of any claim* independent of that document.

It has been necessary to make this clear on two accounts. Firstly, reference was made in argument to section 126; and the *fact that* its language does not require the principal debtor to be a party to the contract of guarantee was relied on as entailing that, whether or no he is privy to that contract, the surety can recover from him. The answer is that section 126 defines only the contract of guarantee between the surety and the creditor and *not its incidents* as between the surety and the debtor. They are defined elsewhere in sections 140, 141 and 145. And secondly the result of the distinction above insisted on is that the

(1) (1834) 3 My. & K., 183 at p. 190.

two grounds of the debtor's liability are distinct. There is his general liability, which may be supported on the ground of the implied promise to indemnify referred to in section 145; and there is his special liability under sections 140, 141, arising from the surety's right to the creditor's original remedies against him. That liability is no greater and no less than it would have been to the creditor. The point as to it, to which I return, is that in the present case the liability of defendant to the creditor is not alleged as based on the existence of any debt independent of Exhibit A or otherwise than on that document. If then plaintiff's claim cannot be supported with reference to section 145, it will be necessary to consider, not whether he can recover on the general ground of defendant's indebtedness to the creditor, but whether he can satisfy the requirements of the Negotiable Instruments Act with reference to Exhibit A.

Firstly as to section 145, to the application of which defendant objects on the ground that he did not know of and was in no way privy to plaintiff's contract of guarantee. It would, he argues, be anomalous that the debtor's position should be liable to alteration in consequence of the intervention of a third party between him and his creditor without his knowledge or request and whether or no he had had an opportunity to adopt or refuse any benefits it might confer; and in particular that the debtor should be subjected to a different rule of limitation. For under article 81, schedule I of the Limitation Act, a suit can be brought by the surety within three years after he has paid the creditor; that is after the date, on which the liability would normally have been defunct, when perhaps the debtor's evidence as to the original debt or its discharge has been lost and he will have to meet evidence as to the making of a contract of guarantee, of which he had no contemporaneous knowledge. There is then in defendant's favour the English l[illegible] stated in *Hodgson* v. *Shaw*(1) already referred to and other cases, that the implied rights possessed by the surety are available, when the suretyship has been undertaken at the request, actual or constructive of the principal debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. In these circumstances, the

(1) (1834) 3 My. & K., 183.

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opposite view must be supported unambiguously by section 145, if it is to be sustained

Plaintiff contends that it is so, because the section imposes no qualification on the debtor's liability under an implied contract of indemnity. But that is to misread its terms. For, in fact, it does not refer to a contract of indemnity at all, but only to a promise to indemnify, and a promise, as sections 2 (d), (f) and (g) and 25 show, is ordinarily void, when, as here, no consideration has passed between promisor and promisee. Section 25 (2), it should be noticed, has no application, because defendant's promise must be held to have been made in accordance with the terms of section 145 in the contract of guarantee and at the date of that contract plaintiff had done nothing for him and nothing, which he was legally compellable to do. A kindred argument to that suggested by section 25 (2) has however been based on the description of the promise in section 145, as implied, and the alleged intention of the Legislature to bring under it relations between promisor and promisee of the kind dealt with in sections 69 and 70 But firstly this construction does violence to the definition of an implied promise in section 9. For that definition recognizes only the distinction between the ways, in which an actual promise may be expressed, not the existence of relations, involving no actual promise, but from which one must be presumed. And next, if the language of the section is to be treated as a lapse into English legal phraseology (vide for example Addison on Contracts, 9th Edition, page 424), it has still to be shown how either section 69 or 70 is applicable. As regards the former, it cannot be said that the present plaintiff was interested in the payment, which he made. For the interests postulated in the section have always been restricted to those arising either in course of law or through mistake or in virtue of some existing relation with the person, on whose behalf the payment is made and have never been held to include interests created officiously, such as that now in question Section 70, it is no doubt conceivable, might cover cases in which the debtor enjoys the benefit of some postponement of liability in consequence of the surety's promise. But here, the plaint averment is only that, the hundi amount, having been demanded of the firm designated by defendant without any result except a promise to obtain defendant's instructions,

was at once paid by plaintiff on demand; and there is no allegation that the creditor at any time intended to sue defendant or expressed any intention to do so or was induced to put off doing so by plaintiff's standing surety. And in any event the authorities do not sanction recovery, when the person primarily liable has no knowledge, actual or imputed, that expenditure is or probably may be necessary on his behalf: and I see no reason for extending the doctrine to cover cases of this nature. Two decisions only, so far as has been shown, deal with instances of expenditure incurred, as here, for another person without any sort of consciousness on his part that it would be or was likely to be incurred. In *Gajapathi Kistna Chandra Deo* v. *Srinivasa Charlu*(1), SADASIVA AYYAR, J., no doubt illustrated his argument by reference to expenditure incurred by way of neighbourly service, when the person benefited had neither knowledge of nor option to refuse what was done. But with all respect, I doubt whether the illustration, which was not essential to the argument, represents the law; *Nanak Ram* v. *Mehin Lal*(2) in some respects no doubt resembled the present case; but it was decided with reference to section 127 and the absence of consideration for a contract between the surety and creditor, and I therefore do not rely on it here. But the foregoing entails the conclusion that in this case the promise to be implied under section 145 does not amount to a contract of indemnity between plaintiff and defendant, either directly or with reference to section 69 or 70. And accordingly plaintiff must succeed, if at all, on his claim as based on sections 140 and 141.

It has been pointed out that under those sections he is restricted to the remedy available to the creditor, that is, to a suit on the hundi (Exhibit A). I agree with my learned brother that he can sue on it with reference either to the sections referred to or as a holder with reference to section 59, Negotiable Instruments Act. It is objected that the plaint does not contain the averments appropriate to that cause of action and that it was first relied on in argument before the District Munsif. The defendant however in his written statement—paragraph 8-had pleaded that the notice of dishonour required by section 30,

(1) Appeal No. 25 of 1909. (2) (1878) I.L.R., 1 All., 487.

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Negotiable Instruments Act, had not been given; and, as he obtained no issue on the point, it is possible that he and the Court overlooked section 140, Indian Contract Act, and section 59, Negotiable Instruments Act, and assumed that plaintiff's payment discharged the hundi and concluded the matter. In the circumstances, I would remand the appeal to the lower Appellate Court for findings on the issues whether—

(1) Exhibit A was presented for payment within a reasonable time after it was received by the holder with reference to section 74, Negotiable Instruments Act.

(2) Due notice of dishonour was given with reference to section 30.

Fresh evidence may be taken

Findings are due within six weeks after the re-opening of the lower Appellate Court. Seven days are allowed for filing objections.

NAPIER, J.

NAPIER, J.—This is an appeal from a decision of the Temporary Subordinate Judge of Sivaganga in Appeal Suit No. 429 of 1913. The suit was brought by one Chinna Vellayan Chetti alias Chinna Karuppan Chetti against the drawer of a hundi for Rs. 1,000, A, Peri N. N Muthuraman Chettiar. The hundi was drawn to bearer and given to one Chidambaram Chettiar. It bears the following words: "Security for this is Chinnakaruppan Chettiar alias Peria M. Chinna Vellayan Chettiar." The lower Appellate Court has found that this endorsement was made at the request of Chidambaram Chettiar who refused to take the hundi without the endorsement, but that the drawer did not consent to this. This being a finding of fact we are bound to accept it. The Court held that the drawer not being a party to the guarantee agreement, the surety could not recover from him on that footing but gave plaintiff the decree on another ground.

It appears that the drawee not having paid the amount, the holder Chidambaram Chettiar called on the surety to pay. The surety paid the amount and took the hundi from Chidambaram Chettiar. On these facts the lower Appellate Court held that he was a holder and as such entitled to recover the amount from the drawer. It is argued in appeal that he was not a holder in due course and that notice of dishonour had not been given to the drawer. In my view it is immaterial whether he is a holder

in due course or not. He is admittedly the holder for value. A hundi drawn to bearer is negotiable by delivery thereof (vide section 47 of the Negotiable Instruments Act XXVI of 1881). Under section 59, the holder of a negotiable instrument who acquired it at after dishonour by non-payment has only as against the other parties the rights thereon of his transferor. The right of Chidambaram Chettiar to whom the hundi was delivered, was to recover the amount from the defendant (the maker) after dishonour, and that right is vested in the plaintiff (the holder), the maker not having made payment in due course of the amount due within the meaning of section 82.

The only question that remains is whether the plaintiff has put himself in a position to sue. Section 30 provides that the drawer of bill in case of dishonour by the drawee is bound to compensate the holder provided that due notice of dishonour has been given to, or received by, the drawer. Section 94 provides that this notice must be given within a reasonable time after dishonour. But section 98 provides for certain cases where no notice of dishonour is necessary. These questions have not been considered by the lower Appellate Court and if the respondent is to succeed on his footing as a holder, findings must be called for on those issues.

A further point is taken by the appellant that, under section 74, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. This question also has not been considered and a finding would be necessary.

The respondent has, however, sought to support the decree in his favour by the contention that the lower Appellate Court was wrong in dismissing his suit on the footing of surety, his argument being that the consent of the drawer to the contract of guarantee is not necessary to enable the surety to sue. Section 126 of the Contract Act is as follows ;—" A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor.' A guarantee may be either oral or written."

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NAPIER, J.

Section 128: "The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

Section 140: "Where a guaranteed debt has become due, the surety, upon payment, is invested with all the rights which the creditor had against the principal debtor."

Section 145: "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee."

It is argued that the language of section 126 does not require the principal debtor to be a party, and that therefore even when there is no consent by the principal debtor the surety has all the statutory rights against the principal debtor. Clearly the principal debtor need not be a party to give the creditor his rights against the surety, but the rest of the proposition does not necessarily follow. The language of section 145 raises a difficulty. The section carries the rights of the surety against the principal debtor a little further than section 140. The latter section gives the surety the rights of the creditor. Section 145 makes the principal debtor liable "on an implied promise" for any sum above the amount due on the note which he has rightfully paid. Illustration (*a*) is a case where the surety defends a suit by the creditor, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from the principal debtor the amount paid by him with costs. The importance of this section is that it speaks of an implied promise *in* the contract of guarantee. The statute does not say that every guarantor shall have a right to recover sums rightfully paid, only; but it seems to base that right on the implied promise of indemnity given by the principal debtor. If the section had contained the latter words only, there would have been nothing in the Act to require the principal debtor to be a party to the contract, but it seems very difficult to hold that a term can be implied in a contract when the party so liable is not necessarily a party, and so, if this section is carried to its logical conclusion, it would follow that there must be more than a consent by the principal debtor; he must be a party to the contract between the surety and the creditor to get the full benefit of the section.

It is unfortunate that the legislature has not used the clear and unambiguous language to be found in the Mercantile Law Amendment Act, 19 & 20 Vict., cap. 97, section 5, where the right is given to every person, who is surety for "a debt or is liable with another for any debt, to recover from the principal debtor or any co-debtor indemnification for the advances made and loss sustained." The right in this statute is not founded on contract or implied promise. Prior to this Act there were many decisions, some not easily reconcilable, on the rights arising out of suretyship. The learned vakil for the respondent relies on *Hodgson* v. *Shaw*(1), as establishing the principle that without consent the surety had no right against the principal debtor. The language used is "consent is necessary, for a person cannot make himself a creditor of another by volunteering to discharge his obligations" (*vide*, page 191 of the judgment of the Lord Chancellor). The same proposition was relied upon in argument in *Ex parte Bishop*(2), but was found not necessary for decision. THESIGER, Lord Justice, referred to the observations of Mr. Justice WILLES in *Cook* v. *Lister*(3), and declined to accept it as established, and the Court decided the case on the broad principle that "every one of the Company's bills in circulation impliedly authorized every holder of the bill to indorse it over and thus transfer to the indorsee his rights against the acceptor, and if the indorsee pays the bill, he does so under compulsion undertaken by the implied authority of the acceptor." This proposition (substituting the drawer for the acceptor, the bill not having been accepted) is that to be found in the sections of the Negotiable Instruments Act above referred to and is in fact the basis of the Subordinate Judge's decision. The result of this proposition is that a surety to a negotiable instrument who has become such without the concurrence in the contract of the drawer (or acceptor as in the last case referred to) gets no higher rights than an ordinary holder and if section 145 is to be construed strictly the same result seems to follow.

I feel convinced that the legislature did not intend this limitation but that it intended to embody the law to be found in the Mercantile Law Amendment Act and to make no distinction between sureties in a bilateral contract and those in a trilateral

(1) (1834) 3 My. & K., 183. (2) (1880) 15 Ch D., 400.
(3) (1863) 13 C.B. (N.S.), 543 at p. 594

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contract but I am not prepared to hold that section 145 can be construed as giving effect to that intention. The plaintiff must therefore fall back on section 140 where his rights are entirely statutory. This section gives him his suit on the original obligation but subject to the same limitations as affect the creditor. This being so it does become necessary to have findings on the issues above referred to. I would like to add that I see no hardship in a surety being enabled by law to become a creditor without the consent of the original debtor. Since the Judicature Act, all choses in action have been transferable without consent of the debtor and even prior to the Act, the Courts of Equity recognized equitable assignments without such consent, *vide*, *Brandt* v. *Dunlop Rubber & Co.* (1) and the law in this country has followed the English Law up to the date of the Amending Act to the Transfer of Property Act (Act II of 1900), which has even gone beyond the English Statutory Law.

In compliance with the order contained in the above judgment the temporary Subordinate Judge of Sivaganga submitted findings on both the issues in favour of the plaintiff, to the effect that there was due presentment of the hundi for payment as well as due notice of dishonour, as required by sections 74 and 30 of the Negotiable Instruments Act, respectively.

This Second Appeal coming on for final hearing the Court delivered the following

AYLING AND NAPIER, JJ.

JUDGMENT.—We accept the findings and dismiss the appeal. There is no order as to costs.

K.R.

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(1) (1905) A.C., 454.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

Re MADDELA RAMANUJAMMA (ACCUSED), PETITIONER.*

1916, March 15 and 28

Criminal Procedure Code (Act V of 1898), sec 164—Difference between statement and confession—Statement taken on affirmation, under section 164 from a complainant, not a confession—Admissibility in evidence of statement, to prove perjury

A complainant's sworn statement charging another with an offence was recorded by a Magistrate as a "statement" under section 164 of the Criminal Procedure Code:

Held, the fact that the statement happened also to amount indirectly to a confession of the complainant's own guilt of some other offence but not recorded as such by the Magistrate in accordance with the provisions of section 364 of the Code, is no bar to its admissibility in evidence against the complainant on a charge of perjury

Semble —Whether a statement is to be regarded as a *confession* or not depends on the connection in which and the purpose for which it was made. A statement recorded as such cannot be used as a confession, nor a confession, as a statement.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of J. C FERNANDEZ, the Sessions Judge of Guntur, in Criminal Appeal No 32 of 1915, preferred against the order of J. N. ROY, the Joint Magistrate of Ongole, in Calendar Case No. 44 of 1915.

The accused in this case laid a complaint under section 373, Indian Penal Code, before the police that one *M. S.* bought from her her daughter who was a minor for purposes of prostitution. The police took her (the complainant) to a Magistrate who recorded from her on solemn affirmation a "statement" to that effect under section 164, Criminal Procedure Code. As during the subsequent criminal trial against *M S.* she deposed to a totally different version and completely denied the guilt of *M.S.* in every way, *M.S.* was discharged for want of evidence. She was then charged for perjury for having made two contradictory statements, one before the Magistrate at the time of the complaint [Exhibit A] and another during the trial held thereon. The Magistrate convicted the accused under section 193, Indian Penal Code, and sentenced her to undergo rigorous imprisonment for one year.

* Criminal Revision Case No 757 of 1915 (Criminal Revision Petition No. 612 of 1915).

Re RAMANU-JAMMA

The Sessions Judge on appeal confirmed the conviction and sentence. Thereupon the accused preferred this Criminal Revision Petition to the High Court.

T. Prakasam for the petitioner.

The Acting Public Prosecutor for the Crown.

AYLING J.

AYLING, J.—Petitioner has been convicted on an alternative charge of perjury in connection with two contradictory statements made on affirmation (Exhibits A and D). The conviction was confirmed in appeal and the sole ground argued before us on petitioner's behalf is that Exhibit A recorded by the Sub-Magistrate of Ongole under section 164 of the Criminal Procedure Code is inadmissible in evidence.

It is urged that this statement is of a confessional nature, that it was not recorded in the manner provided in section 364 of the Criminal Procedure Code and that for this reason it is inadmissible in evidence: *vide*, *Queen Empress* v. *Viran*(1).

It appears that Exhibit A was recorded in the course of an investigation by the police of a charge under section 373 of the Indian Penal Code against one M Subba Rao. This man was said to have practically purchased a certain minor girl, Venkamma, for purposes of prostitution and to have had her kannarikam ceremony performed, thereby dedicating her to that profession.

Petitioner is the mother of Venkamma and in Exhibit A she undoubtedly makes statements which strongly suggest the inference that she was herself guilty of an offence under section 372 of the Indian Penal Code. If she were on her trial for such an offence, Exhibit A would have to be regarded as a statement of a confessional nature; and, not having been recorded in the manner prescribed by section 364 of the Criminal Procedure Code, it would be inadmissible in evidence.

The question is whether it is admissible in the present proceedings (a prosecution for perjury against the person making it) for the purpose of proving that she did make the statement therein recorded? or, to put the difficulty somewhat differently, whether the Magistrate who recorded it was entitled to administer an affirmation before recording it? Both questions turn on the same considerations and both must, in my opinion, be answered in the affirmative.

(1) (1886) I.L.R., 9 Mad., 224.

Section 164 of the Criminal Procedure Code distinguishes sharply between statements of witnesses and confessions of accused persons The former may be made on affirmation and recorded in such of the manners prescribed for recording evidence as to the Magistrate seems best fitted. The latter has to be recorded as prescribed by section 364 of the Criminal Procedure Code and before recording it the Magistrate must follow the procedure laid down in clause (3) of the section, but of course, administers no affirmation or oath.

Now it seems to me that the same utterance or series of utterances made by any individual to a Magistrate might be regarded as a "statement" from one point of view and as a "confession" from another point of view—using both terms in the sense contemplated by the section It all depends on the connection in which and the purpose for which it is sought to be used. As succinctly expressed by ABDUR RAHIM, J, in the Tinnevelly case of *Muthukumaraswami Pillai* v. *King-Emperor*(1) ' whether a statement is to be called a confession or not depends, not merely on the nature of the statement itself, but on the use that is sought to be made of it."

A Magistrate setting out to record under section 164 of the Criminal Procedure Code what any person has to say to him may adopt one of two alternatives : he may record it as a "statement" or as a "confession," using the appropriate procedure in each case. In either case the record may be used, as allowed by law, for the purpose for which it was taken but its use for any different purpose may be open to diverse objections. For example, a "confession" could not be used as the basis of a prosecution for perjury. A "statement" could not be used as a "confession" that is, as an admission of the truth of the facts set out in it, in a criminal prosecution based on those facts, either against the person making it or against other persons with whom he may be jointly tried.

Now in the present case, as far as I can see, until the argument we are now considering was advanced in this Court, the idea of Exhibit A being a "confession" never occurred to any one. No prosecution for an offence under section 372 has ever been instituted against petitioner, nor, so far as appears, has ever been contemplated. When the case against M. Subba Rao

(1) (1912) I.L.R., 35 Mad., 397 at p. 490.

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AYLING, J.

broke down in consequence of petitioner and others resiling in Court from their earlier statements, the police took steps to prosecute petitioner not for an offence under section 372 but for one under section 193 of the Indian Penal Code Before taking her to the Magistrate on 7th September 1913, the police actually treated her as a *complainant* and recorded a statement from her (Exhibit J) as provided in section 154 of the Criminal Procedure Code. Exhibit A itself was undeniably recorded as a "statement" and was used by the prosecution in the case against Subba Rao for purposes of contradiction when allowed to cross-examine her. Throughout those proceedings she was treated as a witness and Exhibit A as the statement of a witness

I can see no reason why its admissibility in the same sense in the present case should be affected by the fact, that, if it had been differently recorded, it might have been used as a confession in a prosecution for a totally different offence.

Our attention has been drawn to the judgments both of the Special Bench and of the Full Bench in the Tinnevelly case —*King Emperor* v *Nilakanta*(1)—and reliance is placed on the fact that the majority of the Full Bench held that section 25 of the Indian Evidence Act precluded the admission as evidence in that case of the statements of the approvers to the Police Inspector. The circumstances there were entirely different and the statements were sought to be used for an entirely different purpose, i.e., to corroborate subsequent statements of the approvers in Court as to the same facts and thereby to establish the said facts. Here no attempt is made to do anything of the kind · the prosecution do not try to prove that the averments in Exhibit A are true, but only that petitioner made those averments.

I may also be permitted to remark that although the majority of the Full Bench held that section 25 of the Indian Evidence Act applied, yet of the eight Judges of this Court, who had to consider the point, four took the contrary view (the CHIEF JUSTICE, MILLER, J., ABDUR RAHIM, J., and myself). I am not sure therefore that if the point had to be considered it should even now be treated as finally settled.

In my opinion Exhibit A was properly admitted in evidence. I would therefore dismiss the petition.

NAPIER, J.

NAPIER, J.—I agree.

N.R.

(1) (1912) I.L.R., 35 Mad., 247.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

NARNA, MINOR BY GUARDIAN VITTAPPA SHANBHOGA (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANT,

1916.
April 27.

v.

AMMANI AMMA (SECOND DEFENDANT), RESPONDENT.*

(Indian) Limitation Act (IX of 1908), arts. 132 and 75—Mortgage bond—Interest payable annually—Principal, payable on a future date—Principal and interest payable immediately on default—Option to mortgagee to enforce payment—Suit after twelve years from default, if barred—Gift by a Hindu widow of a mortgage bond due to her husband—Gift, if valid and to what extent—Suit by widow, competency of transferee to continue—Decree, nature of.

Suits for money due on hypothecation bonds though containing stipulations for payment in instalments are governed by article 132 and not by article 75 of the Indian Limitation Act (IX of 1908) and there is no warrant for importing into the former the words of the latter article A hypothecatee is not *bound* to take advantage of a clause in his bond, which, in case of default in payments of interest, enables him (*a*) to demand the principal before its due date and (*b*) also claim a higher rate of interest from the date of default. Hence a suit restricted to a claim to recover the principal and interest at the original rate, brought within twelve years from the date originally fixed for payment of the principal, though beyond twelve years from the date of first default in respect of interest, is not barred by limitation.

Nettakaruppa Goundan v. *Kumarasami Goundan* (1899) I.L.R., 22 Mad., 20, *Astley* v. *Earl of Essex* (1874) 18 Eq., 290 and *Governors of Magdalen Hospital* v. *Knotts* (1876) 5 Ch D., 175, followed

Perumal Ayyan v. *Alagirisami Bhagavathar* (1897) I.L.R., 20 Mad., 245, explained.

A gift by a Hindu widow, of a mortgage-bond executed to her in discharge of a debt due to her husband, is valid to the extent of the interest that had accrued due at the date of the gift, and the transferee is competent after her death to prefer a second appeal in a suit filed by her on the bond and obtain a decree for recovery of interest only due thereon.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 76 of 1912 preferred against the decree of K APPAJI RAO, the District Munsif of Puttur, in Original Suit No. 553 of 1911.

The suit was originally instituted by one *B*, a Hindu widow, on a mortgage-bond executed in her favour on the 1st of November 1888 by the mother of the second defendant. The bond was in discharge of a previous mortgage-bond executed to her husband and provided that the interest due on the principal

* Second Appeal No. 1553 of 1913.

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amount of Rs. 200 at the rate of 6¼ per cent per annum should be paid on the 1st November of every year, and that the principal amount should be paid on the 1st November 1899 together with interest due for the previous year; the bond contained a further stipulation that, in the event of default by the mortgagor in the payment of interest in any year or of the principal on the due dates specified therein, the mortgagor should pay "the principal sum together with interest at 12 per cent per annum from the date of default till the date of payment without raising the plea of future instalments on the liability of the mortgage property." The mortgagor made default in paying interest on the 1st November 1896 and in subsequent years, nor was the principal amount paid on the due date. The mortgagee brought a suit on the 31st October 1911 on the mortgage bond to recover by sale of the hypotheca the principal and interest due thereon at 12 *per cent per annum* from the 1st November 1899 (the date fixed for payment of the principal amount), and gave up her claim for interest due prior to that date. The defendants contended, inter alia, that the suit was barred by limitation, as the principal had become payable on the date of the first default and more than twelve years had elapsed at the date of suit from the accrual of the cause of action. The District Munsif upheld the contention of the defendant and dismissed the suit. On appeal by the plaintiff, the District Judge dismissed the appeal on similar grounds. During the pendency of the appeal in the lower Appellate Court, the widow, who was the original plaintiff, transferred her rights in the bond by way of gift to one Narna, a minor represented by his father and guardian Vittappa Shanbhoga; the widow died subsequent to the passing of the decree in the lower Appellate Court against her as the appellant. The transferee preferred a second appeal to the High Court against the decree of the lower Appellate Court.

K. P. Madhava Rao and *K.P. Lakshmana Rao* for the appellants.

B. Sitarama Rao for the respondent.

The case coming on for hearing in the first instance, the following judgment of the Court was delivered by

SESHAGIRI AYYAR AND NAPIER, JJ.

SESHAGIRI AYYAR, J.—The suit was instituted by a widow on a mortgage. Her suit was dismissed by the District Munsif. She preferred an appeal. During the pendency of the appeal she assigned her rights in the mortgage to the present appellant.

She then died and the appellant was allowed to continue the appeal. The appeal was also dismissed. This second appeal was preferred by the assignee. A preliminary objection is taken by Mr. Sitarama Rao for the respondent to the competency of the appeal on the ground that as the widow sued for property belonging to her husband, *she was not entitled to make a gift* of that interest in favour of the appellant.

Before deciding the point, we think it desirable to call for a finding on the question whether the original plaintiff had any interest of her own in the subject matter of the litigation which she was competent to transfer to the appellant.

Fresh evidence may be taken. The finding will be submitted within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Canara submitted the following

FINDING.

"I have been directed to return a finding on the question whether the original plaintiff, Bhagirathi Amma, had any interest of her own in the subject matter of the litigation, which she was competent to transfer to the appellant.

"Appellant has examined two witnesses and respondent's vakil has stated that he has no instructions.

"Appellant's case is that the property transferred to him was acquired by Bhagirathi Amma with her savings from the income of her husband's property. It is probable enough that she was able to make large savings as the income is said to have been Rs. 10,000, but the mortgage to which the suit relates was executed in discharge of a prior mortgage in favour of Bhagirathi Amma's husband. So far as the principal is concerned, I do not think she had any interest of her own which she was competent to transfer, but she could dispose of the interest, which was so much accumulated income, and that is my finding"

This Second Appeal coming on for final hearing the following judgment of the Court was delivered by

SESHAGIRI AYYAR, J.—The suit is by the assignee of a widow on a mortgage executed in her favour. On the last occasion, we called for a finding whether the widow had any assignable interest in the debt transferred to the plaintiff. The finding

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returned is that the widow was competent to assign away the interest that remained due on the date of the assignment and not the principal of the mortgage debt. We accept the finding.

Mr. Sitarama Rao, however, raised the question that the claim is barred by limitation. The mortgage is dated the 1st November 1888. It provides for the payment of the principal on the 1st of November 1899, and for annual payment of interest at 6½ per cent per annum. There is a further stipulation in the document which is in these terms: "If I, without paying the interest on the due date and also the principal and interest on the respective due dates according to the aforesaid conditions, allow the same to fall into arrears, I shall pay the principal sum together with interest at 12 per cent from the date of default till the date of payment without raising the plea of future instalment on the liability of the mortgage property." We read this clause as entitling the mortgagee to the original rate of interest only, if he does not desire to enforce the clause for enhanced interest, but that should be claim the higher interest on account of the default in the punctual payment of the ordinary rate, he shall be entitled to sue for the principal sum also without waiting for the due date. In other words, an option is reserved by the clause above referred to, to the mortgagee to anticipate the due date. It is not disputed that the interest was not paid as provided for. The question therefore is, is the mortgagee bound to take advantage of the default clause, and whether limitation begins to run against him from the date of the first default? Under very similar circumstances two learned Judges of the Allahabad High Court held that the cause of action accrued on the date of the first default, whereas BANNERJEE, J., held that the right to sue did not accrue until the date provided for the payment of the principal arrived—*Gaya Din* v. *Jhumman Lal*(1). We are inclined to agree with the view taken in the dissenting judgment. The article applicable to the suit is 132 and not 75. There is no warrant for importing into the former the words of the latter.

Can it be said that the money sued for became due when the first default was made if the mortgagee wants only the principal and the original rate of interest? If the claim is for the enhanced

(1) (1915) I.L.R., 37 All., 400.

interest, it can well be argued that that became due when the first default was committed. When the creditor chooses to exercise the option which limits his claim to the ordinary interest, it would be straining the language of article 132, to hold that his right of action accrued when the benefit which he does not choose to avail himself of might have been enforced by him.

It is a well settled principle of law that no one is obliged to take advantage of a forfeiture, section 4 of 3 & 4 Will. IV, cap. 27. This rule has been applied to cases providing a right of entry on a forfeiture ; and it has been held that the landlord should not be compelled to take advantage of the forfeiture clause, so as to make limitation run against him, if he does not choose to avail himself of it—*Astley* v. *Earl of Essex*(1). In a later case, SIR GEORGE JESSEL, M.R., who decided the case just quoted used some very forcible language against the contention to accelerate limitation. In *Governors of Magdalen Hospital* v. *Knotts*(2), the learned Master of the Rollssays. "The mere statement of such a proposition was shocking to one's intellectual perception when one considered for what objects the Statute of Elizabeth was enacted." It was also pointed out that a benefit secured to the creditor should not be availed of by the debtor when the former does not want it. No doubt, in *Reeves* v *Butcher*(3) and *Hemp* v. *Garland*(4) a different view was taken. Lord DENMAN, C.J., says in the latter case: "If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitations runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the statute; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitations" It is most probable that the language of article 75 of the Limitation Act was borrowed from this judgment. Banning on Limitation points out that this decision [illegible]

(1) (1874) 18 Eq., 290.
(2) (1876) Weekly Notes, &c., 5 Ch. D., 175 at p. 180.
(3) (1891) 2 Q.B., 509.
(4) (1843) 4 Q.B., [illegible]

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SESHAGIRI AYYAR AND NAPIER, JJ.

not consider the principle that no one ought to be forced to take advantage of a forfeiture. Whatever may be the effect of the learned Chief Justice's view regarding the construction of article 75 of the Limitation Act, we see no reason for not giving the language of article 132 its plain and natural significance. As pointed out by BANNERJEE, J., the Judicial Committee in *Juneswar Dass* v. *Mahabeer Singh*(1) seem to indicate that the creditor is not compellable to take advantage of a defeasance clause.

There have been numerous cases under article 75. We are not concerned with them. There are two cases in this Court dealing with article 132. In *Perumal Ayyan* v. *Alagirisami Bhagavathar*(2) the default clause did not reserve any option to the mortgagee. On the other hand in *Nettakaruppa Goundan* v *Kumarasami Goundan*(3), when the mortgagee was given the option of claiming the whole amount "when he required it," the learned Judges held that the cause of action did not accrue on the date of the first default.

Sitab Chand Nahar v. *Hyder Malla*(4) follows *Hemp* v. *Garland*(5). In all the above cases, it seems to have been taken for granted that the words of article 75 should be imported into article 132 We are of opinion that it would not be in consonance with the ordinary rules of interpretation of statutes to regard a specific provision in one of the articles of an Act as containing a general rule of law applicable to claims under other articles. We think the proper view is to limit the restrictive period to the particular claim provided for, and to construe the language of the other articles in their natural sense. Our conclusion is that the claim is not barred by limitation and that the plaintiff is entitled to recover the sum of Rs. 150 which represents the interest due on the mortgage at 6¼ *per cent.* The decrees of the Courts below must be reversed and a decree should be given to the plaintiff for Rs 150 with further interest thereon at 6 per cent per annum from the date of the plaint. The parties will pay and receive proportionate costs.

K.R.

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(1) (1876) I.L.R., 1 Calc., 163
(2) (1897) I.L.R., 20 Mad., 215.
(3) (1899) I.L.R., 22 Mad., 20.
(4) (1897) I.L.R., 24 Calc., 281.
(5) (1843) 4 Q.B., 519

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

PANDILLAPALLI SINGA REDDI (DEFENDANT), APPELLANT,

1915. November 5 and 10.

v.

YEDDULA SUBBA REDDI AND TWO OTHERS, (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—Suit by reversioners to declare an alienation invalid during widow's lifetime, withdrawal of—Subsequent suit after widow's death for possession—Defence, the same as in the first suit—Subsequent suit not barred by Civil Procedure Code, O XXIII, r. 1 (3).

The next presumptive reversioners of a deceased Hindu instituted a suit against his widow and her alienee for a declaration that an alienation by her was invalid and not binding on them. Pending the suit the widow died and the reversioners withdrew the suit but did not ask for permission to bring a fresh suit. They subsequently brought a suit against the alienee for the recovery of possession of properties from him and he set up the very same defences on the merits which he had set up in the first suit·

Held, that the subsequent suit was not barred by the provision of Order XXIII, rule 1 (3), Civil Procedure Code (Act V of 1908) Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit and the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit.

Gopal Chandra Banerjee v *Purna Chandra Banerjee* (1898) 4 C W.N, 110, followed.

Achuta Menon v. *Achutan Nair* (1898) I L.R, 21 Mad., 35, *Machana Vajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1910) M W N, 782, and *Sennavx Reddiar* v. *Venkatachala Reddiar* (1915) 2 M.L.W, 177, overruled.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Nellore, in Appeal No. 170 of 1913, preferred against the decree of B. KRISHNA RAO, the Temporary Subordinate Judge of Nellore, in Original Suit No. 26 of 1913 (Original Suit No. 40 of 1912 on the file of J. W. HUGHES, the District Judge of Nellore).

The facts of the case appear from SADASIVA AYYAR, J.'s ORDER OF REFERENCE TO THE FULL BENCH.

T. V. Venkatarama Ayyar for the appellant

S. Varadachariar for the respondents.

* Second Appeal No 1376 of 1914.

This Second Appeal and the Memorandum of Objections came on for hearing before SADASIVA AYYAR and NAPIER, JJ., who made the following ORDER OF REFERENCE TO THE FULL BENCH :—

SADASIVA AYYAR, J.—The defendant is the appellant. The plaintiffs are the sons of the daughter of *Pera Reddi* by his first wife. The defendant is the husband of the deceased daughter of Pera Reddi by his second wife. The wives and the daughters are all dead, the second wife who was the defendant's mother-in-law having died in 1912. Till her death, she was entitled to enjoy the plaint lands as her husband's heir. After her death, the plaintiffs as reversioners are entitled to possession. These are the facts found. The plaintiffs' case succeeded on the merits in the lower Courts as regards most of the properties in dispute. The defendant's learned vakil Mr. T. V. Venkatarama Ayyar did not and could not seriously argue on the merits, the illatom son-in-lawship set up by his client having been found against by the lower Courts.

The learned vakil therefore based his strenuous contentions on a technical question of law. To understand that question, a few further facts have to be stated. The plaintiffs had brought Original Suit No 46 of 1911 during the lifetime of the defendant's mother-in-law, Venkatammal, against the present defendant (as the first defendant) and against Venkatammal (as the second defendant) for a declaration that the alienation by a settlement deed made by Venkatammal in December 1909 in favour of the present defendant (then first defendant) making several false recitals as to the defendant being an illatom son-in-law and so on, may be declared invalid and not binding on the reversioners after Venkatammal's death. Venkatammal died in 1912 during the pendency of that suit. The present defendant set up the very same false defences on the merits which he has set up in this suit. During the pendency of that suit Venkatammal died. Then the plaintiffs withdrew that suit as, from having been merely contingent reversioners, they became vested reversioners on her death and had become entitled not only to sue for a declaration of the invalidity of Venkatammal's acts after her death but also to sue for possession itself of the lands. They did not ask for permission to bring a fresh suit on the freshly acquired cause of action for fresh reliefs ; evidently they thought it would be unnecessary to do so (see Exhibit IX*a*).

The defendant contended at a late stage of the trial of this suit in the first Court that the suit was barred as *res judicata* by the withdrawal of the former suit. It was clear that there could be no *res judicata* in the usual and strict sense of that term as the first suit was not heard and decided and was only withdrawn from the adjudication of the Court. What the defendant meant by the plea of *res judicata* however appears to be that the suit was barred by rule 1 (3) of Order XXIII of the Civil Procedure Code. This statutory bar cannot, in my opinion, be called *res judicata*.

In the lower Courts, *Machana Uajhala Dikshatulu* .v. *Gorugantulu Yaggamma*(1) was relied upon by the defendant. That case was almost but not quite on all fours with the present suit. The plaintiffs there were also reversioners who had first sued for a declaration that the alienations by the widow were invalid, withdrew that suit against some of the defendants and as against some properties in the possession of those defendants without obtaining liberty to bring a fresh suit and then brought a second suit after the death of the widow against those defendants for possession of those properties. The judgment of the learned Judges (MUNRO and SANKARAN NAIR, JJ.) is contained in the following sentence: "Following *Achuta Menon* v. *Achutan Nair*(2), we dismiss the Second Appeal with costs." The Subordinate Judge in his judgment refers to this decision as follows: "There are no reasons given in the judgment which is very brief. It merely follows *Achuta Menon* v. *Actutan Nair*(2). The full facts have not been given. It is very probable that the plaintiff who proceeded to trial in respect of some property in the previous suit was held not entitled to maintain a second suit with reference to the property as to which he withdrew the claim. But in the present case, the plaintiffs did not proceed to trial at all as the widow died. They withdrew the entire suit and instituted this fresh suit for possession of the entire property." I am unable to concur with the learned Subordinate Judge that the fact that the first suit was not withdrawn in its entirety in *Machana Uajhala Dikshatulu* v. *Goruganiulu Yaggamma*(1) could make any difference in principle, having regard to the language of section 373, corresponding to present Order XXIII,

(1) (1910) M.W.N., 782. (2) (1898) I.L.R., 21 Mad., 35.

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that language making no difference in the result between the withdrawal of a portion or the withdrawal of the whole of a suit as regards the effect of such withdrawal on the suit or the portion of the suit as the case may be. Then the learned Subordinate Judge says in paragraph 52 of his judgment that in *Achuta Menon* v. *Achutan Nair*(1), the first and the second suits were both suits for the relief of ejectment and that the titles set up in the two suits were also substantially the same and that the general observations in *Achuta Menon* v. *Achutan Nair*(1), namely, that where the first suit was withdrawn without liberty to bring a fresh suit, the plaintiff cannot contest in the second suit the allegations which constituted the defence or part of the defence to the claim made in the first suit, must be confined to cases where the causes of action for the two suits and the reliefs claimed in the two suits are substantially the same.

The learned District Judge in paragraph 20 of his judgment says: "The only case on which the appellant can rely is *Machana Uajhala Dikshatulu* v. *Goruganululu Yaggamma*(2) but I find it difficult to apply this case in the absence of a full report of the facts." I have perused the printed papers in *Pullayya Dikshatulu* v. *Yagnamma*(3) and I find the facts are not so different in material particulars as to affect the applicability to this case of what I must hold to have been the principle of the decision in *Machana Uajhala Dikshatulu* v. *Goruganlulu Yaggamma*(2). Further in *Sennava Reddiar* v. *Venkatachala Reddiar*(4) AYLING and TYABJI, JJ., held themselves bound by the decisions in *Achuta Menon* v. *Achutan Nair*(1) and *Machana Uajhala Dikshatulu* v. *Goruganlulu Yaggamma*(2) and dismissed an absolutely similar suit to the present one as barred by Order XXIII, rule 1 (3), of the Civil Procedure Code. In that case also, the widow died during the pendency of the first suit. The learned Judges held that the slight difference in language between section 373 and Order XXIII, rule 1 (3) (the word "matter" being substituted by the words "subject-matter"), did not make any difference. TYABJI, J., says: "In the face of the above" two "decisions," "there is no room for any further discussion of the law." I am free to confess that I feel grave doubts as regards

(1) (1898) I.L.R., 21 Mad., 35. (2) (1910) M.W.N., 782.
(3) Second Appeal No. 389 of 1903. (4) (1915) 2 M.L.W., 177.

the decisions in *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(1) and *Sennava Reddiar* v. *Venkatachala Reddiar*(2). So far as *Achuta Menon* v. *Achutan Nair*(3) is concerned, my learned brother and myself followed it recently in *Damodaran* v. *Theyyanakan*(4). But in that case, the cause of action for and the relief claimed in the first suit were found for the purposes of that decision to have been substantially identical with the cause of action and the relief claimed in the second suit and we held that the facts mentioned in the defence in the first suit cannot be controverted in the second suit. We did not, however, dismiss the second suit but gave relief to the plaintiff on the basis of the truth of the facts pleaded by the contesting defendants in the first suit. Mr. Varada Achariyar wished to attack *Achuta Menon* v *Achutan Nair*(3) on the ground that on the facts of that case the second suit could not be held to have been on substantially the same cause of action as the first suit and hence that decision itself was wrong. I do not think when dealing with a question of law such as this we could go behind the statement of the learned Judges as to the nature of the relationship between the causes of action in the two respective suits. At page 39 the learned Judges say: "In our opinion it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two suits, that there is a complete difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants a duty wholly or to any extent different from that to which they were subject before that transaction took place." Then, no doubt, they go on to say "suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit," and to express the opinion that even in that case the plaintiff would be barred from controverting the defence allegations in the first suit.

While I am prepared to follow the ruling in *Achuta Menon* v. *Achutan Nair*(3) where the causes of action for the two suits are substantially the same, I regret that I cannot follow the *obiter dictum* that even if the causes of action are substantially

(1) (1910) M.W.N., 782. (2) (1915) 2 M.L.W., 177.
(3) (1909) I.L.R., 21 Mad., 33. (4) Second Appeal No. 570 of 1914.

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different, the facts stated in the defence in the first withdrawn suit cannot be controverted in the second suit. If the causes of action are the same and if the reliefs *claimable* (though not claimed) are the same, then also Order XXIII will apply, read with Order II, rule 2. Where the causes of action are substantially different and *afortiori*, where not only the causes of action are different but the reliefs claimed are different and still more, where not only the causes of action are substantially different, but the reliefs claimed are bound to be different, I do not think that the defence pleas in the first suit are made incontrovertible in the second suit by the provisions of Order XXIII. Nor do I think that the difference in language by the substitution of the word "subject-matter" [(which is the word used in the Order XXIII, rule 1(3)], for the word "matter" (which was the word used in paragraph 2 of section 373) can be held to make any difference in the scope of the two provisions. While paragraph 1 of section 373 used the word "subject-matter" paragraph 2 used the word "matter" and this was corrected in the new Code for the sake of uniformity. I might further respectfully point out that no authority is quoted for giving such a very wide interpretation to the word "subject-matter" or "matter" in *Achuta Menon* v. *Achutan Nair*(1), that is, so as to include the defence allegations in the first suit even where the second suit is brought on a different cause of action. Let me take an extreme case to show the length to which we would have to go if the *obiter dictum* in *Achuta Menon* v. *Achutan Nair*(1) is followed. Suppose *A* brings his first suit against *B*, a trespasser who trespassed on the plaint lands one year before suit, *A* claiming title as purchaser from *C* whom he treated as the heir of *D*, the admitted former owner. *B* sets up a false claim of ownership in himself as heir to *D* (the admitted owner who died two years before suit) in preference to the plaintiff's vendor *C*. During the course of the suit, *A* finds that neither *C* nor *B* is the real owner but *E* is the owner as the real heir of *D*. He therefore withdraws his first suit against *B* without permission to bring a fresh suit. He then gets a conveyance from *E* and within three years of the death of the admitted owner *D*, brings a second suit against *B* basing it on the title obtained by the purchase from

(1) (1898) I.L.R., 21 Mad., 35.

F. Can it be argued that his second suit based on the purchase from *E* the real owner is barred by the incontrovertibility of the false defence raised by *B* in the first suit, though the plaintiff honestly and properly withdrew his first suit which he brought through his mistaken notion that *C* was the heir of *D* and which suit was bound to fail?

I am further clear that the suit for declaration brought by a contingent reversioner who has really no title in the eye of the law [see section 6, clause (*a*) of the Transfer of Property Act and section 60, proviso clause (*m*) of the Civil Procedure Code] and who is given a special cause of action by the current of decisions in the Privy Council to bring a suit to declare the widow's alienation invalid as against the reversioners and whose suit as recently decided by the Privy Council in *Venkatanarayana Pillai* v. *Subbammal*(1) is brought on behalf of all the possible contingent reversioners, is brought by him in a quite different character from a suit brought by the same person in whom the inheritance became fully vested on the death of the widow to recover possession of the property from the widow's alienee. The fact of the widow's death is a most important fact which thoroughly changes the nature of the cause of action and which vests the cause of action in a particular defined person and not in the whole body of possible contingent reversioners. Further while in the contingent reversioner's suit he cannot claim the relief of possession but only the relief of declaration (and reliefs appurtenant to that declaratory relief), in the second suit he cannot claim the relief of declaration as a substantial relief or as the only relief but can and ought to claim the relief of possession; see *Syed Siliman Sahib* v. *Hussain Sahib*(2) which is a still stronger case in favour of the plaintiff because it was held that a suit for declaration by a person out of possession was on a different cause of action from that on which a second suit for possession on the same title was based. Again in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee*(3), BANERJEE, J., says: "The mere fact of two suits being in respect of the same property would not be sufficient to make the latter suit one for the same matter as the former, *when the state of facts leading to the*

(1) (1915) I.L.R., 38 Mad., 406 (P.C.). (2) (1913) 25 M.L.J., 125.
(3) (1898) 4 C.W.N., 110 at pp. 112 and 113.

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two suits and the reliefs claimed under them are different." In *Kamini Kant Roy* v. *Ram Nath Chuckerbutty*(1), BANERJEE and RAMPINI, JJ., held that where the causes of action were different, the fact that the defence was the same in both suits and the first suit was withdrawn without liberty to bring a fresh suit did not prevent the plaintiff from controverting in the second suit the defence made in the first suit and repeated in the second.

In section 11 of the Civil Procedure Code which treats of bar by *res judicata* the word used in the section in explanations 3 and 4 is "matter." In the statutory bar prescribed in Order II, rule 2, the expressions used are "subjects in dispute," "cause of action" and "claim." In the statutory bar enacted in Order XXIII the word is "subject-matter." In *Kaveri Ammal* v. *Sastri Ramier*(2) the word "object-matters" is used (see line 2) when considering the question of *res judicata*. In *Ramaswami Ayyar* v *Vythinatha Ayyar*(3), Sir BHASHYAM AYYANGAR considers fully the provisions of the old Civil Procedure Code corresponding to the provision of section 11 and Order II of the new Code. At page 763 he says: "The first contention is mainly based on the argument that the phrase 'the subjects in disputes' occurring in section 42 connotes the corpus or object-matter of the claim and that, therefore, all possible claims to the same should necessarily be offered for decision in the suit. In our opinion the expression 'the subject in dispute' signifies *the jural relation between the parties to the suit, for the determination of which the suit is brought*. In other words, the object of section 42 is to require the plaintiff to bring forward his whole case as to the *matter of litigation on the question of right involved in the suit* and not to require him to unite all the causes of action which he may have against the defendant in respect of the corpus or object-matter of the suit." Then at page 766 he says: "It is clear that the expression 'subjects in dispute' means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon." At page 768, he refers to Mr. Justice HOLLOWAY's decision where the expressions "matter of litigation," "question of right," "particular kind of claim" occur.

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(1) (1894) I.L.R., 21 Calc., 265 (2) (1903) I.L.R., 26 Mad., 104 at p. 109.
(3) (1903) I.L.R., 26 Mad., 760.

It may be that there are subtle and refined distinctions between the meanings of the different expressions "subject-matter," "corpus," "object-matter," "cause of action," "matter," "transaction" [a word used in some places in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1)], "ground of claim" and so on I do not mean to venture upon a discussion of such differences. In *Achuta Menon* v. *Achutan Nair*(2), the word "matter" in section 373 was held to include the question which is raised in the allegations of the defendant. The expression "fresh suit for the same matter" was considered as meaning a fresh suit which involves the truth of the allegations of the defendant forming part of the matter to be decided in the former suit. It may therefore be that the word "matter" has a larger meaning than "cause of action." But can the "matter" in the second suit be held to be the same when the cause of action is substantially different though the defence is the same? In respect of the bar by *res judicata*, it has now been settled by the decisions in *Krishna Behari Roy* v. *Brojeswari Chowdranee*(3), *Ummatha* v. *Cheria Kunhamed*(4), *Alluni* v. *Kunjusha*(5) and *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1) that, where the causes of action are different, even a dismissal of the first suit by the Court after contest on the merits is no bar to the maintainability of a second suit on a substantially different cause of action, even though the defences may be the same in the two suits. Is a plaintiff who, honestly in order to save the time of and trouble to the Court, withdraws the first suit instead of allowing it to be dismissed on the unsustainability of the rights set up by him, to be in a worse position by his said honest withdrawal than if he had delayed the disposal of that suit and obliged the Court to give its opinion on the merits of his first cause of action?

I would therefore refer to the opinion of the Full Bench the following question:—

Whether the rule laid down in *Achuta Menon* v. *Achutan Nair*(2) (that a plaintiff who has withdrawn a former suit without permission to bring a second suit is prevented from agitating in the second suit the truth of the allegations which constitute the defence in the first suit) applies in the present case where the

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(1) (1903) I.L.R., 26 Mad., 760. (2) (1898) I.L.R., 21 Mad., 85.
(3) (1875) 1 Calc., 144 (P.C.) (4) (1882) I.L.R., 4 Mad., 308.
(5) (1884) I.L.R., 7 Mad., 264.

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cause of action and the relief claimed in the second suit are substantially *different from those in the first suit.*

NAPIER, J.

NAPIER, J.—I entirely agree. It seems to me that there must be a distinction in a case like this where the first suit would not give the plaintiff all that he became entitled to when the death of the widow gave him a new cause of action; unless he got leave to amend, he would necessarily have to bring a second action founded on the declaration given in the first, and it is more reasonable that he should withdraw the first suit and bring a consolidated suit for possession.

The case came before the Full Bench.

T. V. Venkatarama Ayyar for the appellants.

S. Varadachariar for the respondents.

The following OPINION of the Court was delivered by

WALLIS, C.J., AND ABDUR RAHIM AND SRINIVASA AYYANGAR, JJ.

WALLIS, C.J.—We agree with the conclusions of SADASIVA AYYAR, J., in the ORDER OF REFERENCE.

The question is whether the second suit can be regarded as brought in respect of the same subject-matter as the first suit within the meaning of Order XXIII, rule 1 (3) of the Civil Procedure Code. The terms "subject-matter" and "the same matter" which occurred in the corresponding section 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character. Without attempting an exhaustive definition of all that may be included in the term "subject-matter" we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. This was expressly decided in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee*(1) with which we agree. It follows that the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit. We think that the decision in *Achuta Menon* v. *Achutan Nair*(2) and the decisions which followed it, viz., *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(3) and *Sennava Reddiar* v. *Venkatachala Reddiar*(4) must be overruled.

C.M.N.

(1) (1898) 4 C.W.N., 110. (2) (1898) I.L.R., 21 Mad., 35.
(3) (1910) M.W.N., 782. (4) (1915) 2 M.L.W., 177.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Abdur Rahim, the Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

SIVASUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

1916. April 5 and 13 and August 3 and 15.

v.

SUBRAMANIA AYYAR (DEFENDANT), RESPONDENT.*

Transfer of Property Act (IV of 1882), sec. 55 (4)—Sale of land—Vendor and purchaser—Vendor's direction to pay purchase money to a third party on his behalf—Existence of vendor's lien, in spite of.

A contract to forego the vendor's charge for unpaid purchase money is not to be necessarily inferred when the whole or part of the consideration for the purchase of immoveable property is to be paid by the purchaser to a third party on behalf of the vendor

Abdulla Beary v Mammali Beary (1910) I L R., 33 Mad , 446 and *Sivasubramania Mudaliar v. Gnana Sambanda Pandara Sannadhi* (1911) 21 M.L.J., 359 overruled.

Webb v. Macpherson (1904) I L.R., 31 Calc , 57 (P.C.), referred to.

SECOND APPEAL against the decree of M. R. NARAYANASWAMI AYYAR, the Subordinate Judge of Trichinopoly, in Appeal No. 417 of 1913, preferred against the decree of S. SUBBAYYA SASTRIYAR, the District Munsif of Namakkal, in Original Suit No. 37 of 1913.

The facts of the case are set out in the first paragraph of the ORDER OF REFERENCE TO THE FULL BENCH.

A. V. Visvanatha Sastriyar for *G. S. Ramachandra Ayyar* for the appellant.

N. Rajagopalachariar for the respondent.

This Second Appeal coming on for hearing in the first instance before KUMARASWAMI SASTRIYAR and PHILLIPS, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was delivered by

KUMARASWAMI SASTRIYAR AND PHILLIPS, JJ.

PHILLIPS, J.—The appellant sold certain lands to the respondent, for Rs. 2,700 and the sale-deed recited that the amount was left with the vendee for payment to the mortgagee of other lands belonging to the appellant—the words used being "to pay off the principal and interest due to Mr. T. V. Seshagiri Ayyar on his mortgage."

* Second Appeal No. 2062 of 1914

SIVASUBRAMANIA AYYAR v. SUBRAMANIA AYYAR.

KUMARASWAMI SASTRIYAR AND PHILLIPS, JJ.

This was on 7th January 1901, but the respondent paid nothing to the mortgagee until 26th November 1903, by which time the mortgage debt amounted to Rs. 3,401-4-0. The respondent paid only Rs. 3,000 and the appellant had subsequently to discharge the balance due, and seeks to enforce his claim for Rs. 401-4-0 and interest thereon from 26th November 1903, and to charge it upon the property sold to the respondent under section 55 of the Transfer of Property Act. The lower Courts have held that no charge exists and have dismissed the suit as barred by limitation on the authority of the decision in *Abdulla Beary* v. *Mammali Beary*(1). Under section 55 (4) of the Transfer of Property Act a vendor has a charge upon the property sold for the balance of unpaid purchase money in the absence of a contract to the contrary and this, as pointed out by their Lordships of the Privy Council in *Webb* v. *Macpherson*(2) is a statutory charge and different in origin and nature from the vendor's lien given by Courts of Equity in England to an unpaid vendor, and consequently the number of English cases cited are to be regarded as useful only for the purpose of illustration, and it was held that an express contract, or at least something from which an express contract can be implied, must be found in order to exclude the charge given by the statute, and further that the charge is not excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge. In *Abdulla Beary* v. *Mammali Beary*(1) it was held that, when the sale was in consideration of a promise to pay to a stranger, it was a mere covenant the breach of which must be compensated in damages, and that there is no occasion for the statutory charge in favour of the unpaid vendor to arise. *Webb* v. *Macpherson*(2) was considered, but the Judge remarked "notwithstanding that decision . . . . we may on the authority of the English cases [see also *Earl of Jersey* v. *Briton Ferry Floating Dock Company*(3) and *In re Bentwood Brick and Coal Company*(4)] whose weight is still left unimpaired, hold that the conveyance was in consideration of covenants to pay in the future and not for purchase money payable to the vendor in which latter case alone the charge

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(1) (1910) I.L.R., 33 Mad., 446. (2) (1904) I.L.R., 31 Calc., 57 (P.C.).
(3) (1869) L.R., 7 Eq., 409 (4) (1876) 1 Ch. D., 562.

created by the statute can attach." Finally the learned Judges say that upon the finding that there was no purchase money payable to the vendor, the plaintiff had no charge. So far as we understand the judgment, the finding that, when the vendor gets in return for his conveyance a promise to pay the purchase money or a part thereof to a third person to whom the vendor is under an obligation to pay, it is perfectly safe to say that there is a contract to the contrary negativing the charge in the vendor's favour, is based on the authority of English cases which treat of a vendor's equitable lien in England, and the basis of the inference of implied contract to the contrary is that there was no purchase money payable to the vendor, the consideration of the contract being a covenant and not purchase money. It is however significant that in section 55 (4) of the Transfer of Property Act the charge is said to be in respect of the purchase money, and not of purchase money payable to the vendor. There would apparently be a charge whether the purchase money was payable to the vendor or to a third party, *i.e.*, so long as anything which can properly be called purchase money remains unpaid. Can it be said that money to be paid to a third party as consideration for the contract is not purchase money ? If, as we think, it is so, then under section 55 of the Transfer of Property Act the vendor has a charge for any balance unpaid, and this cannot be excluded except by a contract to the contrary. *Abdulla Beary* v. *Mammali Beary*(1) was followed in *Sivasubramania Mudaliar* v. *Gnana Sambanda Pandara Sannadhi*(2) where BENSON and SUNDARA AYYAR, JJ., held that a vendor who has directed the purchase money or a part thereof to be paid to a third party must be taken to have waived by a contract necessarily implied from his conduct the right to a lien for any portion of the money to be paid to the third party under the agreement. No reason is given as to why such a condition as to payment should be considered to amount to a waiver of lien, and with all deference it appears to me that a vendor would usually wish to retain his statutory charge, whether the money was to be paid direct to him and then by him to a creditor, or whether it was to be paid direct by the vendee to the creditor. There being no contract between the creditor and the vendee, the

(1) (1910) I.L.R., 33 Mad., 446 (2) (1911) 21 M.L.J., 353.

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vendor's liability to the creditor continues and he would naturally wish to retain in his power a right given to him to enforce the payment of the money by the vendee, and therefore as pointed out by the Privy Council in *Webb* v. *Macpherson*(1), in order to exclude the charge there must be a contract which is inconsistent with the existence of the charge and as pointed out in *Karuppiah Pillai* v. *Hari Row*(2) the intention of the vendor must be considered in ascertaining whether the charge still exists. As against the authority of these two cases we have *Ramakrishna Ayyar* v. *Subrahmania Ayyen*(3), a case very similar to the one now under discussion and there it was held that the purchaser had a charge for unpaid purchase money. The charge was taken for granted in a similar case—*Sheonandan Lal* v. *Zainal Abdin*(4)—and it was further held that the charge was not personal to the seller, but could be transferred with the debt. In *Meghraj* v. *Abdullah*(5), a charge for purchase money payable to creditors was enforced not only against the purchaser but also against a transferee with notice. In *Gur Dayal Singh* v. *Karam Singh*(6), on the other hand, it was observed that the agreement of the vendee to pay a creditor was the consideration, and that the amount payable to the creditor was not part of the purchase money, but the case was mainly decided on the ground that the property was not in the hands of a buyer but of his transferee. In view of these conflicting decisions we think it advisable to refer to a Full Bench the following question :—

"Is a contract to forego the vendor's charge for unpaid purchase money to be necessarily inferred when the whole or part of the consideration for the purchase of immoveable property is agreed to be paid by the purchaser to a third party on behalf of the vendor ?"

As the Order of Reference was in favour of the appellant their Lordships asked the respondent's vakil to begin.

N. Rajagopalachariar for the respondent.—The charge is impliedly taken away by the direction of the vendor to pay to a stranger. I rely fully on all the reasons given in *Abdulla*

(1) (1904) I.L.R., 31 Calc., 57 (P.C.). (2) (1911) 21 M.L.J., 849.
(3) (1906) I.L.R., 29 Mad., 305. (4) (1914) I.L.R., 41 Calc., 849.
(5) (1914) 12 A.L.J., 1034.
(6) (1916) I.L.R., 38 All., 254.

Beary v. *Mammali Beary*(1) and the English cases therein quoted fully support that decision. I rely also on *Sivasubramania Mudaliar* v. *Gnanasambanda Pandara Sannadhi*(2). One additional reason I give is that after such agreement with the vendee on the faith of which alone the vendee agreed to buy, the vendor has no right to change the manner of payment, as that would be substituting a new contract between them. If the vendee breaks his promise to pay to the stranger and the vendor is damnified, the vendor's remedy is only a suit for damages. That in cases of this kind the vendor's only right is to be indemnified is laid down by *Izaat-un-Nisa Begam* v. *Partab Singh*(3). See also *In re Albert Life Assurance Company* v. *Western Life Assurance Society*(4).

A. V. Viswanatha Sastri for *G S. Ramachandra Ayyar* for the appellant.—The charge exists unless a contract to the contrary is proved. See *Webb* v. *Macpherson*(5). The English decisions cannot apply in the face of the charge given by the Transfer of Property Act. The absence of a charge does not necessarily arise by implication from a direction to pay to a stranger, for under section 55 (5) (*b*), Transfer of Property Act, the vendor is entitled to direct the buyer to pay the price either to himself or to his nominee. I respectfully submit that the two Madras decisions relied on against me are wrong and I adopt the reasons given in favour of my position, in the Order of Reference. In addition to that I rely on the observations of Lord ELDON, L.C., in *Mackreth* v. *Symmons*(6). Even *Abdulla Beary* v. *Mammali Beary*(1) may be said to be not against me, as there the vendor expressly agreed to have recourse to a suit for damages in case of breach of contract by the vendee.

This Second Appeal coming on for hearing on the question referred for the decision of the Full Bench, the Court expressed the following OPINIONS :—

ABDUR RAHIM, OFFG. C.J.

ABDUR RAHIM, OFFG. C.J.—The question referred to us must be answered in the negative. Section 55, sub-section 4, clause (*b*) of the Transfer of Property Act, says that in the absence of a

(1) (1910) I L R, 33 Mad, 446. (2) (1911) 21 M.L.J., 359.
(3) (1909) I.L.R, 31 All, 583 (P C.). (4) (1870) L.R., 11 Eq., 164.
(5) (1904) I L.R., 31 Calc., 57 (P.C.)
(6) (1808) 2 White and Tudor's Leading Cases (VIII edn.), 916.

SIVASUBRAMANIA AYYAR v. SUBRAMANIA AYYAR.

ABDUR RAHIM, OFFG. C.J.

contract to the contrary, the vendor shall have a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid. In this case the vendor has asked the purchaser to pay the unpaid purchase money to a certain creditor of his. It is not alleged that the creditor accepted the liability of the purchaser of the property in substitution of the vendor's own liability. But the purchaser as between himself and the vendor has accepted the obligation to pay the purchase money according to the vendor's direction. It has been held by the Privy Council in *Webb* v. *Macpherson*(1) that the statutory charge created by section 55 of the Transfer of Property Act is not to be negatived except where there is a contract to the contrary, either express or arising by necessary implication. They point out that this charge is different, in its origin and nature, from the vendor's equitable lien under the English law. They also observe that "the charge is not excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments, nor is it excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge." It is difficult to see how a direction to the purchaser to pay the purchase money to the vendor's creditor is inconsistent with the existence of the charge. This is the view taken by the Allahabad High Court in *Har Chand* v. *Kishori Singh*(2) and in *Meghraj* v. *Abdullah*(3). It is argued, however, that in this Court the contrary view has prevailed in *Abdulla Beary* v. *Mammali Beary*(4), which has been followed in *Sivasubramania Mudaliar* v. *Gnana Sambanda Pandara Sannadhi*(5). The learned Judges who decided the former case state in their judgment that, by the terms of the contract under their consideration, the purchase money was not payable to the plaintiff and he had no right of action to recover it. That is, however, not the position involved in the present case. It has been held in *Sheonandan Lal* v. *Zainal Abdin*(6) that the vendor's charge for unpaid purchase money is not a mere personal right but is capable of being transferred to a third

(1) (1903) I.L.R., 31 Calc., 57 (P.C.).
(2) (1910) 7 I.C., 639.
(3) (1914) 12 A.L.J., 1034.
(4) (1910) I.L.R., 33 Mad., 446.
(5) (1911) 21 M.L.J., 359.
(6) (1914) I.L.R., 41 Calc., 849.

person and in *Ramakrishna Ayyar* v. *Subrahmania Ayyen*(1), it has been ruled that a suit to enforce the charge is governed by twelve years' limitation. A vendor's lien or charge is not lost by the mere taking of personal security. See *Karuppiah Pillai* v. *Hari Row*(2) and *Mackreth* v. *Symmons*(3). There is no doubt a distinction, on principle as well as authority, as pointed out by the Privy Council in *Webb* v. *Macpherson*(4), between a conveyance or sale in consideration of a covenant to pay a sum of money in the future, and a sale in consideration of money which the purchaser covenants to pay. Here the consideration for the sale is money, payable by the purchaser, only he has agreed with the vendor to pay it to a third person.

The learned Judges who decided *Abdulla Beary* v. *Mammali Beary*(5) seem to hold in one part of their judgment that where the purchase money is to be paid to another, that is necessarily inconsistent with the vendor retaining the charge. There is nothing in section 55, sub-section (4), clause (*b*), to suggest that for the charge to arise or to subsist, the purchase money must be payable to the vendor himself and not, by his direction, to a third person. If the above case holds otherwise, I am of opinion that it was wrongly decided. I may mention that the decisions in *Ramakrishna Ayyar* v. *Subrahmania Ayyen*(1) and *Gopala Aiyar* v. *Ramaswamy Sastrigal*(6) are in accordance with the view I have expressed.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree with the conclusions of the learned Judges who made the reference that the vendor's lien is not lost by a direction to pay the purchase money to a third person. The charge is for the purchase money and it is immaterial that that money is not directly payable to the purchaser. As was pointed out by the learned vakil for the respondent, the statute itself, by section 55 (5) (*b*), enables the vendor to direct it to be paid to any person he names. The obvious inference is that the purchase money does not lose its character by the direction to pay another.

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(1) (1903) I.L.R., 29 Mad., 305. (2) (1911) 21 M.L.J., 849.
(3) (1808) 2 White and Tudor's Leading Cases, (VII edn.), 946
(4) (1904) I.L.R., 31 Calc., 57 at p. 73 (P.C.)
(5) (1910) I.L.R., 33 Mad., 446. (6) (1911) 23 M.L.J., 207.

The main argument of Mr. Rajagopalachariyar was that where there is a breach of the direction to pay a third person, the right of the vendor, who is compelled to pay himself, is only to sue for damages for breach of contract, and that consequently it must be deemed that there is a contract to the contrary when the direction to pay a third person was given. It cannot be contended that the lien is personal: see *Shemandan Lal* v. *Zainal Abdin*(1). The right to the unpaid money as well as the charge therefore can be validly assigned to a stranger. It is not clear therefore why the direction to pay a third person should deprive the vendor of his charge The decision of the Judicial Committee in *Izaat-un-Nisa Begam* v. *Partab Singh*(2) was strongly relied upon. In that case the auction purchaser bought the property subject to encumbrances. The encumbrances were found to be invalid. Thereupon the judgment-debtor sued to recover the amount of the encumbrances by which the purchaser was benefited, and claimed a charge for it on the lands sold. Their Lordships held that when property is sold subject to encumbrances, the vendor whether in a private or Court-sale retains to himself only a claim to be indemnified against the encumbrancers proceeding against him. It was also held that the vendor was not entitled to the benefit of the finding that the encumbrances were invalid. The purchaser took the risk and was consequently entitled solely to the advantage. I fail to see how this pronouncement is an authority against the plain provisions of section 55 (4) (*b*)

The learned Judges of this Court in *Abdulla Beary* v. *Mammali Beary*(3) based their conclusion largely upon English decisions notwithstanding the caution of the Judicial Committee in *Webb* v. *Macpherson*(4), that the charge under the Transfer of Property Act "is different in origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor." There are three classes of charges known to English law: (*a*) equitable charge founded on contract; (*b*) equitable lien enforced by Courts of Equity; and (*c*) the common law lien which enables the vendor to keep back possession until he is paid (19 Halsbury's Laws of England, paragraph 20) The legislature in

(1) (1914) I.L.R., 41 Calc., 849. (2) (1909) I.L.R., 31 All., 583
(3) (1910) I.L.R., 33 Mad., 446. (4) (1904) I.L.R., 31 Calc., 57 (P.C.).

India, in order to avoid these confusions, has enacted a simple rule of law; and with all deference to the learned Judges who decided *Abdulla Beary* v. *Mammali Beary*(1), it seems to me it would be introducing an unnecessary element of uncertainty into this country, if the interpretation of an unambiguous section were made to depend upon English decisions. I do not therefore think that the English cases quoted for the respondent as showing that the rule of law in England is not as stated in *Abdulla Beary* v. *Mammali Beary*(1) need be considered.

Only one other argument need be noticed. It was broadly contended that after giving the direction to the purchaser to pay the money to a third person, the vendor had no right to countermand it. Of course, if the direction had been communicated to the proposed payee, a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money before payment. I do not think that *Gopala Aiyar* v. *Ramaswamy Sastrigal*(2) lays down that an uncommunicated direction to a third party disables the vendor from claiming the money. On the other hand, *Sivasubramania Mudaliar* v. *Gnana Sambanda Pandara Sannadhi*(3) is a direct authority to the contrary.

In the present case, it is not shown that the third person looked to the vendee for payment. *A fortiori*, therefore, when the vendor had to pay the third party himself, the lien attached to the property to the extent of that payment. I answer the question in the negative and hold that *Abdulla Beary* v. *Mammali Beary*(1) was not rightly decided.

PHILLIPS, J.

PHILLIPS, J.—In this case, I have already expressed my views in the Order of Reference and I have heard nothing in the arguments which have now been addressed to us to induce me to change my opinion. I agree therefore in answering the question in the negative.

C.M.N.

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(1) (1910) I.L.R., 33 Mad., 446. (2) (1911) 22 M.L.J., 207.
(3) (1911) 21 M.L.J., 359.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1914.
April 19
and
May 1.

NACHIMUTHU CHETTI (COMPLAINANT), PETITIONER,

v.

MUTHUSAMI CHETTI (ACCUSED), RESPONDENT.*

Bailable offence—Information to village magistrate—Report to the police—Institution of complaint by Police thereon

A man who complains to a village magistrate of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in person to the police station and made a complaint; and if the police charge the case, it is a case instituted on information given to a police officer within the meaning of section 250, Criminal Procedure Code.

The Sessions Judge of Tinnevelly v. *Sivan Chetti* (1909) I.L.R., 32 Mad., 258 (F.B.), followed.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the judgment of J. W. GLASSON, the First-class Sub-Divisional Magistrate of Dindigul, in Criminal Appeal No. 84 of 1913 confirming the order passed by V. S. RAMASWAMI AYYAR, the Second-class Sub-Magistrate of Palni, in Calendar Case No. 630 of 1913.

The facts appear from the judgment of AYLING, J

Dr. S. Swaminathan for the petitioner.

J. C. Adam for the *Public Prosecutor* for the Crown

AYLING, J.

AYLING, J.—The petitioner gave information to the village magistrate of Ayakudi to the effect that one Muthusami Chetti had stolen a load of cotton belonging to him. The village magistrate sent a report to the police under section 45 (c), Criminal Procedure Code. The police put in a charge sheet under section 379 of the Indian Penal Code before the Second-class Magistrate of Palni against Muthusami Chetti. The case ended in discharge and the petitioner was ordered to pay compensation under section 250 of the Criminal Procedure Code.

* Criminal Revision Case No. 71 of 1914 (Criminal Revision Petition No. 62 of 1914).

It is contended that the order is illegal inasmuch as the case was not "instituted by complaint as defined in this case or upon information given to a police officer or to a Magistrate"—vide section 250, Criminal Procedure Code.

This view is supported by some authority: *vide King Emperor* v. *Thammana Reddi*(1) and also two later cases—*In re Arulanandham*(2) and an unreported case *Re Sayyed Ambalam*(3).

On the other hand there is a Full Bench decision of this Court in *The Sessions Judge of Tinnevelly* v. *Sivan Chetti*(4) which seems to me to be conclusive on the matter. The first case quoted above was disposed of prior to this decision and with the greatest respect to the learned Judges who decided the second case, they do not seem to us to have given sufficient weight to it.

In the third case the attention of the learned Judge does not appear to have been drawn to it at all. I feel constrained to follow the Full Bench ruling: the more particularly as I feel strongly that the application of the principles therein ennunciated to the question for our decision is in accordance with reason and equity, and the true intention of the section.

The question before the Full Bench in the case quoted was whether the complaint or information given to the village magistrate constituted the institution of criminal proceedings under section 211 of the Indian Penal Code but the reasoning of BENSON and MUNRO, JJ., in their judgment applies with undiminished force to the question before us; while the reasoning of the learned dissenting Judge, SANKARAN NAIR, J., however applicable in that case, has little or no bearing in the present case. I cannot do better than quote from the judgment of BENSON and MUNRO, JJ.: "He (i.e., the injured party) almost invariably gives information, or makes his complaint, to the village magistrate, well knowing that the latter will report the information on complaint to the Magistrate or the Station-house officer or to both, which latter is the regular course in this Presidency. He has, in fact, set the criminal law in motion just as effectually as if he had gone direct to the Station-house officer under section 154 or to the Magistrate under section 191, for the village headman is *bound* by law to pass on the information

(1) (1902) I.L.R., 25 Mad., 667. (2) (1912) 22 M.L.J., 139.

(3) Criminal Revision Case No. 627 of 1913.

(4) (1909) I.L.R., 32 Mad., 253 (F.B.).

NACHIMUTHU CHETTI v. MUTHUPAMI CHETTI. — AYLING, J.

or complaint to those officers. The case would, of course, be different if the information or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities—*In the matter of the petition of Jamoona*(1). In that case it could not be said that the criminal law was in any way set in motion. But when the information or complaint is one that the village headman is bound by law to pass on, then the language of the Full Bench in the case referred to above, is just as applicable to it as to an information given direct to the Station-house officer or a complaint to the Magistrate."

In other words, a man who complains to a village magistrate of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in person to the police station; and if the police charge the case, it is a case instituted on information given to a police officer within the meaning of section 250 of the Criminal Procedure Code.

A comparison of the opening words of section 250 with section 190, Criminal Procedure Code, will show that they closely correspond, and that the former are intended to cover all the three methods marked in section 190 as (*a*), (*b*) and (*c*) in which a Magistrate may take cognizance of a case, with the single exception of "his own knowledge or suspicion," which would in the nature of things be inappropriate to section 250. I find it difficult to understand why a person who chooses to institute a frivolous or vexatious charge in one way should be less liable to pay compensation than if he instituted it in another—seeing that all are equally effective methods of inducing the Criminal Courts to take action.

A consideration of the cases relied on by the petitioner will show that both in *King Emperor* v. *Thammana Reddi*(2) and *Re Sayyed Ambalam*(3) the Court confined itself to the consideration of whether the village headman to whom the complainant went to complain was a "Magistrate" within the meaning of section 250. The question of whether the information was not,

(1) (1881) I.L.R., 6 Calc., 620. (2) (1902) I.L.R., 25 Mad., 667.
(3) Criminal Revision Case No. 627 of 1913.

NACHIMUTHU CHETTI v. MUTHUSAMI CHETTI.

AYLING, J.

in effect, given to the police was not considered at all. It was, however, decided in the Full Bench case; and it is this decision which in my opinion destroys the authority of *King Emperor* v. *Thammana Reddi*(1) for the proposition that a case of this kind does not come within section 250. I would dismiss the petition.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—In this case, the petitioner complained to the village magistrate of theft against the accused. The complaint was forwarded to the police. The Sub-Magistrate before whom the police charged the accused discharged him and directed the complainant to pay compensation. This order was upheld in appeal. Dr. Swaminathan contends that section 250 of the Code of Criminal Procedure cannot apply as there was no "information given to a police officer or to a Magistrate." I am not satisfied that the term "Magistrate" does not include a village magistrate. Clause (2) (*b*) of section 1 only says that the Criminal Procedure Code does not apply to heads of villages in the Presidency of Fort St. George. It is true that section 6 of the Code does not recognize the Court of the village magistrate But there is no definition of the term "Magistrate." Moreover, the High Court exercises jurisdiction over village magistrates under the transfer sections by transferring cases from one Magistrate to another; I have therefore doubts whether the term "Magistrate" in section 250 does not include a village magistrate as well. However that may be, I am satisfied that when the village magistrate transmits a complaint to the police, information is given to the police officer under section 250 by the complainant. The object of the complainant was that his complaint should be forwarded to the police, and it would be straining the language to hold that when he preferred the complaint with this obvious intention, he was not giving information to the police officer. I see no reason, on principle, why an accused person who goes direct to the police officer should be in a worse position than one who achieves the same object by placing his case before a village magistrate. With all respect to the learned Judges who decided *In re Arulanandham*(2) I am unable to agree with their conclusion. The Full Bench ruling of *The Sessions Judge of Tinnevelly Division* v. *Siran Chetti*(3) is in point. The learned Judges say at pages 262 and 263: "In point of fact in this Presidency the complaint or

(1) (1902) I.L.R., 25 Mad., 667.
(2) (1912) 22 M.L.J., 138. (3) (1909) I.L.R., 32 Mad., 258 (F.B.).

NACHIMUTHU CHETTI v. MUTHUSAMI CHETTI. — SESHAGIRI AYYAR, J.

information to the village magistrate is ordinarily the first step in setting the criminal law in motion . . The *injured* person hardly ever gives information direct to the Station-house officer of police . . . He almost invariably gives information, or makes his complaint, to the village magistrate, well knowing that the latter will report the information or complaint to the Magistrate or the Station-house officer . . . The case would, of course, be different if the information or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities."

I agree with this view, and in the conclusion at which my learned colleague has arrived. The petition will be dismissed.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Kumaraswami Sastriyar.

1915. August 3, 4 and 10.

HAKEEM PATTE MUHAMMAD (PLAINTIFF), APPELLANT,

v

SHAIK DAVOOD (THIRD DEFENDANT), RESPONDENT.*

Transfer of Property Act (IV of 1882), ss. 58, 60 and 98—Possessory mortgage in 1894 for one year with a covenant to treat it as sale, in default of payment—Anomalous mortgage—No right to redeem after one year.

A document of 1894, which was described as a "Swadina Tanaka Meddatu Sharatu Pattiram" which may be translated as a possessory mortgage deed containing a condition for a period fixed, contained among others, the following terms "within these limits a house-site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 from you. So having paid the principal and interest pertaining to these Rs. 10 within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale."

In a suit for redemption brought after the date fixed for redemption,

Held, that the transaction was an anomalous mortgage as described in section 98 of the Transfer of Property Act (IV of 1882), that the rights of the parties were governed by the terms of the mortgage document and that

* Second Appeal No. 2828 of 1913.

accordingly the plaintiff had no right to redeem after the period of one year fixed by the document.

The right of redemption given by section 60 of the Transfer of Property Act to every mortgagor has no application to cases governed by section 98 of that Act.

Sreenivasa Iyengar v. *Radhakrishna Pillai* (1915) I.L.R., 38 Mad., 667, referred to

Usman Khan v. *Dasanna* (1914) I.L.R., 37 Mad., 545, distinguished.

SECOND APPEAL against the decree of F. A. COLERIDGE, the District Judge of Kistna at Masulipatam, in Appeal No. 109 of 1913, preferred against the decree of P. VENKATARAMA AYYAR, District Munsif of Bezwada, in Original Suit No. 210 of 1912.

The facts of the case appear from the judgment of KUMARASWAMI SASTRIYAR, J.

P. Nagabhushanam for the appellant.

K. G. Sarangaraja Ayyangar for *V. Ramadas* for the respondent.

SPENCER, J.

SPENCER, J.—A vendee from the original mortgagors brought this suit for redemption. The suit document is termed "Swadira tanakameddatu sharatu pattiram" which may be translated as a possessory mortgage deed containing a condition for a period fixed. It recites that the mortgagors have received Rs. 10 and have mortgaged their house-site with a thatched house standing thereon, that they undertake to pay the principal and interest of these Rs. 10 within a year and take back possession of their house and site, and that, if they do not act according to these conditions, they will surrender the house and land treating the transaction as a sale.

This suit for redemption was brought seventeen years after the term expired. The District Munsif dismissed the suit on the ground that the third defendant had had adverse possession for over twelve years, following *Usman Khan* v. *Dasanna*(1). The facts of that case were somewhat different. The parties agreed to treat the possession of the mortgagee as the possession of a full owner after possession had been enjoyed for eight years under the mortgage, and nine years after the execution of the deed they showed by their actions that they wished to act upon that agreement. It is, of course, always open to a mortgagor and a mortgagee to enter upon a fresh transaction independent of the mortgage extinguishing the mortgage and passing the

(1) (1914) I.L.R., 37 Mad., 545.

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SPENCER, J.

property to the mortgagee as a purchaser [see *Kunhayalal* v. *Nashar*(1)]. But here we are concerned only with the terms of the document. The District Judge has treated it as an anomalous mortgage, in which case under section 98 of the Transfer of Property Act the rights and liabilities of the parties have to be determined strictly by their contract. The appellant's vakil maintains that it is a usufructuary mortgage or a combination of a usufructuary and a simple mortgage with a clog on the equity of redemption, and he quotes *Sreenivasa Iyengar* v. *Radhakrishna Pillai*(2) in support of his argument. I am of opinion that the District Judge was right. Simple mortgages, mortgages by conditional sale and usufructuary mortgages are defined in section 58 of the Transfer of Property Act. This cannot be treated as a simple mortgage as there is delivery of the property to the mortgagee, as there is no personal covenant of the mortgagor to pay, and as there is no provision that the mortgagee may sell the property and apply the proceeds in payment of the mortgage money nor is it a mortgage by conditional sale as there is no ostensible sale: nor is it a usufructuary mortgage as there is no condition that the mortgagee should receive the rents and profits and appropriate them in lieu of interest. In fact, the document does not provide any rate of interest. Moreover the possession of the mortgagee is not to continue until payment of the mortgage money, but for a fixed period of one year after which the transaction is to become a sale. In *Visalinga Pillai* v. *Palaniappa Chetti*(3) a mortgage for a fixed period was treated as an anomalous mortgage.

It is argued that, if the document be treated as a combination of two forms of mortgage, such, for instance, as a simple mortgage and a usufructuary mortgage combined, all the distinguishing features, such as possession by the mortgagee, necessarily cannot be retained, but, at least, we may expect to find such features present as are not contradictory to the features of the other kind of mortgage with which it is combined. But that is not the case here. Taking the document to be an anomalous mortgage the parties must, by the provisions of section 98, be strictly bound by the terms of their contract, and

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(1) (1903) I.L.R., 27 Bom., 297. (2) (1915) I.L.R., 38 Mad., 667.
(3) (1898) I.L.R., 21 Mad., 1.

neither the conditions of section 60 as to the survival of the rights of redemption, nor the English principles of equity can be applied : *vide Gopala Nair* v. *Kumban Menon*(1).

A number of other decisions have been cited in which by applying the principles of English equity the right of redemption has been held to subsist even after the document declares it to have ceased. Such are the decisions in *Thumbusawmy Moodely* v. *Hossain Rowthen*(2), *Ramasami Sastrigal* v. *Samiyappa Nayakan*(3) and *Kola Venkatanarayana* v. *Vuppala Ratnam*(4) in which the document was described as *meddatu krayam* and contained terms similar to those in the document before us. These decisions relate to documents executed before the year 1882, when the Transfer of Property Act was introduced and settled the law on the subject of mortgages. Between 1858 and 1882, the Courts of this Presidency and of Bombay applied doctrines which the English Courts of Equity applied to mortgages in England, but in dealing with documents executed since 1882 the Courts are bound to apply the provisions of the Transfer of Property Act: see *Neelakantam* v. *Ananthakrishna Aiyar*(5) and *Ramayya* v. *Guruval*(6).

The Second Appeal must be dismissed with costs.

KUMARASWAMI SASTRIYAR, J.—The plaintiff is the appellant. He sued to redeem a mortgage dated 20th March 1894. The material portion of the document runs as follows " Within these limits a house-site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 (ten rupees) from you. So having paid the principal and interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition, we shall quit the land and house as if this is a sale." The deed purports to be a " Meddatu sharatu tanaka".

Both the lower Courts dismissed the suit on the ground that the suit was barred as the mortgagee became the owner and was in possession as owner of the property from 1895 and that there was consequently no mortgage to redeem. It is argued by

(1) (1907) I.L.R., 30 Mad., 300 at p. 303. (2) (1873) I.L.R., 1 Mad., 1.
(3) (1881) I.L.R., 4 Mad., 179. (4) (1896) I.L.R., 20 Mad., 531.
(5) (1907) I.L.R., 30 Mad., 61 at p. 66. (6) (1891) I.L.R., 14 Mad., 232.

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executed before the Transfer of Property Act came into force. Their Lordships were inclined to the view that the instrument in question which provided for the payment of the sum due within a fixed date and in default constituted the mortgagee owner fell within the definition of a mortgage by conditional sale in section 58 of the Transfer of Property Act. If the definition given in section 58 is strictly applied it is doubtful whether a transaction which at its inception is a deed of mortgage with possession and which is to ripen into a sale in the happening of a certain contingency can be said to be a mortgage whereby mortgagor ostensibly sells the property with a covenant for redemption or reconveyance if the mortgage money is paid. In *Sreenivasa Iyengar* v. *Radhakrishna Pillai*(1) SADASIVA AYYAR, J., was of opinion that such a mortgage was not a mortgage by conditional sale but "a mortgage with a clause providing for future conditional sale." Though *Kola Venkatanarayana* v. *Vuppala Ratnam* (2) was referred to during the course of the argument, it has not been referred to and distinguished. SPENCER J., was not disposed to place a strict interpretation on section 58, clause 3, and refers to cases where mortgages like those in question are described as mortgages by conditional sale All the cases where mortgages like the present were treated as mortgages by conditional sale were cases of mortgages created before the passing of the Transfer of Property Act. I agree with SADASIVA AYYAR, J., in thinking that a mortgage like the present one is not a mortgage by conditional sale. It also does not fall within the definition of either a simple or usufructuary mortgage. It is not a simple mortgage as possession has been given and there is no covenant to pay or a right given to the mortgagee to bring the property to sale; nor is it a usufructuary mortgage as there is no provision for the appropriation of the rents and profits towards the principal or interest due and possession as mortgagee is to be only for a year. I do not think that the mortgage can be said to be a combination when the *essential* ingredients of each of the classes are wanting, at least when such elements do not contradict each other and so can find place in the document.

I am of opinion that the mortgage in question is an anomalous mortgage falling within the provisions of section 98 of the

(1) (1915) I.L.R., 38 Mad., 667. (2) (1906) I.L.R., 29 Mad., 531.

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ansfer of Property Act. It has been argued that the princi-:es of equity which form the basis of a series of decisions be-een 1858 and the date of the passing of the Transfer of operty Act whereby any agreement entered into at the time the mortgage having the effect of clogging the right of demption was declared inoperative should be applied to omalous mortgages even though section 98 of the Act enacts it in cases of anomalous mortgages the rights and liabilities the parties shall be determined by their contract as evidenced the mortgage deed. It is contended that the Court ought t to enforce illegal or invalid stipulations

I do not see any sound reason for departing from the iguage of section 98 and importing an exception not mentioned erein. As pointed out by their Lordships of the Privy uncil in *Pattabhiramier* v. *Venkata Rao*(1) mortgages like the ortgage in question were long common in India and were cognized and enforced according to their letter both by Hindu d Muhammadan jurists and that what is known in English law the equity of redemption was unknown to the ancient law of dia. In *Thumbusawmy Moodely* v. *Hossain Rowthen*(2) their rdships of the Privy Council observe that the decision in *ttabhiramier* v. *Venkata Rao*(1) was based on sound principles d that the course of decisions which imported into the consi-ration of Hindu mortgage's principle founded on the maxim, ce a mortgage always a mortgage of the English Court of quity were radically unsound and involved very mischievous nsequences. It is then clear that there is nothing opposed to o Hindu law or to the general principles of equity or good nscience in giving effect to the terms of the contract and it oms to me that the legislature in enacting section 98 intended take such mortgages as did not fall within the classes specified erein out of the rule which prevents clogs on the equity of demption, a rule which their Lordships of the Privy Council ought was erroneously imported into Hindu mortgages. *Neela-ntam* v. *Ananthakrishna Aiyar*(3) and *Ramayya* v. *Gurucal*(4) pport the view that the terms of the contract ought to be rictly enforced in cases of anomalous mortgages.

I would dismiss the appeal with costs N.R.

(1) (1870) 13 M.I.A., 560. (2) (1875) I.L.R., 1 Mad., 1 (P.C.).
(3) (1907) I.L.R., 30 Mad., 61. (4) (1891) I.L.R., 14 Mad., 232.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1915.
August
18 and 23
and
September 1.

SUNDARAM AYYAR AND THREE OTHERS (SONS AND LEGAL REPRESENTATIVES OF THE DEFENDANT), APPELLANTS,

v.

KULATHU AYYAR (PLAINTIFF), RESPONDENT.*

Madras Estates Land Act (I of 1908)—Lessee whose term has expired, whether a landholder under the Act—No power to distrain holding after expiry of lease.

The provisions of the Madras Estates Land Act (I of 1908) do not empower a person who was a lessee of an estate to take proceedings after the expiry of his lease to sell the tenant's holding for arrears of rent due for a fasli covered by the period of his lease.

Forbes v. Maharaj Bahadur Singh (1914) I.L.R., 41 Calc., 926 (P.C.), referred to

Per SPENCER, J.—His only remedy is to sue the tenant on his contract for rent.

Per SESHAGIRI AYYAR, J.—(1) A person to whom arrears are due is a landholder, notwithstanding the fact that his estate has terminated.

(2) The law does not give him a first charge on the holding or the crops thereon.

(3) He can distrain the movable property or the trees in the holding of the defaulter.

(4) He is not entitled to attach the holding.

SECOND APPEAL against the decree of D. G. WALLER, the Acting District Judge of Tinnevelly, in Appeal No. 111 of 1913 preferred against the decree of F. L. BRIGSTOCKE, the Revenue Divisional Officer (Sub-Collector) of Sermadevi, in Summary Suit No. 6 of 1912.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J., at page 1021 *et seq.*

M. D. Devadas, V. S. Govindachari and *V. S. Kallabhiran Ayyangar* for the appellants.

S. Ramaswami Ayyar for the respondent.

SPENCER, J.

SPENCER, J.—The question which we have to decide is whether a landholder in Madras who has ceased to be a landholder

* Second Appeal No. 237 of 1914.

can recover rent for the years when he was a landholder by bringing the ryot's holding to sale under the provisions of chapter VI of Madras Act I of 1908. For Bengal it has been decided by the Privy Council with reference to the Bengal Tenancy Act that he cannot: *vide Forbes* v. *Maharaj Bahadur Singh*(1). The Madras Estates Land Act is modelled on the Bengal Tenancy Act. Therefore the above decision must have great weight with us so far as it is based on provisions which have been repeated in the Madras Act. There are, however, several distinctions between the two Acts. In Bengal a landlord must bring a suit and obtain a decree before he can bring to sale the tenant's holding. In Madras he can proceed summarily to attach the holding by notice to the defaulter served through the Collector provided that he has exchanged a patta and muchilika with the ryot or tendered him such a patta as he was bound to accept. Section 5 of Madras Act I of 1908 and section 65 of the Bengal Act VIII of 1885 both declare that the rent shall be a first charge upon the holding. Section 109 of the Madras Act provides for the case of a conflict between the right of a landholder distraining produce and the right of a Civil Court decree-holder by declaring that the landholder's right shall prevail but this does not apply to the case of a landholder selling the ryot's holding. As in Madras he does not occupy the position of a decree-holder there can be no competition from other decree-holders for rateable distribution of the proceeds of the sale.

Section 148, clause (*h*) of the Bengal Tenancy Act, which declares that notwithstanding anything contained in section 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him does not find place in the Madras Act. Thus one strong argument for the position that the right to sell the holding for arrears is vested in the landholder *qua* landholder is wanting. The Privy Council decision dwells on the anomaly which would arise by two persons, the landlord and the ex-landlord having simultaneously a first charge on the tenure and it goes so far as to class the ex-landlord as an outsider.

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(1) (1914) I.L.R., 41 Calc., 923 (P.C.).

SUNDARAM AYYAR v. KULATHU AYYAR.

SPENCER, J.

This anomaly would present no real difficulties in Madras. Under section 111 a landholder cannot sell the holding for arrears until the revenue year in which they became due is over and he has under section 112 only one year in which he can take this step. Unless proceedings begun by one landholder were still going on when the succeeding landholder wished to sell the holding for the rent of the following year, there would be no conflict of interests. Even after the sale of the holding, the purchaser would be liable for the rent of the year in which he was in occupation. In case of a dispute between two or more rival claimants to the title of landholder, section 3 (5) provides that the person who shall be deemed to be landholder for the purpose of this Act is the person whom the Collector may recognize or nominate as landholder. Again, when there is an intention to distinguish between landholders in possession and other landholders who have no subsisting interest, the Madras Act speaks distinctly of landholders in possession (*vide* section 200). This may be used as a not very convincing argument that where the word "landholder" occurs in the Act without qualification, it includes persons out of possession.

I will now consider whether there are any other indications within the four corners of the Act that landholders have as in Bengal no right to proceed against their ryot's holding unless their interest as landholder subsists at the time.

It is provided in section 53 that the remedy of landholders against the ryot's movables and holdings under chapter IV of the Act is only available to those landholders who have exchanged a patta and muchilika with their ryots or have tendered them such a patta as they were bound to accept or there must be a valid patta or muchilika continuing in force. Can it be said that a valid patta or muchilika continues in force between a ryot and a landholder who has ceased to have any subsisting interest in the estate? If the answer is "no" but he is a person who has exchanged or tendered a patta under the first part of section 53, we must then look to section 52 and we find this section declaring that no ryot shall be bound to accept a patta for a period of more than one revenue year and that pattas and muchilikas accepted or exchanged for any revenue year remain in force only until the commencement of the revenue year for which fresh pattas are accepted or exchanged,

SUNDARAM AYYAR v. KULATHU AYYAR.

SPENCER, J.

Under the old Act (VIII of 1865) it was recognized by the Privy Council in *Ramaswami* v. *Bhaskarasami*(1) that there must be a subsisting relation of landlord and tenant for the exchange of pattas and muchilikas.

The result therefore is that distraint and sale are remedies open only to landholders who have at the time of exercising this power a valid patta in force between themselves and their ryots. I am aware that in his commentary on the Act Mr. V. Ramadas takes a different view but the illustration which he gives to make the matter clear begs the whole question.

Again in section 3 (5) a landholder is defined as a *person* owning an estate or part thereof and it is doubtful if he can lay claim to be called such a landholder merely because at some previous date he has owned an estate. If, as in this case, he is a lessee and comes within the description of a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner, there can be no reason for imputing to the legislature an intention to create in favour of such persons rights of greater extent and duration than those which are declared to belong to owners who are landholders in their own right.

I am therefore of opinion that the lower Courts were right in their conclusions that as the defendant was not the lessee for fasli 1322 he could not attach the plaintiff's lands for the arrears of fasli 1321. In such cases the only remedy left to the ex-landholder is the right of suing upon his contract for rent.

This Second Appeal is dismissed with costs. The Memorandum of Objections is also dismissed with costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Vagaikulam is an inam village belonging to the Vyasaraya mutt. The defendant had a lease of it from the mutt for ten years up to the end of fasli 1321. His son became the lessee in fasli 1322. The plaintiff who is a ryot of the village is alleged to have made default in the payment of rent for fasli 1321. In or about September 1912, the defendant attached the plaintiff's holding for the arrears. This suit is to raise the said attachment. The only question for decision is whether the defendant who had ceased to be the lessee from July 1912 can attach the plaintiff's holding for the rent due

(1) (1879) I.L.R., 2 Mad., 67 at p. 73 (P.C.).

SUNDARAM AYYAR v. KULATHU AYYAR. — SESHAGIRI AYYAR, J.

to him while he was the lessee. There is no question that the defendant was a landholder up to the end of fasli 1321: see *Perraju Garu* v. *Subbarayadu*(1). It is also undisputed that the lessee who succeeded the defendant was a landholder at the time when the attachment was made. After hearing the matter argued very fully on both sides and having regard to the grounds of the decision in *Forbes* v. *Maharaj Bahadur Singh*(2), I have though not without hesitation come to the conclusion that the defendant had no right to enforce the attachment of the plaintiff's holding in September 1912. The reasoning of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh*(2) applies to this case, although as I shall presently show the provisions of the Act which the Privy Council had to construe differ in some material respects from the Estates Land Act. The definition of "landholder" would apply in my opinion to the defendant The somewhat hypercritical comments of the learned vakil for the respondent on the language of section 3 (5) have not convinced me to the contrary. He laid stress upon the phrase "owning an estate" and argued that it predicates a subsisting interest at the time of the attachment. The next clause "entitled to collect the rents" would certainly apply to the man whose lease had expired but to whom arrears were still due. I do not think that the word "owning" was intended to negative the rights of persons who owned the estate at the time the arrears fell due Another argument which belongs to the same category is the distinction sought to be made between *rent* and *arrears* of rent. I am of opinion that the defendant was a landholder when he attached the holding. One has only to look at section 200 of the Act to see that the legislature in Madras contemplated the existence of landholders with co-ordinate or mutually exclusive rights. It is different in Bengal. The definition of "landlord" (it is not landholder) is that he is "a person immediately under whom a tenant holds. This would undoubtedly exclude the defendant in Bengal. So far as I am able to see there can be but one landlord at a time in Bengal, although there may be a proprietor and a landlord. There is no provision in the Bengal Tenancy Act corresponding to section 200 of our Act which limits the power of the

(1) (1913) I.L.R., 36 Mad., 120 (2) (1914) I.L.R., 41 Calc., 928 (P.C.).

landholder in possession. Consequently the observation of Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh*(1) t there can be but one landlord cannot apply to conditions wh obtain in Madras.

It seems to me that to hold that on the expiry of the le the lessee has no right of distraint would render nugatory provision of the Act. Sections 77 and 111 make it clear t distraint proceedings should be commenced only if the rent during the "next preceding twelve months" remains unp These sections do not impose the further restriction that at time of the distraint the distrainer must be the sole la holder. As proceedings of this kind are prohibited during year that rent falls due it seems to me that the legislature c templated action being taken by the person who had the est when the arrears fell due. On the other hand the Ben Legislature confers the right to distrain only on the person whom the estate vests at the time. Section 148 (*h*) prohib an assignee of a decree from distraining unless the estate its is transferred to him There is no corresponding provision the Madras Act. I do not think that the fact that in Ben distraint proceedings have to be taken after decree in a C Court affects the question. My conclusion upon this portion the case is that the defendant was entitled to distrain.

The third question is "could he distrain the plainti holding." It is here that the *ratio decidendi* of the Pr Council decision affects the defendant. In the Madras Act th is a provision for the landholder distraining the gene movable property of the defaulter (see section 77). In sect 121 of the Bengal Tenancy Act which correspond to section this power is not given. In Madras (*a*) the holding, (*b*) crops on the holding, (*c*) the ordinary movable property of tenant and (*d*) the trees on the holding subject to specified exc tions can be distrained. In Bengal the distraint can only with reference to (*a*) and (*b*). Therefore if in the present c the defendants had distrained the movable property or trees, I would have held that the proceedings were not illeg Both the landholders have the right to distrain these properti In the case of the holding itself section 5 of the Madras Act a

SUNDARAM AYYAR v. KULATHU AYYAR.

SESHAGIRI AYYAR, J.

to him while he was the lessee. There is no question that the defendant was a landholder up to the end of fasli 1321 : see *Perraju Garu* v. *Subbarayadu*(1). It is also undisputed that the lessee who succeeded the defendant was a landholder at the time when the attachment was made. After hearing the matter argued very fully on both sides and having regard to the grounds of the decision in *Forbes* v. *Maharaj Bahadur Singh*(2), I have though not without hesitation come to the conclusion that the defendant had no right to enforce the attachment of the plaintiff's holding in September 1912. The reasoning of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh*(2) applies to this case, although as I shall presently show the provisions of the Act which the Privy Council had to construe differ in some material respects from the Estates Land Act. The definition of "landholder" would apply in my opinion to the defendant The somewhat hypercritical comments of the learned vakil for the respondent on the language of section 3 (5) have not convinced me to the contrary. He laid stress upon the phrase "owning an estate" and argued that it predicates a subsisting interest at the time of the attachment. The next clause "entitled to collect the rents" would certainly apply to the man whose lease had expired but to whom arrears were still due. I do not think that the word "owning" was intended to negative the rights of persons who owned the estate at the time the arrears fell due Another argument which belongs to the same category is the distinction sought to be made between *rent* and *arrears* of rent. I am of opinion that the defendant was a landholder when he attached the holding. One has only to look at section 200 of the Act to see that the legislature in Madras contemplated the existence of landholders with co-ordinate or mutually exclusive rights. It is different in Bengal. The definition of "landlord" (it is not landholder) is that he is "a person immediately under whom a tenant holds This would undoubtedly exclude the defendant in Bengal. So far as I am able to see there can be but one landlord at a time in Bengal, although there may be a proprietor and a landlord. There is no provision in the Bengal Tenancy Act corresponding to section 200 of our Act which limits the power of the

(1) (1913) I.L.R., 36 Mad., 120 (2) (1914) I.L.R., 41 Calc., 926 (P.C.).

language of section 127 of the Estates Land Act is in favour of this position. Under clause (c) if the holding is sold, the person to whom the arrears were due in the previous fasli gets no portion of it. The arrears payable in clause (b) will go to the attaching landholder and not to the person whose interest has ceased. I must therefore conclude that the holding can be attached only by the landholder who has the estate still in his possession.

As I have discussed the sections at some length, I may restate my conclusions thus :—

(1) A person to whom arrears are due is a landholder notwithstanding the fact that his estate has terminated.

(2) The law does not give him a first charge on the holding.

(3) He can distrain the movable property or the trees on the holding of the defaulter.

(4) He is not entitled to attach the holding. These propositions will reconcile the provisions of the Estates Land Act with the decision of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh*(1). The Second Appeal must be dismissed with costs. The Memorandum of Objections must also be dismissed with costs.

N.R.

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(1) (1914) I.L.R., 41 Calc., 926 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

1915. October 19.

GAJJALA YELLA REDDI AND ANOTHER (DEFENDANTS NOS 1 AND 2), APPELLANTS,

v.

SYED MUHAMADALLI *alias* DADA PEERU AND ELEVEN OTHERS (PETITIONERS—PLAINTIFFS NOS 1, 3 AND 4 AND DEFENDANTS NOS. 4 TO 8 AND THE THIRD DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sec. 258—Civil Procedure Code (Act V of 1908), O XXI, r. 2—Mortgagee (decree-holder) left in possession under decree—Liability under decree to account and to credit surplus income annually—Receipt by mortgagee, not certified to Court, effect of—Receipt, if payment under or adjustment of decree—Certificate within ninety days, if necessary

Where under the terms of a decree, the decree-holders (mortgagees) were to be in possession of the mortgaged property for six years, to render accounts every year and to give credit for any surplus income accruing from the lands, and at the end of eight years the judgment-debtor applied for the taking of accounts and delivery of possession of the lands),

Held, that the receipts by the decree-holders of the income from the lands were not payments under or adjustments of the decree, under section 258 of the Civil Procedure Code (Act XIV of 1882), corresponding to Order XXI, rule 2 of the new Code, and did not require to be certified to the Court within ninety days from the dates when the incomes were received by the decree-holders

Vaidhinadasamy Ayyar v. Somasundaram Pillai (1905) I.L.R., 28 Mad, 473 at p 478 (F.B.), followed.

Ramasami Naik v. Ramasami Chetti (1907) I.L R, 30 Mad, 255 at p 265 and *Nistarini Dasi v. Kazim Alini* (1910) 12 C L J., 65, distinguished.

APPEAL against the Order of Diwan Bahadur V. SUBRAHMANYAM PANTULU, the District Judge of Cuddapah, in Original Petition No. 184 of 1911 in Original Suit No. 6 of 1902.

The material facts appear from the judgment.

S. Gopalaswami Ayyangar for the appellants.

C. V. Anantakrishna Ayyar and *P. C. Desikachariar* for the respondents.

ABDUR RAHIM AND SPENCER, JJ.

The following judgment of the Court was delivered by

ABDUR RAHIM, J.—This is an appeal by the decree-holders, who

* Civil Miscellaneous Appeal No. 109 of 1914.

were the mortgagees of the property against the order of the Subordinate Judge, dated 30th September 1913, made on an application of the judgment debtors asking that an account be taken of the receipts and disbursements in respect of the income of the property, that the amount so settled be entered in satisfaction of the decree, and that the balance due by the decree-holders who were in possession of the property be paid to the petitioners, that is, the judgment-debtors and also that a direction be made for delivery of the property to them.

A Commissioner was appointed to go into the accounts and to report to the District Judge as to the receipts and expenditure. Upon receipt of the report, the District Judge went into the matter and arrived at the finding that a sum of Rs. 14,000 and odd should be credited against the amount of the decree.

The first objection raised before us was that no credit should have been allowed for the amount received by the decree-holders because such receipts were not certified to the Court within ninety days after they were received. The decree-holders remained in possession of the property under the terms of the decree and the decree provided that every year they should render account and give credit for any surplus that might be in their hands after meeting the necessary expenses. They remained in possession for more than eight years though the decree expressly provided for their remaining in possession only for six years. The question of limitation is whether such receipts by mortgagee decree-holders in possession of the property is "money payable under a decree paid out of Court or adjustment in whole or in part to the satisfaction of the decree-holder." Money so received cannot in any sense be said to be money payable under the decree within the meaning of this rule nor can it be said to be an adjustment between the decree-holder and judgment-debtor. There was in fact no adjustment. The simple fact is that the mortgagee decree-holders being in possession are to account for the money received by them, and if any money is still payable to them, they will be entitled to its payment On the other hand if their decree had been satisfied, the judgment-debtors are entitled to delivery of possession of the property and also to any balance of the money that may remain in their hands. We think this point is covered by a dictum in a Full Bench decision of this Court.

YELLA REDDI v. SYED MUHAMAD-ALLI. — ABDUR RAHIM AND SPENCER, JJ.

Vaidhinadasamy Ayyar v. *Somasundram Pillai*(1). The observation which applies to the case is to be found at page 478 where it is laid down that the special provision for the purpose of limitation would not make the sums received by a usufructuary mortgagee decree-holder in possession, money payable under a decree within the meaning of section 258 of the old Code corresponding to rule 2, Order XXI. Our attention has also been drawn to *Ramasami Naik* v. *Ramasami Chetti*(2). That was not a case in which the decree-holder was in possession of the property under the terms of the decree and the moneys sought to be credited by the judgment-debtor were not the income from the property received by the decree-holder in possession of it; but it appears that at page 265, a reference is made to the decision in *Vaidhinadasamy Ayyar* v. *Somasundram Pillai*(1) and there it is stated that according to that decision, the amount realized by a usufructuary mortgagee remaining in possession after a decree for sale cannot be applied in satisfaction of the decree amount unless certified under section 258 of the old Civil Procedure Code. It seems to us that this proceeds upon a misapprehension of what is laid down in *Vaidhinadasamy Ayyar* v. *Somasundram Pillai*(1) to which we have already referred. We have also been referred to *Nistarini Dasi* v. *Kazim Alini*(3) where it is laid down that in a suit by the decree-holder for an order absolute for sale, the judgment-debtor is entitled to have an account taken of the receipts by the decree-holder. That decision does not apply to the facts of this case. We are of opinion that the plea of limitation is not sustainable.

[The remaining portion of the judgment deals with questions of fact, and has therefore been omitted from this report.]

K.R.

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(1) (1905) I.L.R., 28 Mad., 473 at p. 478 (F.B.).
(2) (1907) I.L.R., 30 Mad., 255 at p. 265 (3) (1910) 12 C.L.J., 65.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915.
October 28.

KRISHNASWAMI NAIDU (PLAINTIFF), APPELLANT IN SECOND APPEAL AND RESPONDENT IN THE PETITION,

v.

SEETHALAKSHMI AMMAL, RESPONDENT IN THE SECOND APPEAL AND PETITIONER IN THE PETITION.*

Hindu law—Gift to the illegitimate son of an undivided collateral co-parcener, not ancestral property as between the donee and his son

Property given for maintenance to the illegitimate son of an undivided deceased collateral co-parcenor is not "ancestral property" of the illegitimate son in which the son of that illegitimate son gets a right by birth.

Nagalingam Pillai v Ramachendra Teven (1901) I L R, 24 Mad, 429 and *Parimal Babu v. Abaninath* (1918) 17 C.L.J., 83, distinguished.

SECOND APPEAL against the decree of J. S. JNANIYAR NADAR, Temporary Subordinate Judge of Negapatam, in Appeal No. 706 of 1909, preferred against the decree of L. R. ANANTA-NARAYANA AYYAR, the District Munsif of Negapatam, in Original Suit No. 188 of 1908 and Civil Miscelleaneous Petition praying the High Court to issue an order to take off from the file of the High Court the said Second Appeal No. 78 of 1912.

One Krishnaswami Naidu and one Subbarayulu Naidu were two undivided brothers. Krishnaswami Naidu had a concubine called Swornam by whom he had two illegitimate sons, viz., Rajagopal Naidu and Narayanaswami Naidu. Plaintiff is the son of Rajagopal Naidu. Sometime after Krishnaswami Naidu's death, his widow as guardian of her minor son and his undivided brother Subbarayalu Naidu executed in 1866 two deeds of gift to Swornam, Rajagopal Naidu and Narayanaswami Naidu, by one of which they gave them a small house worth Rs. 600 absolutely and by the other of which they gave them a shop worth Rs. 3,400, whose income was directed by the deed of gift to be utilized for the maintenance of the donees and for the performance of a charity in certain proportions.

After the death of Narayanaswami Naidu, his mother Swornam and Rajagopal Naidu for himself and as guardian of his minor son, the plaintiff, sold the shop to defendant's father in 1896 for Rs. 2,500.

* Second Appeal No. 78 of 1912 and Civil Miscellaneous Petition No. 2177 of 1912.

SESHAGIRI RAO v. HANUMANTHA RAO.

NAPIER, J.

representative the decision will (in some circumstances) bind the true representative: *vide The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Sing*(1). The latter principle has in my opinion no analogy, for there is no question of legal representatives here. While the former doctrine is founded not on any question of parties, but on the right of a stranger to assume that a decree given as between parties is conclusive of their rights, it cannot be extended to cases where the proper parties have not been before the Court. The real question is, "Was the plaintiff a party to the suit at the time that the decree was given and if not was it the fault of the decree-holder that he was not?" I lay stress on the position "at the time of the decree" because I am satisfied that if the majority of the plaintiff had occurred after the decree we could have treated the notice of the execution proceedings to the guardian instead of to the plaintiff as a mere irregularity on the authority of the Privy Council in *Malkarjun* v. *Narhari*(2), and the suit would have to be dismissed under article 12 of the Limitation Act. But the same case is authority for the proposition that where the Court took proceedings wholly without jurisdiction a defendant who was not before the Court could treat them as a nullity and remain unaffected by them. He would therefore not have to set aside the sale and so article 12 would not operate in limitation. We are asked by Mr Prakasam to apply the analogy of a minor being sued as a major or of a minor being represented by a person not competent to act as a guardian *ad litem* [as to the latter *vide Sham Lal* v. *Ghasita*(3) and *Ganesha Row* v. *Tuljaram Row*(4), a decision of the Privy Council.] In my opinion we should not do so. Courts are always zealous of the rights of minors and insist on the most scrupulous care being taken to see that they are properly represented (compare the English practice of giving a minor an opportunity of attacking a judgment of foreclosure or on a will obtained against him on attaining majority). The question in this case must be decided on other considerations. Now it is noticeable that Order XXXII which deals with suits by or against minors is silent on this point. Rules 12, 13, 14 provide the course to be followed by a minor-plaintiff on attaining

(1) (1872) 14 M.I.A., 605.
(2) (1900) I.L.R., 25 Bom., 337 (P.C.).
(3) (1901) I.L.R., 23 All., 459
(4) (1913) I.L.R., 36 Mad., 295 (P.C.).

majority, but nothing is said about a minor-defendant in the same position. Rule 12 provides that the minor-plaintiff *shall*, on attaining majority, elect. The only assistance to be gained from this rule is that it suggests that the suit *cannot* proceed in the name of a next friend after the minor has attained majority. I do not think, however, that this rule is based on a law of procedure as to parties. In my view, it arises out of the right of a major to exercise his own discretion as to whether he will continue the suit. Turning to the English practice we find that Order XXVI, part III, which deals with persons under disability is also silent on this point, and I cannot find in any book on Practice any reference to procedure by way of alteration of the record where a minor defendant attains majority or a lunatic becomes sane pending the disposal of the suit, though the practice permits a minor defendant on coming of age to apply to amend his defence (*vide* Daniell's Chancery Practice, page 114) Turning to the English Cases the earliest bearing directly on the point is *Powys* v. *Mansfield*(1). There the minor came of age on 8th February. Judgment was given against him on 23rd February and a decree was drawn up on 27th April treating him as an infant and giving a day after majority to show cause. The fact of his majority was not disclosed till he made a motion in accordance with the permission The Vice-Chancellor after reserving the point held that the decree having been passed when he was a major he had no right to show cause It was never even suggested in argument that the decree was without jurisdiction. The next case is *Davies* v. *Dowding*(2) where a decree was given in a mortgage suit in which an infant was a defendant but with a direction for an enquiry whether it would be for the benefit of the infant that the property should be sold It was subsequently ascertained that the infant had attained majority some time previous to the date of the decree The mortgagee then asked for a sale without an enquiry. The Master of the Rolls held that it was the defendant's own default that he did not on attaining age make a new defence or apply for leave to redeem; he therefore ordered a sale as prayed. Here again it was never

(1) (1836) 6 Sim., 637. (2) (1838) 2 Keen, 245 at p. 249.

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argued that the decree was a nullity. *Snow* v. *Hole*(1) does support the respondent's contention for there where judgment was given in terms against a minor whereas in fact she had attained majority, the Vice-Chancellor uses the phrase " I must consider there was no decree against her," but in that case notice had been served on the solicitor for the minor to hear judgment; he had returned to the plaintiff's solicitor stating that his client had attained majority and that he had no instructions; so the notice was bad. In spite of that the decree was drawn up as if she had been properly served. The Vice-Chancellor gave her leave to make a new defence but on paying costs "as it was in the nature of an indulgence."

I cannot but regard his order as inconsistent with the view that there was no decre against her and it is further to be noted that he did not refer to his decision in *Powys* v. *Mansfield*(2) clearly taking the other view; the report also may be inaccurate. There is therefore ample authority in England for holding that the decree is not without jurisdiction. The only Indian case is *Ramachari* v. *Duraisami Pillai*(3) There one of the defendants was treated as a minor in the mortgage suit though he was a major at its institution. The lower Court having returned a finding that he was aware of the suit from its beginning and allowed it to proceed against him he was bound by the decree and could not impeach the sale on the decree That is strong authority against the theory of nullity. In the light of the above decisions I am satisfied that whatever rights the respondent had to apply to set aside the decree he cannot treat it as made without jurisdiction and in consequence his suit is barred by article 12. This appeal will therefore be allowed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I am also of opinion that the decree in Original Suit No. 145 of 1904 and the execution sale held therein were not passed and held without jurisdiction so far as the plaintiff's interests were concerned. I further agree that the present suit to set aside the sale is barred by limitation and I concur in the order proposed by my learned brother.

N.R.

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(1) (1846) 15 Sim., 161 (2) (1836) 6 Sim., 637.
(3) (1898) I.L.R., 21 Mad., 167.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

KOTTAPALLI SUBBAMMA AND ANOTHER (DEFENDANTS NOS. 1 AND 3), APPELLANTS,

1915 November 9 and 16.

v.

JATAVALLABHULA SUBRAMANYAM (PLAINTIFF), RESPONDENT.*

Hindu law—Alienation by widow of her husband's estate—Surrender by widow to nearest reversioner, subsequent to alienation—Effect of surrender on alienations.

A surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations, which were made by her prior to the surrender and which though not binding on the reversioners were binding on her for her life.

Sreeramulu v Kristamma (1903) I.L.R., 26 Mad., 143, followed.

Singaram Chetty v. Kalianasundaram Pillai (1914) M.W.N., 735, referred to

Ramakrishna v. Tripura Bai (1909) I.L.R., 33 Bom., 88, dissented from.

SECOND APPEAL against the decree of J. J. COTTON, the District Judge of Gōdāvari at Rajahmundry, in Appeal No. 138 of 1913, preferred against the decree of A. NARAYANA PANTULU, the District Munsif of Rajahmundry, in Original Suit No. 572 of 1911.

The plaintiff sued in 1911 to recover the amount due on a mortgage bond, dated 15th May 1902, executed in his favour by the first defendant, a Hindu widow, and the second defendant who claimed to be an *illatom* son-in-law of the first defendant and her late husband. The third defendant was the undivided son of the second defendant. During the pendency of the suit the first defendant executed on the 16th February 1913 a deed of surrender in favour of the third defendant who was her daughter's son The defendants contended *inter alia* that the life-estate of the first defendant terminated on the date of the surrender deed, and that the plaintiff was not entitled to enforce his mortgage right on the suit property. Both the lower Courts held that the mortgage

* Second Appeal No. 741 of 1914

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debt was not for necessity but binding on the widow's interest in the property and that the plaintiff was entitled to enforce his mortgage on the first defendant's life-estate in the property, notwithstanding the surrender of her rights in the property in favour of the third defendant subsequent to the suit mortgage. The first and the third defendants preferred a Second Appeal to the High Court.

B. Narasimha Rao for the appellants.

G. Venkataramayya and *A. N. Sitarama Sastriyar* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The defendants Nos. 1 and 3 are the appellants. The suit was brought on a mortgage-bond executed *to the plaintiff by a Hindu widow (the first defendant). The* bond is dated 15th May 1902. On the 16th February 1913 the first defendant executed the surrender deed (Exhibit I) in favour of her husband's reversionary heir (the third defendant). This suit was brought on the 20th September 1911 and it was during the pendency of the suit that the relinquishment deed was executed. The suit was posted for trial for the 16th February 1912. Then there were five more adjournments and the sixth adjourned hearing date was 7th February 1913. Then the defendants made a request for another adjournment to 7th March 1913 and between these two dates (7th February 1913 and 7th March 1913) the surrender deed was executed in favour of the next male reversioner—the third defendant, by the widow (the first defendant) on the 16th February 1913. In the written statement, dated 25th October 1911, however, paragraph 5, there is an allusion to a surrender by the first defendant to the minor third defendant. The surrender mentioned in the written statement must therefore relate to an alleged prior oral surrender. The date of that oral surrender is not mentioned in the written statement which was filed more than a month after the suit was filed. That the surrender whether oral or written was deliberately intended in order to defeat the plaintiff's claim to bring the life interest of the first defendant in the property to sale for recovery of the plaintiff's mortgage amount cannot, in my opinion, be disputed and was not seriously disputed by the appellants' learned counsel. The lower Courts held that the surrender could not defeat the right of the plaintiff to get a mortgage decree for sale of the first defendant's life interest as

the transfer of that interest by way of security to the plaintiff had taken place in 1902 while the alleged oral surrender was at the end of 1911 and the written surrender deed (Exhibit I) was in 1913.

Mr. B. Narasimha Rao, the learned counsel for the appellants, has raised two contentions in the memorandum of Second Appeal.

The first contention is that the mortgage document itself was invalid as it had not been proved that it was attested by two persons who saw the executant execute it This contention however was not pressed at the arguments before us and there is nothing in it as the writer who is also an attestor [see *Radha Kishen* v. *Fateh Ali Ram*(1) as to treating the writer as an attestor for the purpose of section 59 of the Transfer of Property Act] and another attestor have proved the actual execution of Exhibit A.

The remaining contention might be stated in the words of the sixth to ninth grounds of the appeal memorandum as follows:—

"6. The lower Courts were wrong in holding that the plaintiffs could have a decree against the life-estate of the first defendant notwithstanding relinquishment in favour of the next reversioner, the third defendant, which has the effect of extinguishing her estate in the eye of the Hindu law.

"7. The lower Courts erred in holding that the relinquishment conveyed only the first defendant's equity of redemption.

"8. The lower Courts should have held that the relinquishment is equivalent to civil death and that under Hindu law the next reversioner takes the entire estate unfettered by any invalid alienations made by the widow.

"9. The mortgage having been found to be not binding on the reversioners and the relinquishment having been found to be valid, the lower Courts should have held that the third defendant was entitled to the estate in his own right as if the widow had died and the plaintiff's suit should have been dismissed."

In *Sreeramulu* v *Kristamma*(2), a Hindu widow after having sold one of her husband's properties adopted a son. The son sued to recover the property from the possession of the purchaser

(1) (1898) I.L.R., 20 All., 532. (2) (1903) I.L.R., 26 Mad., 143.

SEETAMMA v. SEETHAMMA. SADASIVA AYYAR J.

on contentions very similar to those raised by the sixth to ninth grounds of appeal above set out. Just as Mr. Narasimha Rao contended before us that by the surrender the widow's estate as such ceased to exist and was not available to the plaintiff (mortgagee) any longer for the purpose of his security, it was contended in that case that by the adoption the adoptive mother's estate as widow heir of her husband came to an end and could not be availed of by the prior purchaser from her to advance a claim on his part to remain in possession during the widow's lifetime. Sir V. BHASHYAM AYYANGAR, J. (at page 148), begins the discussion of the question by stating that the question was really one of first impression and presented great difficulty. Then he quotes authorities for showing that a Hindu widow heir has an absolute right to the fullest benefit in her husband's property for her life and that she has a personal right therein which she can exercise at her will and pleasure, by giving, selling or transferring the estate to another for her own life " or, speaking more accurately, for the term of widowhood " Next, he says that if the alienation was not for any necessary purpose, it will still carve out in favour of the alienee an estate during her widowhood which cannot be defeated by a subsequent adoption. He treats it as clear (though he does not say so in so many words) that her widowhood does not come to an end by the adoption and that it lasts till her death, unless of course she remarries and Act XV of 1856 applies. At page 155 he says " A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her lifetime, and except of course in the rare case of a remarriage, this will be ensured by the conclusion herein arrived at even when an adoption takes place subsequent to the alienation." Then the conclusion finally arrived at was that notwithstanding the adoption which put an end to her right as heir in all her husband's property, that is, though the adopted son inherited the adoptive father's property so as to put an end to the widow's right as heir, the property he so inherited could not include the rights already alienated by the widow, the effect of the alienation lasting during her lifetime. Mr. Justice DAVIES mally concurred in that view. In *Singaram Chetty* v. *Kalianasundaram Pillai*(1) WALLIS, C.J., and HANNAY, J., made the

(1) (1914) M.W.N., 735 ; s.c., 26 I.C., 1.

following observations: "In this state of things the defendants contended that the effect of the proceedings in the suit above mentioned was to vest the equity of redemption of the mortgaged property in the mortgagee, at any rate for the lifetime of the widows or the survivor of them. This contention is raised in paragraph 6 of the written statement and is covered by the issues but is not dealt with by the Subordinate Judge, whether from oversight or because it was not strongly pressed before him. But it appears to afford a conclusive answer to the present suit as it seems clear that a widow cannot relinquish her widow's estate to the reversioner affecting the validity of the alienations made by her before such relinquishment, which though not binding on the reversioner, were binding on her for life And the result is that during the lifetime of the surviving widow, the equity of redemption remains vested in the defendants as the assignees of the mortgagor and that the present suit is premature."

Mr B Narasimha Rao contended that these observations were *obiter dicta* and that even if they were not, they were made without the learned Judges having had the benefit of a discussion of that question by the learned vakils who argued that case. I cannot treat the observations as obiter as the decision in that case which dismissed the plaintiffs' suit and reversed the lower Appellate Court's decree was fully rested on those observations. Again I cannot hold on the strength of the report of the arguments in an unauthorized report [*Singaram Chetty* v. *Kalianasundaram Pillai*(1)] that Messrs. Rangachariar and Muthia Mudaliyar who appeared for the appellant in that case did not argue the question. Mr. Narasimha Rao then relied upon *Ramakrishna* v. *Tripura Bai*(2) in which CHANDAVARKAR, J., criticizes Sir V. BHASHYAM AYYANGAR'S judgment in *Sreeramulu* v. *Kristamma*(3) and dissents therefrom. That learned Judge preferred to follow the decisions of his own High Court, the decision *Lakshman Bhan Khopkar* v. *Radhabai*(4) and *Moro Narayan Joshi* v. *Balaji Raghunath*(5) both on the ground of *stare decisis* and also as being sound Hindu law On the ground of *stare decisis* I would similarly prefer to follow the opinions of four learned Judges

(1) (1914) M.W N., 735 s.c. 26 I.C., 1 (2) (1901) I L.R., 33 Bom., 88.
(3) (1903) I L.R., 26 Mad., 143. (4) (1887) I.L R., 11 Bom., 609.
(5) (1895) I.L.R., 19 Bom., 809.

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of this Court in preference to the current of Bombay decisions and as regards the Hindu law also, I would hold that a widow has got the power to alienate her estate so as to enure during her lifetime notwithstanding any event which may happen after the alienation: see *Segu Chidambaramma* v. *Sareddi Hussainamma*(1).

As I ventured to state in a recent Full Bench case, the true and more ancient Hindu law is in my opinion being gradually restored in many respects by the decisions of the Privy Council. We have seen that the rule of survivorship introduced by modern mediaeval Hindu law and the rule of the sons having a legal right to question the debts and alienations of their father have been altered in favour of alienees and creditors for value by the decisions of the Privy Council. The artificial mediaeval doctrine of a widow having no full power of alienation and the consequent doctrine superimposed by the Bengalee lawyers on this doctrine, namely, the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (this second doctrine having been adopted for South India also by the Madras High Court) cannot, in my opinion, be pushed to the extent to which Mr. Narasimha Rao wishes that they should be extended, namely, so as to defeat the claims of alienees for value who as Sir BHASHYAM AYYANGAR said in *Sreeramulu* v. *Kristamma*(2) were entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life except in the rare case of remarriage. Mr. Narasimha Rao argued that as remarriage puts an end to her estate so as to affect even her prior alienees, a surrender should also have the same effect. But remarriage puts an end to her widowhood, while surrender or adoption does not put an end to her widowhood. (I wish to state however that I reserve my opinion even on the question whether her marriage, though it puts an end to her widowhood, will affect the right of the alienee to enjoy the alienated interest during her lifetime, though section 2 of Act of 1856 literally construed is in support of Sir BHASHYAM AYYANGAR's opinion.) If the survivorship doctrine and if the sons' right-by-birth doctrine are made powerless against the equities and rights of attaching creditors and alienees for value, I do not see any reason

(1) (1915) M.W.N., 577. (2) (1903) I.L.R., 26 Mad., 143.

why the surrender doctrine (which is not less artificial than the above two) should be made to affect alienees for value. Mr. Narasimha Rao conceded that a widow who makes a surrender to the reversioner can stipulate for a right to be maintained out of the husband's property during her lifetime and this shows that she does not become civilly dead by the surrender nor does she cease to retain the status of widowhood. In the result, I would dismiss the Second Appeal with costs.

NAPIER, J.

NAPIER, J.—I agree. The theory that change of status of an assignor or a surrender by such assignor can invalidate legal rights obtained by an assignee is in my opinion so contrary to equity and good conscience that it should not be accepted by Courts of this country whatever the ancient Hindu law on the subject was. The proposition entails a defeasance of assignee's title by a collusive alienation made with intent to benefit third parties by subsequent assignment [vide *Chella Subbiah Sastri* v. *Palury Pattabhiramayya*(1)] and by a collusive acceleration made with intent to defraud such assignee. It operates not only against the property which she has inherited but also against property purchased out of savings and added to the inheritance but subsequently alienated. It affects persons not governed by the personal law of Hindus, and might injure minor assignees or alternatively their guardians who acted in perfect good faith. There is no reason on principle why alienations for life already made should not enure, and the rest of the estate merge into the reversion and I decline to accept any extension of the reversioners' right beyond this. The appeal will be dismissed with costs.

K.R.

(1) (1908) I.L.R., 31 Mad., 446.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915. November 19 and 22.

TIRUVENGADA KONAN (PLAINTIFF), APPELLANT,

v.

VENKATACHALA KONAN AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Lessor and lessee—Lease for a term—Dispossession of lessee, within term by trespassers—Right of suit of lessor, for actual possession—Lessee joined as defendant—Decree—Declaration of title—If formal possession can be given.

A lessor whose lessee is dispossessed by a stranger can maintain a suit against the stranger during the term of the lease and obtain a decree not only declaring his title to the reversion, but also awarding him "formal" possession of the land as provided by Order XXI, rule 36, Civil Procedure Code.

Bissessuri Dabeea v. *Baroda Kanta Roy Chowdry* (1884) I.L.R., 10 Calc., 1076 and *Sita Ram* v *Ram Lal* (1896) I L R, 18 All, 440 (F.B.), followed

SECOND APPEAL against the decree of P. C. TIRUVENKATA ACHARIYAR, the acting Subordinate Judge of Tanjore, in Appeal No. 455 of 1913 preferred against the decree of C. VIRASWAMI REDDI, the District Munsif of Tirutturaippundi, in Original Suit No. 68 of 1912.

The plaintiff, who was the owner of the suit lands, leased them to the third defendant for a term of three years under a lease deed, dated 9th November 1911, and put the lessee in possession of the same on the same date Subsequently when the first year's crops were ready for harvest, defendants Nos. 1 and 2 trespassed upon the lands, carried away the crops and remained in possession of the lands. The third defendant immediately gave intimation by a notice to the plaintiff about the trespass of the first and second defendants, and also informed him that he (the third defendant) would not be liable for the rent, but did not surrender the lease before the expiry of the term. The plaintiff brought the suit on the 18th March 1912 to eject the first and second defendants from the possession of the lands. These defendants contended *inter alia* that the plaintiff was

* Second Appeal No. 1932 of 1914.

not competent to maintain the suit for possession against them, as the lease in favour of the third defendant (which was for three years) was subsisting and the plaintiff was not entitled to sue for possession during the currency of the lease The District Munsif passed a decree for the delivery of possession of the lands by the first and second defendants to the plaintiff. On appeal the lower Appellate Court reversed the decree and dismissed the suit. The plaintiff preferred a Second Appeal.

C. V. Anantakrishna Ayyar for the appellant.

T. R. Venkatarama Sastriar for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Mr. Justice HANNAY and myself held in *Souri Ammal* v. *Vellaya Sethurayan*(1) that where a landlord (*A*) is under an obligation to put his tenant (*B*) into khas possession of the leased land he (*A*) is entitled to succeed in a suit in ejectment brought against a trespasser even if the suit was brought during the term of his tenancy.

In this case, however, the plaintiff had put his tenant (the third defendant) into possession and hence had discharged his obligation as landlord to let the third defendant into actual possession. But the plaintiff has a reversion in the plaint lands and he might be said to have been dispossessed of that reversion when the defendants Nos. 1 and 2 took possession of the lands not only adversely to the tenant (the third defendant) but claiming adversely to the plaintiff's reversion.

In such a case, *Sita Ram* v. *Ram Lal*(2) decides that the landlord can be put in possession of his reversion by the passing of a decree against the trespassers in the form indicated in section 264 of the old Civil Procedure Code corresponding to Order XXI, rule 36 of the new Civil Procedure Code. I do not think it is necessary to adopt the rather too broad a view indicated in certain passages of the judgment of SUNDARA AYYAR, J., in *Ambalavana Chetty* v. *Singaravelu Udayar*(3) that the landlord even in such a case is entitled to khas possession from the trespassers. [*Sita Ram* v. *Ram Lal*(2) is not referred to by SUNDARA AYYAR, J., in his judgment.] Mr. Venkatarama Sastriyar for the contesting respondents (defendants Nos. 1 and 2) argues that the landlord is entitled only to a declaratory decree and

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(1) (1915) 29 M.L.J., 233 (2) (1896) I.L.R., 18 All., 440 (F.B.).
(3) (1912) M.W.N., 600.

TIRU-VENGADA KONAN v. VENKATA-CHALA KONAN.

SADASIVA AYYAR, J.

that a decree granting possession of the reversion in the form indicated in Order XXI, rule 36, Civil Procedure Code, is nothing more than a decree declaratory of the title of the plaintiff to his reversion which decree he argues should not be given to him at this stage. I think that, though the distinction between a decree declaring the landlord's right to his reversion and a decree giving him possession of his reversionary right in the lands might be fine [see *Ghulam Husain* v. *Muhammad Husain*(1) where the existence of the distinction seems to be ignored], the said distinction is a real one, for it may be argued that a mere declaratory decree against a trespasser will not prevent the limitation period from running on. Whereas a decree for possession of the reversion, properly executed, will nullify the effect of the adverse possession of that reversionary right by the trespasser during that period (at least) which elapsed before the possession of the reversion was so obtained in execution.

I think that on the facts found in this case the plaintiff's suit should not have been dismissed wholly though he sued for khas possession which he was not entitled to get during the period of the third defendant's lease.

Relying on *Bissessuri Dabeea* v. *Baroda Kanta Roy Chowdry*(2) and *Sita Ram* v. *Ram Lal*(3), I would give a decree declaring the plaintiff's title to the lands as against the defendants Nos 1 and 2 and giving him what is called "formal" possession of the land by the proclamation of his reversionary right (namely, the right to obtain khas possession of the lands at the end of the term and to be obtaining rents from the third defendant during the term of the lease). The claim for mesne profits will be disallowed.

The parties will bear their respective costs throughout.

NAPIER, J.

NAPIER, J.—I agree.

K.R.

(1) (1909) I L R., 31 All, 271. (2) (1884) I.L.R., 10 Calc., 1076.
(3) (1896) I L.R., 18 All, 440 (F B).

APPELLATE CRIMINAL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Ayyar.

THE DISTRICT JUDGE OF KISTNA (PETITIONER),

v.

C. HANUMANULU (RESPONDENT) *

1915
November 26
and
December 2

Legal Practitioners Act (XVIII of 1879), sec. 14—Gross contempt of a Subordinate Court by a second-grade pleader by unjustly attacking its impartiality in the discharge of its duties—Jurisdiction of Subordinate Courts to take proceedings under section 14 for all cases coming under section 13—Clause (f), not ejusdem generis

In the course of an enquiry before a District Munsif, a second-grade pleader who appeared for one of the parties to the enquiry swore an affidavit and filed the same in Court requesting that that Court should not proceed with the enquiry. The affidavit contained unjust aspersions, imputations and insinuations couched in insulting language charging the District Munsif with rancour and prejudice against the pleader and with a desire to injure him both as a pleader and also as a public man. The Munsif thereupon took these proceedings under section 14 of the Legal Practitioners Act (XVIII of 1879) charging the pleader under section 13, clause (*f*), of the Act with contempt of Court.

Held (1) that Subordinate Courts have jurisdiction to take proceedings not only under clauses (*a*) and (*b*) of section 13, but also under all the other clauses of the section, (2) that clause (*f*) is not confined to misconduct *ejusdem generis* as those referred to in the previous clauses and (3) that the pleader was guilty of misconduct by his outrageous attack upon the Court in the exercise of its functions.

Their Lordships accordingly suspended the pleader from practice for a period of four months.

The decision of KNOX, J., in *In the matter of the petition of Mahomed Abdul Hai* (1907) I.L.R., 29 All., 81 and *In the matter of a Pleader* (1903) I.L.R., 26 Mad., 448, followed.

CASE referred for the orders of the High Court under section 14 of the Legal Practitioners Act (XVIII of 1879) by the Acting District Judge of Kistna in his letter, dated 15th March 1915.

The facts of the case appear from the last paragraph of the judgment.

C. Sidney Smith for the Pleadership Examination Board.

T. Prakasam for the respondent.

The *Public Prosecutor* for the Crown.

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* Referred Case No. 7 of 1915.

THE DISTRICT JUDGE, KISTNA v. HANUMANULU

WALLIS, C.J., COUTTS TROTTER AND SESHAGIRI AYYAR, JJ.

the District Munsif insisted on putting certain questions to the respondent as the pleader in the case with a view of satisfying himself apparently that the proceedings were really authorized by the zamindar and on the following day the respondent filed in Court the affidavit which is the subject of the reference. It fills no less than 25 folio pages of print and concludes with the statement that as everything looked inominous (*sic*) for the respondent, he was obliged to file it for the perusal of the High Court and that it was necessary in the interests of justice that the District Munsif should be requested not to adjudicate in the proceedings then before him against the other pleader. It is unnecessary to say much about the contents of the affidavit, as Mr. Prakasam who appears for the respondent has very properly not attempted to justify it and has contented himself with urging in mitigation the respondent's state of mind at the time. It refers at great length to numerous proceedings in which the respondent had appeared before the District Munsif as a litigant or a pleader and is full of aspersions, imputations and insinuations couched in insulting language, charging the District Munsif with rancour and prejudice against the respondent and with a desire to injure him and to make common cause with his political opponents in the Bezwada Municipal Council. It has not been contended before us that there was anything in the District Munsif's conduct on the Bench which could in any way excuse or palliate the respondent's conduct in filing the affidavit, but it was urged in effect that in the case of the respondent ordinary professional rivalries had been aggravated by bitter feuds with other members of the local bar arising out of municipal politics which preyed on his mind and affected his judgment. It is bad enough that disputes of this kind should be allowed to destroy the good relations which ought to exist between members of the bar but it would be far worse, if they were recognized as an excuse for outrageous attacks upon the Court in the exercise of its functions. Giving the fullest consideration to what has been urged by Mr. Prakasam and to respondent's long standing at the bar, we feel bound to mark our sense of his misconduct by suspending him for four months from this date from the exercise of his profession.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

SYED AHMAD SAHIB SHUTTARI (PLAINTIFF), APPELLANT,

v.

MAGNESITE SYNDICATE, LIMITED, BY THEIR AGENT AND MANAGER MR G. TURNER AND SIX OTHERS (DEFENDANTS NOS 1, 2 AND 4 TO 8), RESPONDENTS.*

1915. March 8 and 18 and December 16.

Tenants-in-common—Co-lessors—Lease by Muhammadan co-heirs—Mining lease—Forfeiture clauses—Lease determined by one lessor—Suit by one tenant-in-common in ejectment, maintainability of—Suit for whole or for share, maintainability—Penal provisions, strict construction of—Relief against forfeiture—Covenants in a mining lease, exception to rule—English and American laws, rules of.

A tenant-in common is entitled to sue for his share of the property demised, where a forfeiture has been incurred under the terms of the lease.

Sri Rajah Simhadri Appa Rao v *Prattipati Ramayya* (1906) I.L.R., 29 Mad., 29, *Korapalu* v. *Narayana* (1913) 25 M L.J , 315 and *Ebrahim Pir Mahomed* v *Cursetji Sorabji Desitre* (1887) I.L.R , 11 Bom , 644, followed

Gopal Ram Mohuri v *Dhakeswar Pershad Narain Singh* (1908) I.L.R , 35 Calc., 807, dissented from

Though the aim of law generally is in favour of giving relief against forfeiture in the case of leases, in the case of mining leases a proviso for re-entry should be strictly construed and forfeiture cannot ordinarily be relieved against.

English and American law considered.

Doe v. *Church Wardens of Rugeby* (1844) 6 Q.B , 107 and *Doe d. Lyed* v *Ingleby* (1846) 15 M & W., 465 , s c., 153 E.R., 953, followed

Balambhat v *Vinayak Ganpat Rav* (1911) I.L.R., 35 Bom., 239, referred to.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Salem, in Appeal No. 25 of 1912, preferred against the decree of T. A. NARASIMHA ACHARIYAR, the Principal District Munsif of Salem, in Original Suit No 17 of 1911.

The plaintiff and the defendants Nos. 2 to 8 were owners of undivided shares in the suit properties, the plaintiff being entitled to 150/480th share therein and the defendants Nos. 2 to 8 to the remaining share. The plaintiff and the said defendants who were Mussalmans and inherited the properties as co-heirs and did not separate their shares therein, jointly leased the entire

* Second Appeal No. 858 of 1913.

SYED AHMAD v. MAGNESITE SYNDICATE, LTD.

property to the predecessor in title of the first defendant. The lease was for quarrying magnesite and chalk and was executed on the 26th January 1899 for a period of thirty years. The rent due thereunder was payable in certain proportions individually to the plaintiff and the defendants Nos. 2 to 8. The lease provided for the keeping of accounts, for the weighment of the magnesite and chalk in the presence of the lessors and the lessee and contained stipulations for re-entry and for forfeiture of the lease on certain contingencies. The plaintiff alleged that there was default by the first defendant in the payment of rent and of royalties, in giving notices as to weighment, and in keeping proper accounts as specified in the lease deed, that the lease which was for thirty years was forfeited, that he gave notice to the first defendant that he terminated the lease and would re-enter the property on the 1st October 1910. The plaintiff complained of the breach of the three covenants abovementioned and prayed in the plaint for a decree declaring that the lease had been terminated, directing delivery of possession of either the entire property or the share of the plaintiff therein and awarding damages and other reliefs. The first defendant pleaded that the plaintiff alone was not competent to terminate the lease or to sue in ejectment either in respect of the whole of the property or the plaintiff's share therein, that no forfeiture was incurred by any default on his part and that, in any event, the forfeiture should be relieved against under the circumstances of the case. The District Munsif passed a decree directing the first defendant to put the plaintiff in possession of the plaintiff's share in the property and also awarding damages. The District Judge, on appeal, reversed the decree and dismissed the suit. The plaintiff preferred a Second Appeal to the High Court.

T. Rangachariar, M. O. Parthasarathi Ayyangar and *P. R Narayanaswami Ayyar* for the appellant.

D. Chamier for the respondents.

This Second Appeal coming on for hearing the following judgment of the Court was delivered by

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

SESHAGIRI AYYAR, J.—The plaintiff and defendants Nos. 2 to 8 own undivided shares in the property in dispute. Plaintiff is entitled to 150/480th share. Defendants Nos. 2 to 8 are entitled to the remaining share. On the 26th January 1899, they jointly gave a lease of the entire property to Mr. G. G,

Arbuthnot for thirty years. The present first defendant is the successor in title of the said lessee. The lease was for quarrying magnesite and chalk. It made the rent due thereunder payable in certain proportions individually to the plaintiff and defendants Nos. 2 to 8. It provided for the keeping of accounts for the weighment of the magnesite and chalk in the presence of the lessors and the lessee, and contained provisions for re-entry and for the forfeiture of the lease on certain contingencies. The plaintiff complains of the breach of three covenants (see paragraph 5 of the plaint *) and prays that it may be declared that the lease had terminated, and for possession of either the entire property or the share of the plaintiff. The first defendant denied that he failed to fulfil any of the conditions. He admits in paragraph 13 of his written statement that a certain sum of money is still due to the plaintiff. The other defendants remained *ex parte*.

The Munsif upheld the plaintiff's contention and decreed possession of the plaintiff's share. The District Judge on appeal has reversed that judgment.

The first question argued by Mr. T. Rangachariar for the appellant is that the District Judge's view that one only of the lessors is not competent to maintain a suit in ejectment is not the law in this Presidency. In *Sri Rajah Simhadri Appa Rao* v. *Prattipati Ramayya*(1) and in *Korapalu* v. *Narayana*(2), this High Court held that one of the several tenants-in-common can sue to recover possession of his share from the joint lessee. *Ebrahim Pir Mahomed* v. *Cursetji Sorabji Desitre*(3), takes the same view. On the other hand the Calcutta High Court in a long course of decisions maintains the position that all the

* 5. That the said indenture provides, *inter alia* :—

(a) That an annual rent of Rs 450 shall be paid by the lessee to the lessors at Salem in the shares and proportions of their interest in the property demised and in equal instalments of Rs. 37-8-0 on the first day of every month.

(b) That a royalty of 6 annas for every ton of raw chalk or magnesite despatched from the quarries on the said property or treated locally, shall be paid on the first day of every month by the lessee to the lessors, previous notice of weighment being given.

(c) That the lessee should keep correct accounts of (1) the quantity of chalk or magnesite brought to bank from the mines and quarries on the said property ; (2) the quantity of chalk or magnesite sold and exported, or treated locally and (3) the quantity of chalk or magnesite otherwise disposed of.

(1) (1906) I.L.R., 29 Mad., 29. (2) (1913) 25 M.L.J., 315.
(3) (1887) I.L.R., 11 Bom., 644.

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co-owners must sue together. Having regard to this conflict of authorities, and to the guarded language used by Mr. Justice SANKARAN NAIR in *Sri Rajah Simhadri Appa Rao* v. *Prattipati Ramayya*(1) we had the question fully argued before us. It was contended that under the English law, it is open to a tenant-in-common to sue for the recovery of his share of the land demised, and that there is nothing in the statute law of this country which restricts such a right. The view maintained by jurists that "joint tenants are seized *per my et per tout* (by the half, or moiety, and by all)" has been commented upon in the note to *Murray* v. *Hall*(2), and its limitations have been explained. It is said in English books that the right to bring separate suits is due to the conception that it is a concession to the lessee that he should be allowed to take a joint lease, and that by the mere fact of joining in the lease, the several owners are not debarred from enforcing their individual rights. It is not necessary to cite all the English authorities which recognize the rights of a tenant-in-common to sue to recover his share of the holding demised. They are collected together in Cole on Ejectment, page 286. See also Williams on the Law of Ejectment, page 194. Freeman in his book on Co-tenancy and partition points out the distinction in this respect between joint tenants, tenants-in-common or co-parceners. See sections 329, 330, 331 and 341. The general rule is stated to be: "Whenever the title of the co-tenants, as in case of joint tenancy and co-parcenary is joint, the action must also be joint; and whenever, as in tenancy-in-common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be distinctly and separately pursued." An exception even in the case of several tenants has been maintained from the earliest times to the effect that "where the thing to be recovered in a real or mixed action is entire, there of necessity, tenants-in-common must join." That is the reason for the distinction in this respect between actions for the recovery of real and of personal property.

There can be no doubt that the rights possessed by the members of a Muhammadan family in an intestate's estate are that of tenants-in-common. As was pointed out by the Judicial Committee of the Privy Council, there is no presumption of joint

(1) (1906) I.L.R., 29 Mad., 29. (2) (1849) 7 C.B., 455.

tenancy in this country except in the case of co-parceners under the Hindu law—*Jogeswar Narain Deo* v. *Ramachandra Dutt*(1). Therefore, unless there is something in the conditions of this country which warrants a departure from the principles applicable to tenants-in-common both in England and in America, we must hold that the plaintiff is entitled to sue for his share. On the other hand, we find that the rule of law as obtains in England is accepted by the legislature in this country in sections 37 and 109 of the Transfer of Property Act. The view of the Calcutta High Court that the English decisions do not apply to India may be traceable to the suggestion thrown out by Mr. Justice RAMPINI in the course of the argument in *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh*(2), that under the Bengal Tenancy Act a fractional share-holder is not entitled to maintain an action in ejectment against the joint lessee. So far as we are aware, this principle is not recognized in the tenancy legislation of this Presidency. Nor has our attention been drawn by counsel to any provision to that effect. Mr. Chamier tried to distinguish the Madras decisions on the ground that they are within the strict letter of sections 37 and 109 of the Transfer of Property Act, as in both the cases there was a transfer of the lessor's interests since the demise. We fail to see on what principle the transferee can acquire a better title to sue for the share sold to him than the transferor himself. Our conclusion is, a tenant-in-common is entitled in this Presidency to sue for his share of the property demised, where a forfeiture has been incurred. Of course his right must be found in the terms of contract. Mr Chamier contended that Exhibit A contemplates a joint action. The canon of construction regarding forfeiture has not been uniform. Lord ELLENBOROUGH said in *Goodtitle d'Luxmore* v. *Saville*(3): "In the construction of covenants of this sort they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put the fair construction upon them according to the apparent intention of the contracting parties" Lord TENTERDEN in *Doe d'Davis* v. *Elsam*(4), emphasises that position He says: "I do not think

(1) (1896) I.L R., 23 Calc, 670 at p 679. (2) (1908) I.L.R, 35 Calc., 807.
(3) (1812) 16 East, 87 at p. 95, s c, 104 E R., 1022 at p 1025.
(4) (1828) Moo. & M 189 at p. 191.

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SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

provisos of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisos ought to be construed according to the fair and obvious construction, without favour to either side." On the other hand, many other eminent Judges have held that a proviso for re-entry ought to be construed strictly *Doe* v. *Church Wardens of Rugeby*(1); *Doe d. Lyod* v. *Ingleby*(2). In this country, the legislature inclines in favour of holding provisions as penal even when a definite sum is mentioned as payable in cases of the breach. The aim of law generally is in favour of giving relief against forfeiture. We think the safer course will be to act on the principle that penal provisions providing for re-entry should be strictly construed. Even in this view, we are unable to hold that Exhibit A provides for the institution of a joint action where there has been an infraction of individual rights. The document has been drawn up by English solicitors and the whole scheme of it suggests that the English doctrine of separate action was in the contemplation of those who drafted the lease-deed. We are therefore forced to the conclusion that the general right of individual action is not taken away by the terms of this contract. See the decision in *Balambhat* v. *Vinayak Ganapat Rav*(3).

There is one other consideration which confirms our view that the forfeiture should be enforced if it had been incurred. Under the English Conveyancing Acts of 1881 and 1892, which were passed with the object of affording relief against forfeiture, one of the exceptions relates to " Covenants in a mining lease to allow the lessor to have access to, or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or workings."

In the Indian Mines Act (Act VIII of 1901) there is no provision either in favour of or against forfeiture. The principle of the English rule must therefore ordinarily apply. The reason of the rule is apparently that in a mining lease, the interests of the

(1) (1844) 6 Q B, 107. (2) (1846) 15 M. & W., 465; s.c, 153 E.R., 953.
(3) (1911) I.L R, 35 Bom., 239.

Government are also in jeopardy. Consequently, it is not a matter depending entirely upon the rights of the actual parties to the contract. For this reason also, we must hold that the forfeiture cannot be ordinarily relieved against.

On the merits, we are not satisfied with the way the facts have been dealt with by the lower Appellate Court. In the view the learned Judge took of the law, there was no necessity for giving clear and definite findings on the questions of fact involved in the case. As we differ from him on the question of law, it is desirable that the District Judge should be asked to submit revised findings upon the question whether the plaintiff has proved that there has been a forfeiture of the covenants in the lease as alleged by him. He must return findings on issues Nos. 1, 2 and 3 on the evidence on record and also upon the further question to what relief the plaintiff is entitled to within six weeks from this date.

The District Judge has also held that the suit as brought must be construed as one for partition and that the District Munsif had no jurisdiction to entertain it. The relief claimed is to eject the first defendant and to such a suit section 7, clause (xi) (cc) of the Court Fees Act, applies. The suit must be held to have been rightly valued and that it was properly instituted in the Court of the District Munsif

In compliance with the order contained in the above judgment, the District Judge of Salem submitted the following findings:— viz., firstly, that the first defendant had made default in the payment of rent due to the plaintiff, but not in the payment of royalties due to him; secondly, that the first defendant did not give to the plaintiff due notices of weighments; thirdly, that the first defendant did not maintain correct accounts as required by the lease-deed; and fourthly, that the first defendant was entitled to be relieved against forfeiture for non-payment of rent but not against forfeiture for omission to give notices or for not maintaining proper accounts.

This Second Appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings, reverse the decree of the District Judge and modify the decree of the District Munsif by

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adding a direction for partition and delivery of the share of the plaintiff. The respondents will pay the costs of the appellant in this and in the lower Appellate Court.

Solicitors for the respondents—*Messrs. King and Partridge.*

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915 December 20, 21 and 22.

KATTALAI MICHAEL PILLAI AND THREE OTHERS (PLAINTIFFS NOS. 1 TO 3 AND 5), APPELLANTS,

v.

RIGHT REVEREND J. M. BARTLE AND THIRTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Church, Roman Catholic—Convert to Roman Catholic religion—Claim for certain exclusive rights in the church by one set of converts over another, on the ground of superiority of caste, unsustainability of—Internal management of church, absolute right of church authorities over.

According to Canon Law a Roman Catholic Church becomes, as soon as it is consecrated, the property of the church authorities, irrespective of the fact that any particular worshipper or worshippers contributed to its construction.

The Bishop and other church authorities have the exclusive right to the internal management of the church, whether relating to secular or religious matters, such as accommodating the congregation inside the church and prescribing the part to be taken by the congregation in the services and the ceremonies.

The Canon Law knows no distinction of castes amongst the Roman Catholics and no convert to Roman Catholicism can claim any special or exclusive rights or privileges in the church on account of any supposed superiority of his caste over that of others.

Where a certain section of Roman Catholic converts of a place claimed as against the local church authorities and as against another set of converts whom they considered to be of inferior caste, an exclusive right to sit in and worship from a particular portion of the church during time of the service and to take part in certain duties connected with the church service,

Held, that such a claim was legally unsustainable, however long such privileges might have been enjoyed, whether by reason of any custom or by reason of any agreement to that effect with any former Bishop of the locality.

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* Second Appeal No. 431 of 1914.

Long v. The Bishop of Cape Town (1863) 1 Moo. P.C.C. (N.S.), 411 and *Merriman v. Williams* (1882) L R., 7 A.C., 484, distinguished.

SECOND APPEAL against the decree of D. G. WALLER, the Acting District Judge of Tinnevelly, in Appeal No. 89 of 1913 preferred against the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Tinnevelly, in Original Suit No. 62 of 1910.

The following statement of facts is taken from the judgment of NAPIER, J. :—

"This is an appeal from an appellate decree of the District Court of Tinnevelly dismissing a suit brought by the five Roman Catholic Vellalas as representatives of the Pillais and Mudalis of Vadakkankulam against the Roman Catholic Bishop of Trichinopoly, the parish priest of Vadakkankulam, and certain Shanan Roman Catholics the last being sued as representatives of the Nadars, asking for certain reliefs in connection with the Holy Family Church situate in the above village. The reliefs may be grouped as follows.—

(1) A mandatory injunction to re-erect walls between what are called the two churches in the above church, the cause of action being the obstructing of the plaintiffs' right, the obtaining of an order under section 144 of the Code of Criminal Procedure, and the demolition of the walls, all in November 1910

(2) A declaration that the ownership of the alleged southern church is vested only in the so-called high caste Christians of the plaintiffs' *vagaira*.

(3) A declaration of the right of the plaintiffs' *vagaira* alone to enter it and an order restraining other so-called low caste Christians of the *vagaira* of the defendants Nos 3 to 14 from entering it.

(4) An order restraining the latter from entering the altar and other *peetams* and restraining the Bishop and the parish priest from allowing them to do so (The phrase 'entering the altar' is meaningless Altar is probably used for chancel)

(5) A declaration of the sole right of the Pillais, Mudalis and so-called high caste Christians to perform services at the altar and join in the service of the congregation except on certain days.

(6) A declaration of their sole right to conduct certain processions, have custody of the sacred images and keys of the church, and ring the bell, etc.

(7) A declaration that the *vagaira* of the defendants Nos. 3 to 14 have no right to go in procession in palanquins in marriages through the streets inhabited by the plaintiffs and asking for appropriate injunctions in respect of the above declarations . . . . .

The Bishop in his written statement has claimed that the church fabric and site is vested in himself in trust for sacred uses and has asserted the sole right of himself and the Vicar to regulate the accommodation inside, to prescribe the part to be taken by the congregation in the services, and the ceremonies, has denied that any exclusive right or privilege can be claimed by members of any community, and has alleged that the so-called agreements have only been concessions which he has thought fit to withdraw. The Subordinate Judge who tried the case has in a judgment composed chiefly of long extracts from exhibits, sometimes inaccurately quoted given certain reliefs which as already stated have been set aside on appeal."

Thereupon the plaintiffs preferred this Second Appeal.

T. Rangachariar, *V. S. Govindachariar* and *V. S. Kallabhiran Ayyangar* for the appellant.

One of the questions in this case is who is the owner of the properties endowed for a Roman Catholic church whether the congregation or the Pope. I submit the congregation is the owner. The law applicable is to be found in section 16 of the Madras Civil Courts Act. That says that custom governs such cases. Canonical law as such is not applicable. If there is no such custom, then equity, justice and good conscience governs.

[NAPIER, J.—The section only concerns itself with the usage and not the property of the institution.]

Usage governs modes of worship and also property: see *Sankaralinga Nadan* v. *Rajeswara Dorai*(1), *Anandarao Bhikaji* v. *Sankar Deyi Charya*(2), *Krishnaswami Ayyangar* v. *Rangaswami Ayyangar*(3), *Krishnaswami Ayyangar* v. *Samaram Singrachariar*(4) and *Bishop Mellus* v. *Vicar Apostolic, Malabar*(5). In this case different portions of the church were built by different caste converts and the different portions were allotted to the different communities from a long time. It is a reasonable custom. It was so recognized by a Bishop of this Roman Catholic church. I base my right also on a contract to that effect made with my clients by a previous Bishop (Exhibit F). Why Courts uphold usage in such cases is that usage is the result of an express or implied agreement with the congregation

(1) (1908) I.L.R., 31 Mad., 236 at p. 249 (P.C.).
(2) (1883) I.L.R., 7 Bom., 323.
(3) (1909) 19 M.L.J., 743.
(4) (1907) I.L.R., 30 Mad., 158.
(5) (1879) I.L.R., 2 Mad., 295.

—see *Bishop of Natal* v. *Gladstone*(1) and *Long* v. *The Bishop of Cape Town*(2)—and that Canon law as such is not binding on them: see also *Brown* v. *Cure, etc., DeMontreal*(3).

The right to sit in a particular pew in a church can be acquired by prescription; *Philipps* v. *Halliday*(4) and *Chapman* v. *Jones*(5). This latter case is not based on any right of easement as the former. *A caste can acquire exclusive rights of* property; see *Suppan Asari* v. *Vannia Konar*(6). A religious body can modify the usages of the church; see *Merriman* v. *Williams*(7). This is a civil right as it is dependent upon contract; see *Raghavendra* v. *Gururow*(8). Even among Muhammadans custom is recognized; see *Bai Jiva* v. *Kharwa Jiva*(9); also among Christians, before the introduction of the Indian Succession Act; see *Abraham* v. *Abraham*(10).

W. Barton for the respondents.

[SADASIVA AYYAR, J.—Mr. Barton, Why should not Exhibit F be considered as an agreement, as contended for by appellant, though it is styled *kattalai* or order?]

It is not an agreement. The history which led up to Exhibit F shows it is not. It is only an order and at the most it is only a *concession* or a license and that too only for the time being. The exclusive right claimed in the case is not sustainable in law.

[SADASIVA AYYAR, J.—The document of 1854 refers to a previous agreement to keep these two castes separate in the church. It may not have been a written one, but yet what is its effect?]

As a contract the priest or a bishop had no power to enter into such a contract which violates the fundamental principles of the Catholic Church and the Pope is not bound by such a contract. Moreover the agreement was modified in 1896.

[SADASIVA AYYAR, J.—Is it not on the strength of your so-called concession that the plaintiffs spent a lot of money on building a portion of the church?]

No such inference can be drawn from the documents. Persons agreeing to become members of a Catholic church must be

(1) (1866) L.R., 3 Eq., 1. (2) (1863) 1 Moo. P.C.C. (N.S.), 411.
(3) (1879) L.R., 6 P.C. App., 157 at pp. 207 and 208.
(4) (1891) A.C., 228. (5) (1869) L.R., 4 Ex. 273.
(6) (1914) 27 M.L.J., 110. (7) (1882) 7 A.C., 484 at p. 509.
(8) (1913) 15 Bom. L.R., 362. (9) (1907) I.L.R., 31 Bom., 366.
(10) (1863) 9 M.I.A., 195.

MICHAEL PILLAI v. RT. REV. BARTLE.

The Bishop in his written statement has claimed that the church fabric and site is vested in himself in trust for sacred uses and has asserted the sole right of himself and the Vicar to regulate the accommodation inside, to prescribe the part to be taken by the congregation in the services, and the ceremonies, has denied that any exclusive right or privilege can be claimed by members of any community, and has alleged that the so-called agreements have only been concessions which he has thought fit to withdraw. The Subordinate Judge who tried the case has in a judgment composed chiefly of long extracts from exhibits, sometimes inaccurately quoted given certain reliefs which as already stated have been set aside on appeal "

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(4) (1907) I.L.R., 30 Mad, 158.
(5) (1879) I.L.R., 2 Mad., 295.

pressed by Mr. Rangachariar on the grounds of agreement and custom. It has been a little difficult to ascertain the extent of the claims as the learned vakil was naturally not familiar with the meaning of the words "altar" and "pulpit" and with the nature of the ceremonial and observances of the Catholic church. He has however pressed those parts of the claim as have reference to the ritual as strongly as those connected with the exclusive rights in the so-called southern church, and the custody of the whole fabric.

The Bishop in his written statement has claimed that the church fabric and site is vested in himself in trust for sacred uses and has asserted the sole right of himself and the Vicar to regulate the accommodation inside, to prescribe the part to be taken by the congregation in the services and the ceremonies, has denied that any exclusive right or privilege can be claimed by members of any community, and has alleged that the so-called agreements have only been concessions which he has thought fit to withdraw. The Subordinate Judge who tried the case has in a judgment composed chiefly of long extracts from exhibits, sometimes inaccurately quoted, given certain reliefs which as already stated have been set aside on appeal.

In arguing his case Mr. Rangachariar has relied on a Bull issued by Pope Gregory XV in 1623 recognising caste distinctions and has invited an expression from the Court as to the existence of these rights. Speaking for myself, I do not propose to express any opinion on so broad a subject which has not been thoroughly argued before us and, in my opinion, does not arise. Whether the Courts have power to give declarations as between different classes of His Majesty's subjects on such matters and whether any action can be founded on a disregard of such rights save as they arise out of trusts are questions on which I have serious doubts; but these doubts need not be resolved here. What we have to decide is a narrower question, namely, whether by agreement or caste-custom a Roman Catholic can claim exclusive privileges for his caste inside a church against the directions of the Bishop having authority over that church. I have had some difficulty in ascertaining from Mr. Rangachariar the legal nature of the rights claimed. He did not press his claim to ownership of any part of the site of the church but he put his claim as a customary right to deal with immoveable

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property—"dealing with" covering the exercise of any exclusive privilege within the church premises. Unfortunately he did not assist us by referring to any authorities on the subject of customary rights *in alieno solo* and indeed English law furnishes no precedent for a claim so wide as this. Such customary rights as are recognized, of which there are many examples in the text books, have one feature in common, namely, that however large the community enjoying them and however frequent the exercise of the right they never amount to a continuous and complete deprivation of the owner of the soil of his natural exclusive right of user. Here the plaintiffs claim an exclusive right of user of a portion of the church on all occasions when the church is used, not, it is true, to the exclusion of *the owner* but to the complete exclusion of the owner's licensees. Again the custom on which the claim is based is not one arising out of, and confined to the exercise in the particular land or tenement. On the contrary it is a so-called caste-right *in personam* of application at all times and everywhere which the plaintiffs claim to enforce when in occupation of the tenement. I can find no precedent for any such claim. Whether the customary right be a profit *a prendre* or a right of unprofitable user such as to hold a fair or play games in a particular close, the custom has arisen in the close, and has no other origin. Lastly, the alleged customary right can only have been associated with this particular tenement since the construction of the church between 1858 and 1872, a period quite insufficient to establish a right of customary user. Reference was made in the course of argument to the law of "pews" in the established church; but these are easements vested in an individual by virtue of a dominant tenement or are presumed to have had such an origin and have no relation to customary rights claimed by a class. For these reasons I have no doubt that the claim cannot be supported on the basis on which it was placed by the learned vakil for the appellants and that no customary right of this character is known to law. It is, however, abundantly clear on the record that the case has not been founded on any customary right *in alieno solo*, but on a claim of a right of freedom from contact which can have but one origin, strongly insisted on by all Hindu members of the caste, and evidently equally strongly adhered to by these

so-called Christians — namely that of *pollution*. In the eyes of these plaintiffs the Shanars are non-touchables — persons whose contact defiles and entails ceremonial ablution. Stated thus, they can certainly claim a far longer period of customary observance than the foundation of this church or the introduction of Christianity; and indeed their case on the alleged agreements means nothing more than the supposed recognition of this claim as one of right. The Vellalas are a high sub-caste of what are conveniently termed Sudras — though of course the term is not historically applicable to South Indian Dravidians — the whole caste of Sudras being however considerably below the three higher castes in the latter's estimation. The Shanars spring from a humble origin outside caste, but having raised their social position by their industry naturally seek the recognition due to their changed condition. It has been the effort of the Vellalas to keep them in their lowly status that has led to this trouble in the last forty years. Conversion to Christianity has it seems in no way modified the pretensions of the former or taught them that sense of equality before God which is a cardinal feature of the Christian religion as well as of other religions. Turning now to the history, it appears that the case, so far as it is based on agreements, is stated as follows in the plaint· Paragraph 10 alleges a stamped agreement in 1855 signed by the plaintiffs' caste and the caste of the defendants Nos. 3 to 14 in the presence of the parish priest to the name of the Bishop in pursuance of which two churches were to be built side by side with a common chancel, so that worship should be seen from both churches. The said agreement further provided that all other rights of control should remain vested in the plaintiffs' caste. It is alleged that accordingly each caste built its church with its own labour and by its own contributions, the edifice being completed and consecrated in 1872. Paragraph 13 alleges that as the Nadars subsequently set up claims inconsistent with the agreement a compromise was made by the parish priest in 1877 agreed to by both parties amending that agreement which the Bishop bound himself to adopt and in consequence issued an epistle in 1877 setting out the amended terms. This arrangement constitutes the alleged second agreement and on these two the suit is based. The appellants' vakil argues that the lower Appellate Court has found the first agreement to be true and

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should accordingly have given effect to it. There is no foundation to this argument. The District Judge finds in paragraph 2 that no stamped agreement is forthcoming though he does find that some arrangement was come to as to separation of castes. He states also in two paragraphs of his judgment that the case as presented before him was based on what is now treated as the second agreement evidenced by Exhibit F, and I have no doubt that this is so. On the failure to prove the written agreement relied on in the plaint, the vakil in the lower Court probably abandoned that part of the case, and it has now been raised here for the first time since the trial. On the evidence I have serious doubts whether the two castes ever did arrive to a clear arrangement. The fact that the written agreement was never signed seems to me fatal to the suggestion—and that the priest never contemplated binding himself is clear from the fact that the draft agreement is only drawn as between the two castes, he not being a party Even if he had been a party, I should hold, for reasons that will appear later, that no such agreement could bind his successor or higher ecclesiastical authority. In this view, I have not thought it necessary to refer to Exhibit XVI, the diary of Father Gregory, covering the period of the dispute which demonstrates his zeal as the parish priest in endeavouring to make peace between the warring elements in his flock somewhat to the detriment of his authority and undoubtedly also at some sacrifice of the tenets of his faith. With regard to the alleged agreement founded on the language of Exhibit F, the District Judge has held in paragraph 9 that the document is both in terms and effect an *episcopal decree*, "to speak of which as a contract is an obvious misdescription." We are invited to hold that the District Judge has misconstrued the document and that whatever be its form, its operation is that of a contract binding on the Bishop's successor. Mr. Barton has called our attention to an earlier document, Exhibit VI (a), a decree of the same Bishop issued soon after the consecration of the church in 1872, as showing the point of view of the ecclesiastical superior. It refers to an arrangement made between the two parties at the time when the construction of the church was commenced, but proceeds by way of "*allotment*," "*assignment*" and "*direction*" as to the share to be taken by the disputants in the ceremonies and concludes with the words "all that I have said in this

niroopam are my orders." It appears however that the Nadars did not submit to this decree and Civil and Criminal Court proceedings between the parties continued up to 1877 (vide Exhibits I, II and III) when the Nadars put in a petition to the Bishop, Exhibit VI, the effect of which is that they have refused to sign an agreement but are willing to abide by his orders. It is in response to that petition that the Bishop issued his decree, Exhibit F. It is therefore a matter free from doubt that the decree is not the result of an agreement come to between the Bishop and the contesting parties, but is an order passed on a petition by one of the parties. It certainly reproduces the paragraph that appeared in Exhibit VI (*a*) as to the arrangement made at the time of the construction of the church allotting separate naves in the church to the disputants while it gives certain concessions to the Nadar petitioners, but the District Judge is correct in holding that it is both in form and substance an episcopal decree. That it was intended to be such is clear from the endorsement on it by its author to the parish priest in which he used the Tamil word *kattalai*, i.e., order, exhorts the father to get this "*reglement*" faithfully observed and concludes "*Toute reserve faite de notre autorite*" The case on the second agreement therefore fails, but even if there had been an agreement come to by which the Bishop bound himself to allow certain concessions to the weakness of his flock, I am clear that it was not in the power of the Bishop to use his unfettered right of control to prevent his successor exercising the same authority. That it is unfettered, save by higher authority, seems to me clear on the canons of the church, just as it is equally clear on the law applicable that a congregation has no power to select what canons it will follow and what disregard, and that the rules and jurisdiction of officers in the church are to be sought in the canons of the church and must be given effect to by the Courts.

Much reliance has been placed by the appellants' vakil on the decisions of the Privy Council in *Long* v. *The Bishop of Cape Town*(1) and *Merriman* v. *Williams*(2), as laying down that the congregation of a particular church can vary the canons of their religion from time to time. This contention is based on a misunderstanding of the use of the term "church" in these

(1) (1863) 1 Moo. P.C C. (N.S), 411. (2) (1882) 7 A.C., [illegible]

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judgments. The question in dispute in the first case was as to the authority of a certain Synod in South Africa and when their Lordships say [*vide Long* v. *The Bishop of Cape Town*(1)] that "the members of the Church of England where there is no church established by law may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them," the Board was explaining that in such cases a church, in the broad sense of the word, can be constituted by persons who agree *to form a new religious association. This is made abundantly* clear in the later case in 1882 where their Lordships repeat the same language with reference to the articles of the Constitution of the Church of South Africa framed in 1870 which in the opinion of the Board substantially excluded portions of the faith and doctrine of the Church of England (vide page 503). Nothing could be farther from the intentions of their Lordships than the suggestion that where there is a recognized religious association such as the Roman Catholic Church under the supreme authority of the Pope of Rome, persons who become members of that body at a particular place can, in respect of their local church, derogate from the authority of the rulers of their community by any agreement made among themselves or adopt rules for the conduct of ceremonial observances at variance with the canons of the church. To do this they must secede from the Roman Catholic Church and form a new religious association for themselves as was done by the Church of South Africa and by the great voluntary churches in England; but having so formed a new Christian church they would be as much bound by its articles of constitution and be as powerless to vary its rules so as to accord with local wishes, as are the congregation of the Church of England as by law established in England. These rules are in the language of the Board quoted above "binding on those who expressly or by implication have assented to them" and no stronger implication of assent can arise than the admission into the fold of the church by baptism and the submission to its tenets by acceptance of its sacraments. Mr. Rangachariar has argued that it is open to the Courts to decide

(1) (1863) 1 Moo. P.C.C. (N.S.), 411.

questions in dispute between the laity and the clergy, and that the District Judge was in error in holding that the claims in this suit being unconnected with an office could not be adjudicated on and he relied on the decision of the Board—*Brown* v. *Cure, &c., DeMontreal*(1). I entirely accept the proposition that a member of a church need not sue by virtue of an office but the difficulty still remains as to what alleged injuries are cognizable by a Court of Law. Whatever they be, however, the authority relied on is fatal to the appellants' case on the question of the material to be examined. Their Lordships say on page 207, that when a complaint is made by a member "that he has been injured as to his rights, in *any matter of a mixed spiritual and temporal character*, the Courts have power to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury." Assuming for the present that there is any allegation in the plaint of action by defendants Nos. 1 and 2 inflicting on the plaintiffs such injury as a Court will take cognizance of—a matter on which I have the gravest possible doubts—there can be no question, on the authority of the three cases in the Privy Council, that we cannot go outside the Canon law to ascertain what are the rules which are binding on the plaintiffs as members of the church The claims are to introduce into a Christian edifice their practice as to pollution and thus insist on a right to be kept from contact with a lower caste, to dictate to their clergy who shall and who shall not assist the priest in the ceremonial, and to control the arrangements for festivals, processions and custody. With regard to the first, it is hardly necessary to say more than it contradicts the fundamental doctrine of Christianity and is at variance with the universal practice in Catholic churches where daily persons of every degree mingle in their worship. The plaintiffs rely on the practice of a great Roman Catholic Missionary Father De Nobili in the early part of the seventeenth century [*vide* a life of him—Exhibit H (4)] in adopting Brahman dress and manners and in sanctioning them among his converts, but it is to be remembered that De Nobili's mission was to Brahmans alone and that he failed in his efforts just as his successor 150 years later Abbe Dubois has confessed failure. It is true that

(1) (1874) L R., 6 P.C , 157.

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Pope Gregory XV supported De Nobili by "according to caste converts the cord (sacred thread), kudumi (tuft of hair), sandal paste and purification of the body" [*vide* Exhibit H (4), page 27]; but it is not suggested that the Pope in thus permitting the recognition of caste has ever sanctioned such claims as are made in this suit. Certain directions are stated to have been given by the Holy See at later date on this point (*vide* extract in Exhibit H, page 529, a work which apart from such extracts has no authority) but they say nothing more than that the people are not to be persuaded to renounce their usages, customs and manners "*provided that they be not most evidently contrary to religion,*" an exception which clearly covers a claim to assert caste-pollution in a Christian church against the orders of the Bishop. In Exhibit K, a life of Bishop Canoz, the writer of Exhibits VI and F, written by a member of the Society of Jesus, the author speaking of the construction of the church says on page 293 the Vellalas desired that the plan "should assign to each caste a separate part and Monseigneur Canoz '*ad Duritiam Cordis et Pro bono Pacis*' sanctioned it" and the diary of the parish priest bears testimony to the grief of the Bishop at having to make this concession. This concession has now developed into a claim that there are two churches belonging to each caste separately—a claim which has never received the sanction of the Bishop at any time. There can be no doubt that in his desire to see the new church built the Bishop shut his eyes to the real foundation of a claim so inconsistent with his faith, in the delusion that time would remove the discord—a hope that has been falsified by the quarrels of the parties from that day to this. It was however within his powers to allot the sittings in the church as appears from a collection of the decrees on the *Congregatio Sacrae Rituum* made in 1856 and published in Rome which has been filed as Exhibit X. Each paragraph contains the question propounded from a diocese and the ruling by the Council on it. Nos. 256 and 1418 on pages 58 and 246, respectively, contain decrees laying down that the Bishop has the right to arrange the seating in a church at his absolute discretion, and there can be no doubt that in sanctioning the plan in 1854 and in p[illegible]rmitting the separation of the castes in 1872 and 1877, the [illegible] pur-ported to exercise power vested in him at his abs[illegible]ion. The like power has now been exercised by t[illegible]

in forbidding that separation. It is contended for the appellants that sanction having once been given could not be revoked, that is to say, that the Bishop in issuing directions within his power binds the successors in the diocese for all time. This proposition is in direct conflict with the view expressed in a treatise on Canon law, a work of high authority by Cardinal Zitelli revised and enlarged by Doctor Solieri, Professor of Canon Law in the Pontifical Institute of the Propaganda of the Faith published in Rome in 1907. It opens by dividing the members of the church into clergy and laity and lays down the broad proposition that it is the province of the former to exercise the Government in the church and of the latter to submit to the power of the former. At page 191, paragraph 251, dealing with the episcopal power of legislation, there is a passage so pertinent to the question in issue in this case that I think it necessary to extract it in full.

"Being the Pastor and Prince of his diocese, the Bishop has within the sphere of his jurisdiction everything that pertains to the legislative power. He can enact for his diocese laws pertaining to his office which is to preserve and promote divine worship and to feed the sheep entrusted to his care, so as to direct them to the ecclesiastical end. The Episcopal laws however should not have a sanction too heavy and passing the bounds of moderation. From this, his legislative power, results for him the right to change, to abrogate, to relax by dispensations both his own law and the laws of his predecessors provided they have not been confirmed by an authority superior to his, e.g., the Roman Pontiff or by his own oath. An oath taken by his predecessors would not bind him From the same power results also the right to abrogate the particular customs of his diocese if they be obnoxious to the good of the church."

Mr. Rangachariar has sought to find limitation to this extremely definite pronouncement in the words that immediately follow the above quotation. They have been translated and filed as Exhibit N, and are as follows:—"In which matter however he should act prudently especially if there be any right of a third party which may suffer prejudice." This obviously is no limitation (1) as it is only a warning to the Bishop and (2) because as between the Bishop and his flock, the latter are not "a third party." The next passage is also relied on "He cannot abrogate universal customs" (I think "practices" would be a

better and more accurate translation) because they are such as pertain to a common right. The suggestion put forward is that the rights claimed in this suit are *Universales Consuetudines* and come under the phrase *Ad Jus Commune pertinent.* The argument ignores the meaning of the whole passage. A clear distinction is made between *particulares Consuetudines suae diocesis,* and *Universales Consuetudines* and the meaning is obvious. If a certain practice is a universal practice of the church, obviously it could not be in the power of the Bishop to abrogate it within the limits of his jurisdiction. But where any particular practice has been authorized either by himself or by his predecessor for his diocese, it is clear beyond doubt on the above language that he has power to modify or abrogate it. Reliance is placed on another passage at page 91 which is also extracted in Exhibit N. " As all practices are not in the knowledge of the chief in such cases, his consent, presumed but of legal efficacy, is sufficient, because in Canon law as well as in other law, all rational practices sanctioned by sufficient length of time are naturally approved of by the chief. (This is not the translation filed as Exhibit N, but is, I think, more accurately expressed in English.) Here again there can be no real doubt as to the meaning of the passage and it does not support the argument of the appellants. It follows a passage in which the assent of the chief is stated to be *required* for all practices and provides for presumption of consent. It has of course no application where the Bishop has, with full knowledge, abrogated the particular practice. Several other passages have been extracted from this book on behalf of the appellants and are quoted in Exhibit N. They have not however been relied on and an examination of them shows that they deal with customary right in Civil law and wherever necessary a distinction is drawn between Civil law and Ecclesiastical law. There are others which are directions and advice to Missionary Bishops prescribing the powers of Vicar Apostolic. None of them are of any assistance to us in determining this question. On this point as to the power of Bishops, I do not think it necessary to examine the evidence any further, the passage at page 191 of the treatise being so clear and definite that it is fatal to the whole of the plaintiff's claims. It is almost inconceivable that the congregation of the church should think that they have the power to forbid their Bishops employing a member of a

particular caste to assist him in the conduct of the service and the ceremony of the mass. My learned brother in the course of the argument pointed out the absurdity of this contention. As to the claims of keeping the church door and ringing the bells and other like matters, it appears on the evidence that there is an official called a Sacristan who has charge of these matters and even if there were not, they obviously are matters in which the priest, subject to the Bishop's control, must have full discretion. I am therefore of opinion that the whole claim whether founded on agreement or custom fails both on the facts and on law. We are told by Mr. Rangachariar that the decision against the claims of the plaintiffs may have serious consequences, viz., these people will leave the fold of the Roman Catholic Church. That is a matter which we cannot take into our consideration. We have only according to the law laid down by the Privy Council, to ascertain who are the persons having authority over such matters and by what rules they are bound Applying this test, it is clear to me that the plaintiffs' suit must fail and this appeal must therefore be dismissed with costs.

SADASIVA AYYAR, J.—As my learned brother has fully set out the pleadings and dealt with the facts in the judgment just now pronounced by him, it is unnecessary for me to set them out in detail. The plaint in the suit in spite of (or because of) its length is rather vague as to the foundation of the plaintiff's case. After careful consideration, I think it must be taken as based on the Bishop's Epistle of May 1877 referred to in paragraph 13 of the plaint. The first sentence in paragraph 14 is " from that time, the high caste people of the plaintiffs' *vagaira* and the low caste people of the *vagaira* of defendants from No. 3 have been acting in accordance *with the agreement termed as Epistle above.*" The next paragraph 15 is as follows:—" The rights which have accrued as mentioned above to the Pillais and Mudalis of the *vagaira* of the plaintiffs in respect of the suit church have become established to the high caste people of the plaintiff's *vagaira* not only on the ground of title but also by prescription and enjoyment." (That is, I take it, prescriptive enjoyment from the date of the alleged agreement of 1877.)

This epistle which is said in the above paragraph 14 to be an agreement binding on all the three parties, namely, (1) the plaintiff's faction, (2) the faction of the defendants from the third

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defendant downwards and (3) the ecclesiastical authorities represented in this suit by defendants Nos. 1 and 2, is Exhibit F in the case. The third paragraph of Exhibit F is as follows :—"In accordance with the agreement made by the Pillaimars, Mudaliyars and Nadars with the Vicar of the parish when the construction of the church was about to be begun, all the Pillaimars and Mudaliyars and such other castes as sat with them in the old church must be along with them in the southern half of the church, and all the Nadars together with such castes, as sat with them in the old church, must be with them in the northern half of the church. Of whatever castes they may be, they must approach the communion table at the respective railings before the altar. Similarly also for the solemnization of marriages and the performance of other requirements." (The beginning of the construction of the church was in 1854.) The note to Exhibit F is as follows :—"To prevent as far as possible the recurring of the deplorable disputes that desolated the Christian congregation of Vadakkankulam, I exhort our fathers to get this regulation faithfully observed and not to favour in anything the pretension of the rival castes. All our Christians should be well persuaded that henceforth things will go as we order it by the present order. This will be the way of preventing the endless claims which would not fail to be raised on all sides on the day on which they would again discuss the conditions of this peace which has cost so much. *Toute reserve faite de notre autorite.*" The Epistle with the note was entered in the register of the church, Exhibit XVI.

I do not think that Exhibit F can be treated as an agreement at all between the three sets of parties. It is only an order of the then Bishop to the worshippers at the church to conduct themselves as directed by him in this epistle and one of the motives for issuing that order was because the Bishop thought that the two sets of worshippers had entered into an agreement or arrangement in 1854. As the suit is based upon an alleged agreement of May 1877 (miscalled, according to the plaint, an epistle) and as the Epistle F is an episcopal decree and not an agreement, the suit fails on the short ground that the foundation for the suit has not been established.

I shall assume, however, that the plaintiffs can fall back on the alleged agreement of 1854 referred to in paragraph 3 of the

Epistle Exhibit F. It is rather doubtful whether the statement about the alleged agreement is relevant evidence as it cannot come under clause (4) of section 32 of the Indian Evidence Act, it having been made long after the controversies had arisen between the two factions. It does not also come under clause (2) as it cannot be said to have been made in the ordinary course of "*business*" by the Bishop. Clearly, clauses (1), (3), (5), (6) and (8) of section 32 do not apply. It may perhaps be relevant under clause (7) which refers to statement *relating to a transaction* mentioned in *section* 13 (*a*). Taking it then to be relevant evidence under clause (7) of section 32, it is evidence of a very weak character. Bishop Canoz was then being worried with the "deplorable" and "recurring" disputes between the two sets of worshippers. He refers to a previous episcopal decree of July 1872 and he says that "the devil which is an enemy to all good things in order to ruin the souls of worshippers eternally played his fraud and made them not to abide by" his decree of 1872. Exhibit D, the draft of an agreement prepared in 1854, was not signed by any Pillaimar, Mudaliyar or Nadar and *it* is clearly erroneous to call it a concluded agreement and Father Canoz's reference to a *concluded* agreement of 1854 seems to have been intended more to justify his decision to his doubting mind than as an accurate and reliable statement of fact. That the terms of this draft prepared in 1854 were not accepted in their entirety by the Bishop when he issued his decree of 1872 is admitted. That many Nadars refused to be parties to any agreement recognizing the claims of the Vellala and Mudali faction is clear from Exhibit VII. That Father Canoz's decree, Exhibit F of 1877, was not treated by his successor (the first defendant) as binding on the episcopate is shown by Exhibit XX where the first defendant modified some of his predecessor's directions as contained in Exhibit F.

Again let us assume that there was a concluded agreement in 1854 between the two sets of worshippers as to the right to occupy seats in the church to be thereafter built. How can such an agreement be binding on the ecclesiastical authorities? They are the legal owners of the church premises. Even the incomplete document, Exhibit D, refers to the "order" of the parish priest and does not say that the parish priest was a party bound by the contemplated agreement. Again the parish

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priest has no right to make any such agreement with the worshippers so as to bind the Bishop of Trichinopoly or His Holiness the Pope in whom the church buildings became vested as soon as they were consecrated to the worship of God according to the tenets of the Roman Catholic Church. Assuming (without deciding) that the Bishop can bind himself personally during the tenure of his office to allow the Vellala faction the exclusive use of the southern wing, I have not been shown any authority for the proposition that he can perpetually bind the Roman Catholic Church or his successor by any such agreement relating to the church property. I am clear that it would be a breach of trust on his part to grant any such perpetual license to a particular set of worshippers. In fact in 1896, the first defendant by using the following expressions in Exhibit XX, namely, "We hereby *by our own authority*" or (during the period of his own bishopric) "put it in force and we order that no one should make any alteration *without our permission*" clearly asserted that Exhibit F was not binding on him or upon the worshippers except to the extent that he himself affirmed, ratified and re-issued the same.

Then there is the larger question whether certain Roman Catholic Christians styling themselves as belonging to particular castes can by an agreement bind the succeeding generations of Christians alleged to belong to the same castes.

Almost all the members of the communities professing to follow the Hindu religion belong to definite castes. The children of such caste-people (unless they become apostates or are excommunicated) are, by their very birth, members of their parents' respective castes. Many of the Hindu caste-communities living in defined localities recognize certain person as the spiritual heads of the respective castes. Some few castes recognize also the authority of local headmen or of local caste panchayats to enforce caste-discipline and to administer caste properties and the caste charities. In *Suppan Asari* v. *Vannia Konar*(1) SANKARAN NAIR and AYLING, JJ., state that a caste can be recognized for the purpose of acquiring rights to property and easements by prescription as if the members of the caste formed a corporation owning civil rights. Then the learned

(1) (1915) 27 M.L.J., 110.

Judges say: "The cases show that properties are purchased for the caste and by the caste. Their right to hold and manage property has been recognized. Courts have often given effect to the resolution of the caste as a body as to the management of property. Suits have been brought on behalf of caste and against caste."

Now the identity of a Hindu caste as a unit is preserved (*a*) by the almost total exclusion of any accession from outside, that is, by confining accessions to its members to increases by births (*legitimate* births except in very few cases like the children of dancing girls) and (*b*) by confining valid marriages to persons belonging to the same caste. Now it is almost impossible to impose such restrictions on the so-called caste Christians because restrictions as to intermarriage (other than restrictions as to incestuous connections and bigamous connections) cannot be legally recognized among Christians. Suppose that some Brahman Hindus become Roman Catholic converts and settle in the plaint village, can the Pillaimars and Mudaliyars prevent them from using the southern wing and can the Nadars and the other converts who sit with them (like Pariah Christians) prevent the new converts from occupying the northern wing? Supposing the Bishop or the parish priest appointed to the church was a Nadar or Panchama convert, can he be prevented from going into the southern wing or getting up the chancel for fear of polluting that wing or part of the church by his presence? Can excommunication of a Pillai Christian from caste by the vote of the community because he dined in a Shanar's house be recognized by Courts and can Courts prevent such a Christian from using the southern wing because those who excommunicated him were afraid of pollution by his contact? Supposing a Nadar Christian male marries a Vellala female and children are born and baptised into the Roman Catholic faith or suppose an excommunicated Brahman female gives birth to illegitimate children by unknown fathers and they become Roman Catholic converts and settle in this parish, to what caste are they to belong and in what wing of the church are they to be made to sit? To recognize castes among Christian communities as distinct corporations with exclusive legal rights as caste-corporations would lead to complications and anomalies of such a far-reaching character that I am not prepared to extend the recognition by

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Courts of Hindu castes as distinct corporations for certain purposes to so-called caste Christians. It follows therefore that the alleged agreement of 1854, even if it is established, cannot bind any other persons except the particular individuals who entered into that agreement, assuming that it would bind even them as individuals. That alleged agreement being more than sixty years old, very few, if any, of the parties to the agreement, can now be living. (Of the parties named in the plaint, I find only five could have been born then and as all of them must have been boys or children at that time, they could not have been parties to the alleged agreement.)

In the Kamudi temple case—*Sankaralinga Nadan* v. *Rajeswara Dorai*(1)—the learned Subordinate Judge excluded Hindu Nadars from access to a particular temple on the ground that the temple itself would be polluted according to the Hindu ecclesiastical law by the admission of Shanars into it. The Madras High Court also referred to the entry of Shanars, Pallars, Pariahs and Chucklers into the temple as causing pollution and to the shastras prohibiting the Shanars from so entering the temple Their Lordships of the Privy Council (through Lord ROBERTSON) make the following observations in their judgment: "It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple, . . . The controversy touches, but does not involve delicate and abstruse questions of Hindu religious doctrine. . . . The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to show that there were inconsistencies in the respondents' treatment of the appellants in other respects. All this, however, as matter of theological argument, is too rationalistic; while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that by custom the appellants *are not among the people for whose worship this particular temple exists.*"

(1) (1908) I.L.R., 31 Mad., 236 (P.C.).

Thus Their Lordships have clearly indicated that what the Courts have to see is whether a particular place of worship was not intended for the benefit of any particular people and if (by the evidence of usage) it is so established, Courts should negative the claims of such people to worship therein. In the present case, it cannot be alleged for a moment that the defendants from the third defendant downwards are not persons for whose use the plaint church was built. The Bishop and the parish priest acting under the Bishop's directions have uncontrolled authority in regulating the seatings in the church and in the conduct of ceremonies and festivals within the church enclosure. That authority was never given up and could not be legally given up according to the Canon law which is binding on the parties to this suit. In "any matter of mixed spiritual and temporal character, the Courts have power to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury." Now injury by pollution to lawful worshippers in a Hindu temple or to the image in the temple through the presence of people belonging to castes below the fourth caste (known as polluting castes) is a matter of "mixed spiritual and temporal character." But the sentiment of pollution in a Christian church indulged in by so-called caste Christians is neither spiritual nor temporal injury and it seems to me rather brazen to ask a civil Court to recognize it as a legal injury giving rise to a civil cause of action. The bad usage, never accepted as lawful or invariable by the Shanars, by which in this church finished about forty years ago, they have been usually confined to the northern wing cannot be recognized as a reasonable custom having the force of law,

> "*Justice and Truth with Custom's hydra-brood*
> *Wage silent war*"

and custom, though not reasonable, sometimes wins in Courts of Justice when buttressed (as in the case of many Hindu customs) by theological writings whether genuine or spurious. The usage relied on by the appellants in this case cannot make a shadow of claim to even such theological buttressing up and Mr. Rangachariar's attempts to quote one or two ancient Roman Catholic Ecclesiastics in favour of his clients failed utterly.

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Mr. Rangachariar in the course of his arguments referred (without dealing elaborately with the matter) to the prescriptive right to occupy pews and seats in the churches consecrated for divine worship by the Church of England as furnishing an analogy in support of the right claimed by the plaintiffs. In the first place, I am instructed by my learned brother that the system of enclosed seatings called pews does not obtain in Roman Catholic churches and I think that this one fact makes the analogy sought to be relied on by Mr. Rangachariar largely inapplicable to this case. A right to a pew can only be acquired by faculty or prescription, the long user necessary to establish prescription being held to be evidence of a lost faculty. Now, a faculty is "a privilege or special dispensation granted to a person by favour and indulgence to do that which by the law he cannot do." It seems to me that favours and indulgences granted by one ecclesiastical authority (say, a Consistory Court representing the Bishop's ancient ecclesiastical jurisdiction) can only be interfered with by himself or by the appellate ecclesiastical authorities (the final Appellate Court being the Privy Council). A Civil Court must of course recognize the favour or indulgence granted by the proper ecclesiastical authority when *temporal or mixed spiritual and temporal rights flowing from* the favour or indulgence are interfered with by wrong-doers. But it seems to me that Civil Courts cannot interfere with the jurisdiction of the ecclesiastical authorities in the grant or revocation of such favours and indulgences. A grantee of a favour or indulgence can make no claim against his grantor that the favour or indulgence should be treated as irrevocable unless the grantee can invoke the doctrine of estoppel in his favour.

"In the English church before the Reformation, no seats were allowed for the use of parishioners in a church" except in private chapels. "After the Reformation, any question as to seats in the body of a church was to be decided by the 'ordinary' because the place is common to all the inhabitants and it belongs to the Bishop to order it so that the service of God may be best celebrated and that there be no contention." The duty of church-wardens under the Bishop's control is "to provide to the best advantage for the accommodation of all parishioners so that as far as practicable every one may have a seat and they

are bound not to accommodate richer classes beyond their real wants to the exclusion of their poorer neighbours." (Halsbury's Laws of England, volume 11, page 740) I have no reason to believe that the Canon law governing Roman Catholics is based on different principles so far as the right of the parishioners to seating accommodation in the church is concerned. "By the common law, there is no property in nor any right to sell or let a seat in the body of a parochial church or chapel." Such rights in English churches seem to have been introduced mostly by private Acts of Parliament in derogation of the wholesome common law rule. In *Claverley (Vicar, etc.)* v *Claverley (Parishioners, etc.)*(1), Sir JOHN NICHOLL's remarks in an old case are referred to. Those remarks are to the effect that in former times faculties for pews had been granted with too great facility and "they ought to be granted thereafter with the greatest prudence and circumspection." In the Roman Catholic church now in dispute, there are no enclosed seats or pews. The body of the church consists of two wide expanses of sitting accommodation. It has been held so long ago as in 1612 (in Corven's case) that church-wardens and Bishops "cannot make an irrevocable assignment of seats or divest themselves or their successors of the power of making fresh arrangement whenever circumstances render it desirable." Further "the parishioners to whom seats are assigned have no right to exclude others if they and their family do not occupy the whole." (Page 471 of the Halsbury's Laws of England, volume 11.) It seems to me therefore that the analogies derivable from the English Ecclesiastical law relating to seats in churches are rather against Mr. Rangachariar's contentions than in their favour.

The plaintiffs in this case do not allege that they were refused necessary sitting accommodation in the church or that they were made to give up their seats for others after they had lawfully seated themslves. Their bold claim is to compel the ecclesiastical authorities to refrain from giving available seats in the southern wing to Christians whom the plaintiffs consider to belong to polluting castes and also to restrain the Nadars, etc., from occupying such available seats. The plaintiffs have, of course, given up the Hindu orthodox notion that the touch of a European

(1) (1909) L.R. P.D., 195.

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is polluting (as they receive with unction holy water and sacramental bread, etc., from the European priests and Bishops) but have retained that sentiment as regards their fellow Christians of Indian nationality.

It is natural that I should feel a greater sense of freedom in dealing with modern undesirable innovations in support of alleged rights to exclude certain classes of worshippers from a Hindu temple and in respect of squabbles over honorary precedence in Hindu temples than when dealing with similar disputes in a Christian church: see *Sadagopa Chariar* v. *Srinivasa Chariar*(1) and *Gopala Mooppanar* v. *Dharmakarta Subramania Iyer*(2). I have therefore not yielded to the temptation I have felt to express my views on the system of pews in English churches. Nor shall I say anything on the policy of some of the Roman Catholic ecclesiastics of a bygone generation in partially recognizing caste sentiments and scruples among their converts as a matter of expediency rather than of principle. It is very difficult to describe the plaintiffs' faction as a class recognizable with reasonable definiteness as they are the descendants of Hindu converts who belonged to at least two Hindu sub-castes, namely, Vellalas and Mudaliyars. I find also that there are references in the documents to other castes who have been sitting in the southern and northern wings, respectively, as they belonged respectively to the touchable castes like the plaintiffs or the non-touchable castes like the Shanars. The plaintiffs cannot invoke (like the Hindus) the sanction of accepted sacerdotal texts (whether genuine or spurious) for perpetuating the distinction (and that, in God's House) between human beings as touchables and untouchables during a particular life period by reason solely of birth. While even among Hindus the strength of this distinction and of the alleged religious sanction therefor is according to competent authorities being weakened in these days through the effects of several unifying causes, it is difficult for one to sympathise with the efforts of so-called caste Christians to obtain legal sanction for alleged customs among them tending in the opposite direction.

In the result I agree with my learned brother that the appeal should be dismissed with costs. N.R.

(1) (1913) M.W.N.; s.c., 18 M.L.J., 340. (2) (1914) M.W.N. 822.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

SUBRAHMANIAN CHETTIAR (FIRST DEFENDANT), APPELLANT,

v.

KADIRESAN CHETTIAR AND FIVE OTHERS (PLAINTIFFS AND DEFENDANTS NOS 2 TO 6), RESPONDENTS.*

1916. January 7, 11 and 19.

(Indian) Limitation Act (IX of 1908), arts. 59 and 60—Loan or deposit—Money left with a trader, not being a banker, if loan or deposit—Deposit, in article 60, meaning of.

Under article 60 of the (Indian) Limitation Act (IX of 1908), money left in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee is a banker.

Article 60 and not article 59 of the (Indian) Limitation Act (IX of 1908) applies to a suit to recover money so deposited, even though it is payable on demand

The word "deposit" in article 60 is used in a non-legal sense.

Official Assignee of Madras v. Smith (1909) I.L.R., 32 Mad., 68, *Perundevitayar Ammal v. Nammalvar Chetti* (1895) I.L.R., 18 Mad., 390 and *Ishur Chunder Bhaduri v Jibun Kumari Bibi* (1889) I.L.R, 16 Calc., 25, followed.

Dharam Das v Ganga Devi (1907) I.L.R, 29 All., 773 and *Ichha Dhanji v. Nathu* (1889) I.L.R, 13 Bom., 338, dissented from

Sinclair v. Brougham (Birkbeck Bank Case) (1914) A.C, 398, referred to.

SECOND APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Rāmnād at Madura, in Appeal No. 234 of 1912 preferred against the decree of V. R. KUPPUSWAMI AYYAR, the District Munsif of Paramagudi, in Original Suit No. 826 of 1910.

These are two connected suits against the same defendants instituted by different plaintiffs to recover certain sums of money said to be deposited by them with the defendants who were traders carrying on money dealings. The plaintiff in one of the suits alleged that he had deposited a sum of money in the firm of the defendants in 1905 and subsequently entered the service of the firm as an agent or *aduthal* for their firm at Uvakuma on a salary of 301 pagodas for three years. He further alleged that he had likewise deposited in 1906 half his salary due from the firm also in the same firm, and had drawn certain sums therefrom, and that a balance was still due to him from the defendants out of the two deposits aforesaid. The plaintiff brought the suit in 1910 to recover the balance due to him and contended that the suit amounts were in the nature of deposits with the defendants' firm which were payable on demand, and as he made the demand in 1909

* Second Appeal Nos. 737 and 738 of 1913.

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within three years of the institution of the suit, the suit was within time. The defendants contended *inter alia* that the transaction was a loan and not a deposit and that the suit was barred by limitation. The District Munsif held that the transaction was a loan but that the suit was not barred on account of the calculation and crediting of interest in the defendants' *accounts in 1908. The lower Appellate Court held that the* transaction was a deposit and that the suit was therefore not barred. The defendant preferred a Second Appeal.

V K. Srinivasa Ayyangar for *C. S. Venkatachariar* for the appellant.

K. V. Krishnaswami Ayyar for the respondents.

NAPIER, J.

NAPIER, J.—The question raised in this Second Appeal and in the connected Second Appeal No. 738 of 1913, is whether certain sums claimed by the plaintiff in each case from the defendant firm are "money deposited" within the meaning of article 60 of the present Limitation Act. The lower Appellate Court has held that they are, but we are asked to hold that there is no evidence to support that finding. The Second Appeal No. 737 of 1913 is to recover Rs. 817-1-9 alleged to be due to the plaintiff as balance of principal and interest due in respect of two sums deposited by him. The first amount was Rs. 550 given to the defendants on October 17, 1905, prior to his entering their service as an assistant, which he did on March 3, 1906. The second sum was Rs. 562-12-0, which represents half the salary of the defendant for the whole three years of his service and credited by him to himself on joining the service. No cash was taken out or returned by the plaintiff but it is proved that according to the custom of those traders the plaintiff was entitled to take that amount and deal with it as he wished. What he did was to leave it with the firm and draw against it as he required money. The lower Appellate Court has found further that the agreement between the parties was that the account of both sums should be credited with interest at the current rate and should be payable on demand. It is contended for the appellants that the money is "money lent" within article 59 and that the suit is barred by limitation. Reliance is placed on *Ichha Dhanji* v. *Natha*(1), *Dharam Das* v. *Ganga Devi*(2) and *Official Assignee of Madras* v. *Smith*(3). The

(1) (1889) I.L.R., 13 Bom., 338. (2) (1907) I.L.R., 29 All., 773.
(3) (1909) I.L.R., 32 Mad., 68.

Madras case is one of those arising out of the Arbuthnot insolvency in which a large number of claims were made for preferential payment in respect of money in the hands of the firm. The Court had to decide the real legal character of the transaction between the banker and his customer, and for that purpose laid down the law with which I respectfully agree the basis of which is to be found in the two leading cases—*Foley* v. *Hill*(1) and *In re Hallet's Estate*(2)—lately re-affirmed by the House of Lords in the *Birkbeck Bank Case* [*Sinclair* v. *Brougham*](3). The law is as follows:—The true relation between a banker and his customer is that of debtor and creditor [*Foley* v. *Hill*(1)], but a customer who pays money to his banker under terms that they are not to use it or who authorizes his banker to collect money due to him on the like terms constitutes a fiduciary relationship between himself and the banker and is entitled to recover the amount from the general assets of the banker, if the banker has committed a breach of trust, on the principle that all other payments must be assumed to have been made out of money in the banker's hands to which no fiduciary character attached [*In re Hallett's Estate*(2)]. It is contended for the appellants that on the admitted facts the present case is not within *In re Hallett's Estate*(2) and further that these principles must not be applied in the construction of the articles of the Limitation Act and that what is in law and fact a loan could not be money deposited under article 60. This i undoubtedly the view taken in *Dharam Das* v. *Ganga Devi*(4), where the Court holds on facts very similar to those here that article 60 is not intended to apply to a transaction which is in law a loan, and in *Ichha Dhanji* v. *Natha*(5) where the same language is used with the same result.

With great deference to the learned Judges the reasoning ignores the fact that if the term deposit is legally inapplicable to a loan it is also inapt for describing a trust of money and also that the word deposit is familiar in banking parlance as describing money held by a banker for his customer on special terms as distinguished from current account. In both of which cases however the banker is intended to have the use of the money and no

(1) (1848) 2 H.L.C., 28.
(2) (1879) 13 Ch. D., 696.
(3) (1914) A.C., 398.
(4) (1907) I.L.R., 29 All., 73.
(5) (1889) I.L.R., 13 Bom., 338.

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trust arises. The contrary view is expressed in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*(1) where the Court held that article 60 must be construed with reference to the ordinary idea of the public as to the dealing with banks and by the language used by the bankers themselves in describing their balances held on account of customers in a judgment which will repay careful examination and the learned Judges give good reasons for taking the view. The same view was taken by this Court in *Perundevitayar Ammal* v *Nammalvar Chetti*(2) a case somewhat stronger than the Calcutta case in one respect in that the depositee was not a banker but an ordinary shopkeeper and thus the position was much more like the present case, the only difference being that in *Perundevitayar Ammal* v. *Nammalwar Chetti*(2) the depositor is not shown to have been entitled to draw against the deposit, whereas in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*(1) he did draw; all these cases however are decided on the words of the article in the Limitation Act of 1877 but the present Act has added the words "including money of a customer in the hands of a banker so payable." It must be admitted that the legislature has not yet made the matter perfectly clear but it has definitely, and I think intentionally, used language in a non-legal sense. The money of a customer can only mean money paid in the ordinary customary way of business. Now clearly when it passes into the banker's hands it is not the customer's money any longer. It becomes a debt due from the bank. I cannot but regard this language as throwing light on the meaning to be given to the word "deposit" for it seems to me illogical to treat the word "deposit" as inapplicable to what is in law a loan and yet be compelled to give a non-legal meaning to a phrase which is stated to be "included" in the word "deposit". We can, I think, only give full meaning to the language used in the present article by holding that money in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee was a banker. For these reasons I am of opinion that the judgment of the lower Appellate Court is right and the Appeal must be dismissed with costs.

AYLING, J.

AYLING, J.—I agree.

K.R.

(1) (1889) I.L.R., 16 Calc., 25. (2) (1895) I.L.R., 18 Mad., 390.

SPECIAL BENCH.

Before Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

IN THE MATTER OF THE INDIAN PRESS ACT (I OF 1910), SECTION 4 (1) AND IN THE MATTER OF THE "NEW INDIA PRINTING WORKS"

1916. September 27, 28 and 29 and October 2 and 18.

MRS. ANNIE BESANT, PETITIONER,

v.

EMPEROR.*

Indian Press Act (I of 1910), ss 3 (1), 4 (1), 17, 19, 20 and 22—Demand of security by Magistrate under proviso to section 3 (1), legality of—Order by Government under section 4 (1) forfeiting security and copies of newspaper, legality of—Jurisdiction of High Court under section 17, extent of—" Words . . . which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication, or otherwise" in section 4 (1), meaning of—" Hatred " or " contempt, " and " Government established by law in British India," in section 4 (1), meaning of—Intention of writer whether essential under section 4 (1)—Onus under section 4 (1), whether on applicant—" In aid of the proof of the nature of or tendency of the words " in section 20, effect of—Sections 4 and 22, whether ultra vires of the Imperial Legislature of India, as contravening section 43 of 3 & 4 Will IV, cap 85, or section 22 of 24 & 25 Vict, cap. 67, or section 65 of the Government of India Act 5 & 6 Geo V, cap 61

The petitioner in this case who was the keeper of a printing press and publisher of a newspaper therein made this application to the High Court under section 17 of the Indian Press Act (I of 1910) for cancellation of (*a*) an order of the Chief Presidency Magistrate of Madras, demanding from her under section 3(1) of the Act security for two thousand rupees in supersession of a previous order made by him dispensing with security and (*b*) an order of the Governor in Council, Madras, declaring under section 4 (1) the security of the two thousand rupees so deposited and all copies of the newspaper wherever found, to be forfeited to His Majesty.

In dismissing the application on the ground that some of the specified articles (hereinafter called extracts) of the newspaper were of the objectionable nature described in section 4 (1) of the Press Act, their Lordships of the Special Bench,

Held as follows —In an application, made under section 17 of the Indian Press Act, the only question which the Special Bench of the High Court

* Original Petition No. 122 of 1916.

MRS. BESANT v. EMPEROR.

can determine is whether the extracts complained of did not contain any words of the nature described in section 4 (1) and the Court has no jurisdiction to determine any other question such as, (a) whether the particular order of the Magistrate demanding security was beyond his powers, or (b) whether section 4 or 22 of the Press Act is *ultra vires* of the powers of the Imperial Legislature of India as contravening any Act of Parliament, or (c) whether the order of forfeiture was legally made.

In re Mahomed Ali (1914) I L R, 41 Calc., 466, referred to

Advocating "Home Rule" for India is not *per se* objectionable But such advocacy must not offend against existing laws

"Hatred" and "contempt" towards "the Government" occurring in section 4 may be created by articles "*imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties,*" or by articles unjustly "*accusing the Government of hostility or indifference to the welfare of the people*"

Though the operative or enacting portion of section 4 (1) (c) does not make the intention or motive of the writer of the articles complained of, material in considering whether the words are not of the nature described in section 4 (1), Explanation 2 thereto requires that the writer must *intend* to excite hatred, contempt or disaffection if his writings are to be brought within clause (c), the intention being deducible mainly from the words used

The words "the Government established by law in India" occurring in section 4 are not to be construed as indicating only the supremacy of the British Crown over India and the British connection with it, as opposed to independence

Per ABDUR RAHIM, OFFG C.J., and AYLING, J.—The phrase in section 4 "any words . . . which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" can relate only to the natural and probable effect which the words themselves are likely to produce on a normal reader of the paper, possessed at least of average capacity and the phrase cannot relate to any and every *possible* effect which they can ingeniously be supposed to produce.

Per SESHAGIRI AYYAR, J—The phrase is not confined to *probable* effects only, but includes also *reasonably possible* effects which the words can produce.

Per ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J.—The onus of proving that the extracts complained of are not of the objectionable nature described in section 4 (1) is on the applicant.

Per AYLING, J.—The Act does not throw the onus either on the applicant or on the Government, but the tendency of the words has to be determined by the Court from the words themselves

Per AYLING, J.—Articles dwelling adversely on the foreign origin and character of the Government can also create hatred and contempt.

Per ABDUR RAHIM, OFFG. C. J.—"Hatred" and "contempt" in section 4 (1) (c) mean something more than mere disapproval or dislike

Per AYLING, J.—"Hatred" and "contempt" in section 4 (1) (c) do not mean only such hatred and contempt as would lead to the commission of crimes referred to in the other clauses of the sub-section, viz., murder, violence, resistance to law, intimidation of public servants, etc

Per ABDUR RAHIM, OFFG. C J. and SESHAGIRI AYYAR, J.—The words in section 4 (1) (c), viz., "the Government established by law in British India"

mean the British rule, and the collective body of men authorized by law to administer executive Government in British India—the existing political system as distinguished from any particular set of administrators or individuals administering the country for the time being. In this sense the "Government" includes not only Government of India but also Local Government.

Queen Empress v. *Bal Gangadhar Tilak* (1898) I.L.R., 22 Bom., 112, *Emperor* v. *Bhaskar* (1906) 8 Bom. L.R., 421, *Queen-Empress* v. *Jogendra Chunder Bose* (1892) I.L.R., 19 Calc., 35 and *Reg.* v. *Alexander Martin Sullivan* (1868) 11 Cox's Cr. C., 51, referred to.

Per AYLING, J.—In the absence of any other definition in the Press Act, the phrases "Government," "the Government," "Government of India," and "Local Government" used in the Indian Press Act are to be interpreted as defined in section 3 of the General Clauses Act.

Per ABDUR RAHIM, OFFG. C.J.—The protection afforded by Explanation 2 to section 4 (1) is extended only to comments on Government's measures and actions, etc., and not to attacks on Government itself and these have to be judged by the light of section 4 alone without reference to the explanation.

Construing the extracts on the above principles—

ABDUR RAHIM, OFFG. C.J., held Extracts Nos 1, 2, 6, 11, 12 and 13 to be of the nature described in section 4 (1) (*c*) and Extract No. 12 to be also of the nature described in section 4 (1) (*e*).

AYLING, J., held Extracts Nos 1, 2, 6, 9, 10, 11, 12, 13 and 14 to be of the nature described in section 4 (1) (*c*) and Extract No. 7 and the editorial note to Extract No. 4 (d) to be of the nature described in section 4 (1) (*e*).

SESHAGIRI AYYAR, J., held Extracts Nos 2, 8, 11 and 13 to be of the nature described in section 4 (1) (*c*) and Extract No 11 to be also of the nature described in section 4 (1) (*e*).

Per ABDUR RAHIM, OFFG C.J.—The Indian Press Act does not impose any duty on a Local Government to issue any warning to or to ask for any explanation from the keeper of the Press before taking action under the Act.

Per AYLING, J.—The fact that the words complained of are those of correspondents and not of the editor or publisher, does not in any way minimize the responsibility of the editor or publisher and the intention of the writer must be ascribed to the publisher.

Per ABDUR RAHIM, OFFG C.J.—The Indian Legislature is not competent to enact anything which will affect any unwritten laws of the realm whereon may depend the allegiance of the subject to the Crown.

Quære Whether section 4 of the Indian Press Act is *ultra vires* of the Imperial Legislature of India?

Allegiance is the return which the subject renders to the sovereign for the protection afforded by the latter.

In the matter of Ameer Khan (1870) 6 B.L.R., 392, *In the matter of Ameer Khan* (1870) 6 B.L.R., 456 and *Secretary of State* v. *Moment* (1913) I.L.R., 40 Calc., 391 (P.C.), referred to.

Per SESHAGIRI AYYAR, J.—Section 4 of the Indian Press Act does not contravene section 43 of 3 & 4 Will. IV (corresponding to section 65 of the Government of India Act, 1915) and is not *ultra vires* of the Imperial

Legislature. The section does not deprive the subject of the right of showing that the forfeiture has not been incurred. Simply because, instead of providing for the taking of the decision of the Court first and then declaring the forfeiture, the section has reversed the process, the section cannot be said to affect any unwritten law whereon may depend the allegiance of the subject to the Crown.

Section 22 of the Press Act only enacts that the declaration of forfeiture shall be conclusive evidence of the fact that the forfeiture has taken place and not that the forfeiture has been legally made.

The words "in aid of the proof of the nature or tendency of the words" in section 20 of the Indian Press Act do not empower the Crown alone to tender in evidence, other articles of the newspaper in support of its contention, but the party proceeded against can also do so in support of his contention.

Per AYLING and SESHAGIRI AYYAR, JJ.—But articles which do not illustrate the general policy of the paper when that is in question or have no direct connection with the articles complained of are useless

THE following facts are taken from the judgment of SESHAGIRI AYYAR, J. :—

"The Press from which *New India* is printed has been in existence for over half a century. In it the *Madras Standard* was printed till July 1914. Mrs. Besant purchased the printing press as well as the good-will of the *Madras Standard* on the 14th of that month. Mrs. Besant made the usual declaration under section 4 of Act XXV of 1867 on the 2nd December 1914. . . No security was demanded from the petitioner at that time. On the 22nd May 1916, the Acting Chief Presidency Magistrate, Madras, informed her. 'I hereby cancel my order, dated 2nd December 1914, dispensing with security in respect of the "New India Printing Works" and require you under section 3 (1) of Act I of 1910, to deposit security for Rs. 2,000 . . . The security was furnished, and the paper continued to be published as before until the 28th of August 1916, when the Local Government acting under section 4 (1) of the Indian Press Act declared that 'the security deposited in respect of the "New India Printing Works," Madras, and all copies of *New India* wherever found to be forfeited to His Majesty.'" But no copies of *New India* were actually seized and forfeited and the publication of the paper has been continued on deposit of further security under section 5 of the Act.

The abovementioned notice of the Acting Chief Presidency Magistrate and the Order of the Government and the material portions of the extracts held objectionable by the Court and on

account of which the Government ordered the forfeiture of the security and the copies of the newspaper are given below :—

NOTICE.

IN THE PRESIDENCY MAGISTRATE'S COURT, EGMORE, MADRAS.

To

MRS. ANNIE BESANT,

Keeper of the "New India Printing Works,"
Nos. 13 and 14 Second Line Beach, Madras.

Take notice that under section 3 (1) of Act I of 1910, I hereby cancel my order, dated 2nd December, 1914, dispensing with security in respect of the "New India Printing Works," at Nos. 13 and 14, Second Line Beach, Madras, and require you under section 3 (1) of Act I of 1910, to deposit security for *Rs. 2,000* before me within *14* days from the date of this notice.

Dated this 22nd day of May, 1916

(Sd.) C. B. N. PELLY,
Acting Chief Presidency Magistrate.

NOTICE UNDER SECTION 4 (1) OF THE INDIAN PRESS ACT, 1910.

Whereas on the 5th June 1916 in compliance with an order made by the Chief Presidency Magistrate, Madras, under the proviso to section 3 (1) of the Indian *Press Act, 1910, security* to the amount of two thousand rupees was deposited by Mrs. Annie Besant in respect of the press known as the "New India Printing Works, Madras."

Whereas it appears to the Governor in Council that the said press is used for the purpose of printing a newspaper entitled *New India* and

Whereas the Governor in Council is of opinion that the passages published in the said newspaper and reproduced below are of the nature described in section 4 (1) of the Indian Press Act, 1915.

Now therefore, in the exercise of the powers conferred by section 4 (1) of the Indian Press Act, 1910, the Governor in Council declares the security deposited in respect of the "New India Printing Works," Madras, and all copies of *New India* wherever found to be forfeited to His Majesty

(By Order of the Governor in Council)

(Sd.) *LIONEL DAVIDSON,*
Acting Chief Secretary.

EXTRACT No. 1.

Bureaucracy in Excelsis.

PROTEST FROM PRESS AND PUBLIC

Anglo-India versus "*New India.*"

Mr. M. Krishnamacharya, B.A., L.T., of Ottapalam, writes:

Out of evil cometh good. Out of the absolutism of Stuart monarchs constitutional Government was won for England. Out of the persecutions of Auraungzebe, Maharatta power attained its ascendancy. Out of the high-handed tyranny and overbearing imperialism of Lord Curzon sprang the National movement which is destined to play an irresistible part in Indian politics. And now, out of the blind hostility evinced by the Madras Government against *New India* our ultra-moderate begging politicians are bound to learn the unwisdom of relying too much upon the sympathy of the Bureaucracy towards any of our truly higher aspirations.

For in the eyes of our high-minded rulers, especially with their new, changed "angle of vision" what are the sins of which *New India* is guilty? None, specifically; its Editor could not be brought by the most wary and zealous scrutiny of Government under any of the sections of the ordinary Criminal Law. But we can well guess how the Journal has offended the Bureaucracy. The *Madras Mail* and others of its ilk, the professional calumniators of the most legitimate Indian aspirations and as such the real promulgators of sedition and unrest in India, against whom however there is no law in the statute book—the *Madras Mail* among other bureaucratic barometers, has been of late giving unerring indications of how the strong plain-speaking of *New India* has grown intolerable for the over-delicate, self-adulent, flattery-loving ears of Anglo-India.

The real issue may indeed be expressed in one small phrase: Anglo-India *versus* "New India". The talk of Home Rule the un-English "Englishman" can manage to sneer at; but when *New India* mercilessly exposes any and every vagary of the "Englishman" in this land that it can come across, the Anglo-Indian blood boils with all the uncontrollable rage of the most selfish vested interest. Thus, by speaking out the plain truth that a Bureaucracy, however benevolent, that an alien Government, however theoretically well intentioned, can never in practice, so long as its officers are human beings, see eye to eye with the natives of the land; by exposing mercilessly, from day to day, the highhandedness of the Executive, by pointing out to the people of India that the only true remedy for all these manifold ills consists in claiming boldly, and

in qualifying for, Home Rule; by appealing to the sense of justice and love of liberty deeprooted in the heart of the British people at home and calling upon them to undo the wrongs done by their countrymen in India;—thus, and in a hundred like ways, *New India*, though only an infant two years old, has made itself the inveterate enemy of gigantic Anglo-India. The first stage of despising, or affecting to despise, the infant's strength is gone The contest has begun in grim earnest for the ten-thousandth time of "Hiranya" against "Prahlada". Now, once more, for the ten-thousandth time in the history of the world's evolution, the attempt, bound to be futile, is made by Might to overawe and put down Right.

New India—7-6-16.

EXTRACT No. 2.

Bureaucracy in Excelsis.

PROTESTS FROM PRESS AND PUBLIC.

Injustice done to Mrs. Besant.

The unexpected and inexplicable imposition of a maximum security on the "New India Printing Works" has provoked universal indignation and protest. *New India* has been condemning anarchism. See for example what you said in Palghat Are we to understand that the Government desire the existence of anarchism in India?

New India has been emphasising the importance of the connection of India with England Does the imposition of security mean that the bureaucracy is opposed to this? Again the popular daily has been enthusiastically struggling for Home Rule Lord Hardinge has told us that it is a legitimate aspiration. The Congress says it is its goal. Is the benign Government against this optimistic and legitimate struggle?

"They think rightly that Home Rule means the passing away of bureaucracy as bureaucracy It does not mean that we want to drive the English out of India. It is the method we object to, not the person" This speaks of what metal the lady is made of.

In this special connection the drastic legislation was very drastically applied; the maximum security was demanded No warning or sign of warning was given before this time; the amount is to be paid within a fortnight: to aggravate all this no specific reason is assigned for such an unprecedented and inhuman action. Is the Government irrational? No. It is obstinate. Perhaps both.

What private cause has made the Government stoop to such a barbarous atrocity, we know not. But this we know full well: the much hated and ever-mischievous bureaucracy discountenances outspoken criticisms and no good Government should be afraid of criticism. We also know that the Government have a spite against the editor of *New India* for she is the head of an institution which works against the missionaries and the missionaries are the parasites of the Government. To say the exact truth, the security is demanded not from the "New India Printing Works" but from Mrs. Besant.

* * * * *

News of Prussian aggression and German atrocity are communicated to India to bewilder the Indian imagination They are committed under pressure, during the War, under passion. They are common. But what does this mean? This perpetration of atrocity in civic life, in peaceful times, in a peaceful Province? This thunder during this sunny day sets the world a-wondering.

E. R. SUBRAHMANIA AIYAR.
New India—8-6-16.

EXTRACT No. 4 (*d*).

"*Reserved for Europeans.*"

The following facts are of interest to the readers of your valuable journal, in connection with the recent judgment on the reserving of railway carriages for Europeans, found in the *Sindh Law Report* (Volume V):—

Knowing that such reserving was illegal, I got, yesterday evening, in the 5-45 p.m. train or the "First Local" as it is otherwise called, into a compartment with a printed notice "Reserved for Europeans and Eurasians" on it. Some Indian gentleman were already in it keenly discussing the legality of such a notice with an Anglo-Indian who disputed their right to enter the compartment. Soon after the Chief Stationmaster of the Madras Central Station appeared and asked us to get out of that compartment. We refused and showed him a leaflet containing an extract of the judgment of the Sindh Law Court. But this was beyond everything that august personage could bear. He got wild, exclaimed that the leaflet had nothing to do with him, and threatened us with prosecution because he said we got into that compartment wilfully when there were other compartments vacant, and thus disturbed the peace of the

public. We then thought it prudent to get down, as it was past time for the departure of the train; and got down under protest.

* * * * *

SRINIVASAN.

[But why did you get out? It is this submission to illegality that causes half the troubles from which Indians suffer —ED.]

New India—20-7-16.

EXTRACT NO. 6.

Prussianism in India.

It is a well-known fact that in India we live hemmed in on all sides by repressive measures The Press Act, the Seditious Meetings Act, the Official Secrets Act, the Defence of India Act, not to mention several despotic measures of early days—potential of mischief and capable of retarding democratic progress—are all there in the hands of a powerful Bureaucracy to be used as it thinks fit That time and again they have been made use of we are all aware; we also know how they tend to terrify people, and make them behave as if their very souls were not their own These iniquitous measures in the hands of people with vested interests of their own, naturally assume a shape and a form all too ghastly for the children of the soil and day and night exert a baneful influence over them, engendering at once fear and hatred.

* * * * *

As if the Prussianism already woven in the fabric of the Indian administration is not enough, Englishmen belonging to the Anglo-Indian caste rigidly go after more repressive acts. The War has brought the Defence Act into being, and all know to what use it is being put. Censorship was introduced, and who is not aware by now of the prerogatives it has bestowed on the Indian public!

* * * * *

One has to ask where is the trust which the changed angle of vision is said to have brought into being? In these times of War, when Great Britain is fighting its battle of life, and when its very position in the European world is threatened, in this vast land there is peace and quiet; there has not been a single riot or disturbance; save for the few cases of anarchy, the country is going on with her business as usual; 300,000 of her sons are fighting the Empire's battle and yet the Anglo-Indians want repressive measures! When the mother-country is waging War against Prussianism, are her sons in this

land to fall a prey to it? We hope the insidious suggestion will be left unnoticed.

New India—29-6-16.

EXTRACT No. 7.

The Latest Political Crime in Calcutta and its Moral by Bepin Chandra Pal.

The latest political outrage in Calcutta has called forth the usual protests from the Indian, and the familiar threats of greater and wider repression from the Anglo-Indian press. But neither will help the situation.

* * * * *

No Sympathy.

We do not sympathize with these murderous outbursts. We have protested against them all these years. No reasonable Indian politician or publicist, to whatever school he may belong, has ever . . . publicly encouraged these crimes

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Consider, again, the conduct of the assassins themselves. There was a quiet and even courageous determination in the way they went about their criminal business

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Heroism may, according to some people, be too noble a word to apply to men guilty of such ignoble assassinations; but that there was a kind of courage, in any case—an utter disregard of personal consequences even in these criminals, cannot be denied. This recognition does not condone their crime; this courage in no way takes away from the suicidal folly and cruel inhumanity of their acts. But it is essential to recognize it for a right understanding of the present situation.

Whence comes this Determination?

And to the statesmen called upon to solve this problem of political criminalism in this country, the most important question is whence do these youthful revolutionaries derive all this dare-devil determination of theirs? What is the origin of this new courage in them? They are not ordinary criminals. They are not hardened criminals. They have had no training in crime such as creates the hardened murderer or assassin.

* * * * *

Whatever else they may or may not be, it is impossible—and it would serve really no purpose—to deny that they are idealists of a type. Their idealism does not condone their criminality but rather, perhaps, adds to it; but the idealism must be noted and recognised in the consideration of any effective measures for checking their criminal activities.

Misguided Idealism.

When any one is driven to commit any crime under the inspiration of some sort of idealism, however misguided it may be, people generally pity them, but are not moved by any spirit of revenge or even retributive justice towards them People do not approve of the crime of the man who avenges his honour by killing a faithless wife or a treacherous friend, but all the same, they pity the criminal The gallows have absolutely no terrors for them. To send them to the gallows would not hinder but, on the contrary, very materially help their criminal propaganda.

Everybody knows and feels that repression and punishment are not the right remedy for this evil. And this makes the work of suppressing this criminal propaganda by relentlessly punishing the revolutionaries so difficult and well-nigh impossible for the Government.

Other Weapons necessary.

This revolutionary movement must be fought by other weapons. However misguided these young men may be, and however we may condemn their criminal activities, we must, if we are to cure the evil for which they are responsible, first of all recognize them as political offenders, moved by the desire to see their people occupying their legitimate place in modern history and politics The Government and the general public should acknowledge the ideal they hold as in itself nothing wrong or criminal. And if this is done, half the battle will be won. It will give a common basis of mutual understanding between the party of constitutional progress, which has after so many years been openly recognized by the Government, and that of revolution. We shall then be able to convince these young men of the folly and futility of their ways. And if the Government will publicly accept Swaraj, or Home Rule, as the ideal objective of our immediate historic evolution, and will not interfere with our legitimate and constitutional Home-Rule propaganda among the rising generations of the country on the one hand, and on the other start those reforms that will give a practical assurance of our future National Autonomy inside the coming Federation of the whole British

MRS. BESANT v. EMPEROR.

Empire, this problem, with many others, may find an easy solution. There is no other way.

New India—8-7-16

EXTRACT No. 8.

Ave Cæsar.

The following order was served on me to-day:—

ORDER.

Whereas in the opinion of the Governor in Council there are reasonable grounds for believing that Mrs. Annie Besant has acted and is about to act in a manner prejudicial to the public safety.

Now, therefore, the Governor in Council in exercise of the powers conferred by rule 3 of the Defence of India (Consolidation) Rules, 1915, published in the Notification of the Government of India in the Legislative Department, No. 86, dated the 9th December 1915, is pleased to direct that the said Mrs. Besant shall not enter and shall not reside or remain in the Province of Bombay, pending the further orders of Government.

And the said Mrs. Besant is hereby informed that if she knowingly disobeys this order, she will be liable to imprisonment of either description for a term which may extend to three years and will also be liable to fine.

(By order of His Excellency the Honourable the Governor of Bombay in Council)

L. ROBERTSON,
Secretary to Government

Dated this 29th day of June 1916.

This is the explanation of Mr. J. D. Jenkins' belated letter in the *Times of India*. Some justification was wanted for this Order of Exclusion, so he suddenly attacked a book sold in Bombay since December last. "The said Mrs. Besant" will not "knowingly disobey this order," because to do so would be the act of a maniac; on the contrary, she respectfully sympathizes with the fear of the Governor in Council that she may prejudice public safety, for it must be in very unstable equilibrium if it can be so easily disturbed.

I wonder it does not strike our rulers that they cannot stop the desire for Home Rule by showing how objectionable is Other Rule. The more they try to strike me, the more resolved does India become to win freedom from such tyranny. Lord Willingdon has been very slow; I was in the Bombay Presidency at Christmas, and was there for a couple of days in May. And this is July 10th! What a pity

I did not go to the Press Meeting to say "Good bye" to my Bombay friends. I would have gone, had I known this was coming!

I am sorry to see on the Order the Royal Arms: "Dieu et mon droit," "God and my Right"; that is more suitable on my lips than on those of the Bombay Governor in Council. There should be a new escutcheon, Justice gagged, sable and gules, and the legend: "My strong arm and your Wrong".

ANNIE BESANT,
New India—10-7-16.

The material portion of Extract No. 9 and the whole of Extract No. 10 are given in the judgment of AYLING, J., in pages 1139 to 1141 *infra*.

EXTRACT NO. 11.

An Outrage in Calcutta.

No, good reader; not an assassination; not a dacoity, motor or other; not a bomb. But the arrest of a respectable gentleman, Babu Shyam Sundar Chakravarti, Assistant Editor of the *Bengalee*, without reason given, without notification of his offence, without chance of clearing himself; the Editor, Babu Surendranath Bannerji's safe was also searched by the police. The *Bengalee* bears witness to the blameless life of the burgled man, for four years, save for one day's illness, he has been in its office from 10-30 a.m. to 6 p.m. He was known to condemn unlawful movements, and none has a harsh word to say about him. The arrest is legal, doubtless, but it is truly unlawful, the breaking of the sacred Law of Justice which holds society together. When injustice is perpetrated, when crimes are committed legally, when innocence is no protection, and harmless men are treated as criminals, then we live in a condition of anarchy, no matter what legal sanction may cover the wrong-doer. "Civilisation" does not protect us; we should be better off in a state of savagery, for then we should be on our guard, we should carry arms, and protect ourselves We are helpless, we pay taxes to be wronged.

New India—20-7-16.

EXTRACT NO. 12.

Three Ways to Home Rule

"Forward" writes in the *Commonweal*.

The conviction is growing that the Indian public have been deceived by the talk of the new angle of vision. A feeling is slowly

coming over us Indians that our loyalty, so much praised by statesmen of the type of Lord Hardinge, is looked upon by the Bureaucracy in this country as mainly due to our impotency and our servile position, and not as rooted in a genuine devotion to the British Raj.

* * * * *

Difficult Times.

That we are living in strange and difficult times is patent. As Paine said of the Americans in the most crucial period of their history, we are living in "times that try men's souls." This is an age for heroes who dare to enter the arena of righteous warfare loved by the true Kshatriyas of old, to whom according to the *Gita*, "nothing is more welcome."

* * * * *

Value of India.

India, if she would be allowed to live normally and naturally her life, enabling her to fulfil her own Dharma, would gladly help in the building up of the Aryan Empire. Without India the Aryan Empire is not possible Very few of Great Britian's children see this because of their inherent nature, conservative and conceited; vested interests of her sons in this land drive out of them their love of liberty, and push them on to mean and undesirable ways of action; the dangerous results thereof are not allowed to be revealed to the great Democracy ruled by the Mother of Parliaments; those very traits of habit and thought going under the name of Prussianism, which the Mother-country is fighting against, are displayed with self-satisfaction and pride by her sons in India Naturally, therefore, all efforts that Indians make to assert their own rights, to gain Liberty for the Motherland, to win Home Rule for themselves, are resented, and our opponents have recourse to repression and *Prussianism. Without* arms, without the vote, we find ourselves worse than useless. We pay, and if we resent we will be forced to pay taxes, and we have no representation; if we claim it we must ask for it as a boon, a favour, and not claim it as a right. This humiliating position is being resented, and rightly so, by thousands of Indians to-day. A new spirit is abroad and we do not say with our fathers that we are helpless We are beginning to realise that we are being treated unjustly and that there are remedies which can be utilised by us.

A Just and Righteous Demand.

The first thing essential for us to realise is that our demand of Self-Government within the Empire is a just and righteous demand,

Unity is Strength.

Secondly, we must realise that unity is strength. Our opponents know this and therefore have followed in the past, as they are doing now, the principle of "Divide and Rule." Against the attack we must hold the shield of "United we stand," and not forget that "divided we fall." Much nonsense is talked about Brahmana oligarchies and Muslim autocracies. I am a non-Brahmana and I would say: "Better a Brahmana Bureaucracy than an Anglo-Indian Bureaucracy." I am not a Muslim, but I have no hesitation in affirming: "Better a Muslim Oligarchy than an Anglo-Indian Bureaucracy." If we are to be tyrannised and lorded over, better that Indians do it—be they Brahmanas or Muslims—than that foreigners do it. But all that talk is over-exaggerated, and interested parties and their organs only utilise it in their own interests. If the Anglo-Indian Press attack Brahmanas as against non-Brahmanas and allow some of the latter class to rail against the former, it is done not at all in the interests of non-Brahmanas, but for the sake of Anglo-Indian self-preservation and self-aggrandisement. Indians, remember it: it pays the bureaucrat and the Anglo-Indian, whatever his sub-caste, trader, missionary, or administrator, to throw the apple of discord into the midst of a friendly gathering of Hindus and Muslims, Brahmanas and non-Brahmanas, Hindus and Indian Christians, Eurasian, and Indian Christians, etc. "Divide and Rule" has been well observed by the ruling hierarchy in this hapless land, as Captain Gervais Lyons pointed out ("Afghanistan," published by Messrs. Higginbothams, Madras, "with the official sanction of the Army Council"), and we are traitors to our Mother and her peace and prosperity if we allow these aliens' pranks to mar the harmony of our corporate life and labour.

EXTRACT No. 13.

Bal Gangadhar Tilak.

A wave of anger will pass over India when the people hear that this great martyr of the Motherland is again in the toils of his enemies. His going abroad to carry on his suit against Sir Valentine Chirol had been announced. Maharashtra was celebrating his birthday, and had given him a birthday present of a lakh of rupees. Lord Willingdon sends him a birthday gift of a demand for security bonds of Rs. 40,000 against sedition. What chivalry and good taste are shown in thus breaking into the birthday festivities.

What is the object? To save Sir Valentine Chirol from being brought to account? Else, if the Bombay Government think him a

preacher of sedition, why not rejoice to get rid of him out of the country? He could not preach sedition to India from England.

Mr. Tilak is to show cause why he should not be bound over to be of good behaviour for a year in a sum of Rs. 40,000

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New India--25-7-16.

EXTRACT No. 14.

Education and Newspapers.

We have been reading a report in the *South Indian Mail* of a speech by the Honourable Mr. V S. Srinivasa Sastri, in which he strongly objects to the intervention of newspapers in educational disputes. He said broadly that any newspaper agitation was wrong, if it was against the examiners, professors, teachers, or against the university.

That is a most extraordinary position to take up. Any abuse is to be allowed to continue, rather than that a newspaper should draw attention to it! A newspaper is expected to publish a report of a Senate meeting, but must not comment on that which it reports. Even if the education of Indian boys were in Indian hands, Mr. Sastriar's position would be impossible; but when we remember that they are in the grip of foreigners, who impose upon them a crushing curriculum in a strange language, who force them to specialise at an age when their natural bent is not discernible, who have no regard to their miserable poverty, nor try to improve their indecent and insanitary surroundings, and who, when professors or teachers, often treat them with the greatest rudeness and address them in the most insulting terms—when this is the present condition of affairs, it is only the feeling that some sympathy is to be found in the press that saves the students from despair

New India—17-8-16.

Mrs. Besant filed this application to the High Court under section 17 of the Indian Press Act for a cancellation of the above-mentioned Order of the Magistrate demanding security of Rs. 2,000 and of the order of forfeiture made by the Government.

Mrs. Besant, petitioner in person.

Hon. Mr. *S. Srinivasa Ayyangar*, the *Acting Advocate-General, E. R. Osborne*, the *Acting Public Prosecutor* and *J. C. Adam*, the *Crown Prosecutor*, for the Crown.

Mrs. Besant.—The order demanding security and the order of forfeiture are both illegal. The press in which the extracts

were published is one which existed long prior to the Indian Press Act and the provisions of the Act do not apply to it. When I made a declaration in December 1914, the Magistrate dispensed with security under the proviso to section 3 (1) of the Press Act. Having once dispensed with security, he cannot demand security thereafter under the same proviso. The demand of the security is illegal.

[ABDUR RAHIM, OFFG. C.J.—You are applying to us under section 17 of the Press Act and under it our jurisdiction is very limited. How can we go into this question ?]

I have put in another petition to cancel the order of demand.

[*ABDUR RAHIM, OFFG. C.J.—We can go into it in that* petition.]

On the question of the powers of the Special Bench, *In re Mahomed Ali*(1) is against me. I submit that that decision is wrong in several respects. I am at least entitled to show that the demand is illegal, as a step which leads me to show that the order of forfeiture is illegal. Section 4 (1) speaks of forfeiture of "such security," *i.e.*, a security that can legally be demanded under section 3 (1). The Press Act is a penal enactment and must be strictly construed. The charges are too many and too vague—*Subrahmania Ayyar* v. *King Emperor*(2).

[SESHAGIRI AYYAR, J.—As pointed out by the OFFICIATING CHIEF JUSTICE how can we go into all these questions ?]

The question is whether the forfeiture is legal. Section 22 which limits the High Court's powers is *ultra vires*.

[AYLING, J.—Not section 17, under which this application is made.]

The whole Act is *ultra vires*, especially sections 22 and 4. If the forfeiture is not properly incurred, this Court can set it aside or declare its illegality. No grounds are given by the Government in the order of forfeiture. see *In re Mahomed Ali*(1).

[ABDUR RAHIM, OFFG. C.J.—The forfeiture is not under section 12 but under section 4 which requires no reasons to be stated.]

Anyhow the demand of security is illegal. If the demand is not legal, the deposit is not legal. The demand of the security and the forfeiture thereof are *ultra vires* and nullities.

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(1) (1914) I.L.R., 41 Calc., 466. (2) (1902) I.L.R., 25 Mad., 61 (P.C.)

preacher of sedition, why not rejoice to get rid of him out of the country? He could not preach sedition to India from England.

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[ABDUR RAHIM, OFFG. C.J.—If the Governor-General in Council is competent to pass it, why not this Act be within his powers?]

This is a permanent measure. As to the powers of the Indian Legislature I refer to *In the matter of Ameer Khan*(1), a case dealing with *habeas corpus* in respect of the custody of the person of a subject. The right to property is exactly the same under the Magna Charta and Bill of Rights.

Coming now to the question whether the extracts offend section 4 of the Indian Press Act, I submit that the passages extracted are extremely trivial and they do not come within the terms of section 4. What is aimed at is that no "hatred" or "contempt" should be created by the writings, but not any passing feeling of anger or annoyance that might be occasioned by a reading of the articles. The interpretation put in by *In re Mahomed Ali*(2) on the phrase in section 4 (1), viz., "words which are likely, or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication, or otherwise," is far-fetched and wrong. The phrase only refers to the natural and probable effect the words will have on a normal reader and not any and every possible effect that can be imagined on any abnormally constituted or biassed person. The latter portion of the phrase does not really enlarge the scope of the former portion, viz., "which are likely, directly or indirectly." "Hatred" and "contempt" in section 4 (1) mean only such "hatred" and "contempt" as can lead to the commission of such offences as are mentioned in the various clauses (*a*) to (*f*) of that sub-section. The words "Government established by law in British India" are to be understood only as equivalent to sovereignty or supremacy of the British Crown over India and the British connection with India as opposed to independence and not as referring to any and every passing official that may be in charge of some one or other department of the British administration in India: see *Queen-Empress* v. *Bal Gangadhar Tilak*(3), *Emperor* v. *Bhaskar*(4) and *Joy Chandra Sarkar* v. *Emperor*(5). Without ever advocating the disruption of this supremacy of the British Crown over

(1) (1870) 6 B.L.R., 392 at p. 450.
(2) (1914) I.L.R., 41 Calc., 466.
(3) (1898) I.L.R., 22 Bom., 112 at p. 135.
(4) (1906) 8 Bom. L.R., 421 at p. 435.
(5) (1911) I.L.R., 38 Calc., 214 at p. 222.

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India I have advocated "Home Rule" for India; and that is what I have done in my paper; and the articles do not go beyond this. Advocacy of "Home Rule" in India on such lines is not seditious and the Government have not declared otherwise. I do not know what the other side will say on this aspect of the question, which is very important for a decision on these articles.

[*The Advocate-General.*—I am instructed to say that advocating "Home Rule" without offending the existing laws is not objectionable.]

Then, I have in these articles only advocated that certain departments of the administration require to be manned purely by indigenous agency and others partly Suggestions to bettering the method of administration without upsetting the Government, cannot be legally objectionable, however unpalatable they may be to some. In fact all the articles are governed by the two exceptions, as they comment on Government's measures and actions. I admit that under the guise of comments I ought not to excite people to violence or murder, etc. On the merits, I submit these articles are trivial and are harmless and they do not in any way come under section 4 (1) There is no intention either on the part of the correspondents or on my part to write so as to incite people to commit violence, etc. No previous notice or warning was given to me by the Government as to how it viewed my articles. The policy of my paper on the subjects dealt with in the articles complained of will appear from other articles of the paper. I have got the other articles here.

[*The Advocate-General.*—They are inadmissible. The words "in aid of the proof of the nature of the words" occurring in section 20 of the Press Act enable only the Crown to tender other articles which will help its contention. The party proceeded against cannot tender anything in *disproof* of the nature of the words complained of.]

Subject to arguments in the future as to their actual relevancy, copies of articles published in 1914, 1915 and 1916 were allowed to be put in to show that the newspaper wanted to put down the dissemination of news likely to promote hatred towards the Government.

[*The Advocate-General for the Crown.*—In this application the only right of the applicant is that contained in section 17 of the Press Act. This Act is a special Act giving special rights

and special remedies. Section 19 specifies the powers of the High Court in dealing with the application, under which the Court's *jurisdiction is only to see whether the articles complained* of do come under section 4 (1) of the Act. Section 22 has to be read in this connection. By the declaration of forfeiture it must be taken that a forfeiture has taken place. It is the incurring of forfeiture that gives a right to the applicant to seek redress in the High Court and that too only on one ground. The legality of the forfeiture cannot be questioned.]

[SESHAGIRI AYYAR, J.—What you say is that the forfeiture can be attacked only on the merits and not on technical grounds?]

Yes. I rely on *In re Mahomed Ali*(1), *Karam Chand* v. *Emperor*(2), *Gulam Qadir Khan* v. *Emperor*(3), *Amar Singh* v. *Emperor*(4) and *Faroor Ali* v. *Emperor*(5). The phrase in section 3 (1), proviso, "or may from time to time cancel or vary *any* order under this section" includes an order dispensing with security. An order demanding security under section 8 of the Act cannot be revised—see *Aga Syed Jalaluddin Husain* v. *The King-Emperor*(6). Section 4 is not *ultra vires*. If section 4 is *ultra vires*, section 17 which depends on section 4 is also *ultra vires*. If only the forfeiture is a fact, this application will lie under section 17. *Secretary of State* v. *Moment*(7) has nothing to do with this case. The Governor-General in Council has power to legislate upon matters like these and even in matters relating to allegiance to the Crown of British subjects resident in India. see *In the matter of Ameer Khan*(8), the judgment of the Court on appeal from NORMAN, J. Forfeiture of security is not forfeiture of property; keeping a printing press is a profession and it is allowed to be exercised by the issue of a license and if the license is subject to certain conditions, then the licensee must subject himself to those conditions. If the submission eventually leads to loss of money, that is not deprivation of property as is contemplated by the English Common law. The Press Act does not declare any act

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(1) (1914) I.L R., 41 Calc., 466. (2) (1913) 18 I.C , 347
(3) (1914) 24 I.C., 578 at p. 591. (4) (1915) 29 I C , 827.
(5) (1915) 28 I.C., 422. (6) (1913) 17 C.W.N., 1245.
(7) (1913) I.L.R., 40 Calc , 391 (P.C.).
(8) (1870) 6 B.L.R , 456 at pp. 482 and 483.

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as an offence. It is designed to preserve the public peace. The policy of the Press Act is not quite the same as that of the Penal Code. There is no Act of Parliament which is contravened by this Press Act and no English case has been cited. No previous notice to the party is required to be given by the Act: see *Karam Chand* v. *Emperor*(1). The Crown is entitled to forfeit the whole newspaper, *i.e.*, the periodical and not only the particular articles. The order of forfeiture relates only to past numbers. There is no difference between an old press and a new press when once a new declaration had to be made and had been made on a change of ownership. See section 4 of Act XXV of 1867. Section 4 of the new Press Act is very wide in its terms. No prosecution for any offence is involved in this case. The object being preservation of peace, even mere possibilities of creating hatred, etc., are aimed at by section 4.

[ABDUR RAHIM, OFFG. C J.—Not a mere abstract possibility but a possibility under the circumstances of the case. It must be a possibility with reference to a reasonable man.]

The Court's powers under section 19 are much less than those of the Government under section 4. "Directly or indirectly" refer to the effect. "By metaphor, implication or otherwise" refer to the words used. According to section 19, the onus is on the applicant If a matter comes under the explanation to section 4 it is taken out of clause (c) According to the explanation to section 4 (1) one can bring Government into "hatred" or "contempt" even in the mind of one person and it need not be in the minds of several or of a class—compare section 153-A of the Indian Penal Code. The exception to be found in section 153-A is not to be found in section 4 of the Press Act. It is the "words" that are the governing factor. The question of *intention* is immaterial to this section or to the explanation—see on these points, *In re Mahomed Ali*(2). The explanation will protect only comments on measures of Government and not attacks on Government—see *Queen Empress* v. *Bal Gangadhar Tilak*(3) and Mayne's Criminal Law, page 296. The order of the Magistrate demanding security is not a measure of the Government within the explanation. In the absence of any other definition

(1) (1913) 18 I.C., 347.
(2) (1914) I.L.R., 41 Calc., 466 at pp 489 and 490.
(3) (1898) I.L.R., 22 Bom., 112.

word "Government" must be interpreted only according to lefinition given in the General Clauses Act. The interpreta- given by the other side and the articles complained of do y aim at subverting the existing Government. Advocacy Home Rule" should be without offending the existing laws. only question in this case is, what do the words used mean— *Reg. v. Burdett*(1) and Mayne's Criminal Law, page 300. articles complained of come within section 4 (1). I tender r articles to show the general policy of the paper on matters t with in the articles complained of.

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'Their Lordships admitted in evidence some of the articles r section 20 of the Act.]

What has to be seen is, what is the effect of the articles com- ued of and not what was the policy of the editor a year or two re or what was published in the paper a year or two ago.

ABDUR RAHIM, OFFG. C J.—Why not those earlier articles elevant to construe articles of doubtful import?]

The intention of the writer on a former occasion is irrel- t: see *Hulton & Co.* v. *Jones*(2) The articles sought to ut in by the applicant are not in any way qualifying the ice produced by the articles complained of. *In re Mahomed* 3) must be followed.

Mrs. Besant replied.

Cur ad vult.

ABDUR RAHIM, OFFG. C.J.—This is an application under on 17 of the Indian Press Act of 1910 by Mrs. Annie Besant, keeper and printer of the "New India Printing Works" the Editor of the newspaper *New India*. The applicant s to have set aside an order of the Chief Presidency istrate of Madras, dated 22nd May 1916, requiring her to osit security of Rs. 2,000 under section 3 (1) of the Act and rder of the Governor in Council, dated 25th August 1916, ring under section 4 (1) the security so deposited and all es of *New India* wherever found to be forfeited to His esty. No copies of *New India*, it may be mentioned, have ally been seized.

ABDUR RAHIM, OFFG. C.J.

The order of the Chief Presidency Magistrate is attacked ly on the ground that in as much as the press and the

(1) (1820) 1. St Tr (N.S.), 1. (2) (1910) A.C., 20.
(3) (1914) I L.R., 41 Calc, 466 at pp. 489 and 490.

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newspaper in question were in existence before the passing of the Press Act under the names and styles respectively of the "Standard Press" and the *Madras Standard*, the fact that the appellant having purchased the said press, made a declaration before the Magistrate with respect thereto on the 2nd December 1914 under section 4 of the Press and Registration of Books Act of 1867 in the new name of the "New India Printing Works" did not bring this press under the operation of section 3 (1) of the Press Act. But clearly the provisions of the Act are applicable to all printing presses: under section 3 (1) the Magistrate is to take security from any person who makes a declaration before him with respect to any printing press apart from any question whether it was set up before or after the Act and by sub-section (2,) the Local Government may in certain circumstances require the keeper of a press in respect of which a declaration was made before the commencement of the Act of 1910 to deposit security. Section 4 of the Press and Registration of Books Act of 1867 prohibits any person to keep a printing press without making a declaration to the effect that he has a press for printing purposes at a particular address, which he is bound to disclose. It is directed against the keepers of printing presses for the time being: so, with every change of hands, a fresh declaration becomes necessary. In this way, the "New India Printing Works" became amenable to the action of the Chief Presidency Magistrate under section 3 (1) when as required by the law a fresh declaration was made before him by the applicant. I may mention that a certified copy of a judgment of the Patna High Court, dated 5th June 1916, in Criminal Revision No. 93 of 1916 was cited before us in support of the applicant's contention; but it is sufficient to say that I have not been able to find out what exactly was decided in that case.

The Acting Chief Presidency Magistrate, however, chose to dispense with the deposit of security at the time the applicant made the declaration. And it is thereupon argued that he became *functus officio* so far as this press was concerned and was not competent to pass his subsequent order of 22nd May 1916. By section 3 (1), all keepers of printing presses are required to deposit security at the time of making the required declaration to such an amount not exceeding Rs. 2,000 as the Magistrate may fix; then comes the proviso which says: "Provided that the

Magistrate may, if he thinks fit for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section." It is contended by the learned Advocate-General on behalf of the Crown that the words "to cancel or vary any order under this sub-section" gives the Magistrate the power to cancel his order dispensing with security although he derived authority to pass that order from the proviso itself. But it seems to me that the use of the words "or may" before the words "cancel or vary any order under this sub-section" goes to negative such a construction: it indicates that an order dispensing with the deposit of security is not included in the words "any order within this sub-section."

It is true in one sense that a proviso is part of the section to which it is attached. But in ordinary legal parlance a proviso is to be distinguished from the enactment to which it is generally appended either for the purpose of explaining what particular matters are not within the meaning of the enactment [see *West Derby Union* v. *Metropolitan Life Assurance Society*(1)] or for providing exceptions and qualifications to the enactment or for other similar purposes. The proviso is something subordinate to the main clause and the general rule is that what is contained in the proviso is not to be imported by implication into the clause.

When a reference is made in the proviso to what is enacted by the section or sub-section to which it is appended, one would not ordinarily read it, unless so compelled, to include anything contained in the proviso itself. Here the main purpose of the enactment is to authorize the Magistrate to fix the amount of security and it is to enable him to cancel or vary this order from time to time that he is given the power under the latter part of the proviso.

It was argued that the legislature could not have intended that if the Magistrate once dispensed with the deposit of security, he should have no further power to require security if he so chose. But it must be remembered that he is to dispense with security only for special reasons which have to be recorded by him and it is not unlikely that the legislature thought that where such reasons existed, the particular keeper of the press

(1) (1897) A.C., 647 at p. 652.

who was so exempted should not again be called upon to furnish security.

However that may be, I do not feel called upon to put any construction on an enactment such as this which would tend to extend its scope beyond what is warranted by the natural meaning of the words used by the legislature. Section 3 (1) imposes a serious disability on persons desiring to keep printing presses; it must have the effect of hampering the carrying on of what is ordinarily not only a perfectly legitimate business, but one which has played such an important part in the diffusion of knowledge and progress of civilization.

Upon this application, however, it is not open to us to set aside the order of the Chief Presidency Magistrate. Whether section 22 of this Act bars all interference on our part or not is a question which will have to be considered in connection with another application which will be dealt with later. But in any case, there is no provision in the Press Act of 1910 under which this application is made which enables us to deal with the order of the Magistrate purporting to be made under section 3 (1).

As for the order of forfeiture, section 22 read with sections 17 and 19 debars us from interfering with it except on one ground, namely, that the extracts in question are not of the nature described in sub-section (1) to section 4. This is quite clear.

Before dealing with the application on the merits, I should mention that the applicant repeatedly complained to us that the Government before passing the order of forfeiture did not give her sufficient intimation as to the kind of matters published in her paper which they regarded as objectionable nor did they call upon her to show cause why the security deposited by her should not be forfeited. The Act imposes no duty upon the Government to issue any warning or to ask for any explanation before taking action. There may be force in Mrs. Besant's plea that if she knew what it was in the policy of *New India* or in the nature of the matters published in it to which the Government had objection, she would have been in a position to take steps to prevent anything appearing in the paper which might reasonably be considered to be offensive. She has told us that there was only one letter which appeared in *New India*, written by an Englishman on the subject of Indian servants to which the Government took exception but that, as a

matter of fact, the editorial note had made it clear that the views of the writer found no sympathy with the editor. She says she received no other warning of Government's disapprobation. It seems quite possible, judging from Mrs. Besant's attitude before us, that if her attention had been properly drawn in time, greater check would have been exercised over the language used in some of the letters and articles published in *New India*. But that is a matter which the Government alone could legitimately take into account; it can in no way influence our judgment on the questions for decision.

The scope of section 4 was considered by the Calcutta High Court in the matter of a petition of *In re Mahomed Ali*(1), and the learned Advocate-General has supported the interpretation put upon it by Chief Justice JENKINS and the other learned Judges of that Court. That, generally speaking, the terms of the section are extremely wide and comprehensive cannot be doubted. They vest the Local Government with a discretion so large and unfettered that the keeping of printing presses and the publication of newspapers become extremely hazardous undertakings in the country. A press may be devoted to the printing of most useful and meritorious literature or other publications of an entirely innocent and non-controversial nature, yet it will be liable to forfeiture if any matters printed in such press are considered by the Government to be objectionable within the meaning of the Act. It may be doubted if it is possible for the keeper of any printing press in the country to maintain such an efficient expert supervision over matters that are printed as to detect everything that might be regarded to fall within the "widespread net" of *section* 4.

Similarly a newspaper may be consistently staunch in its loyalty to the Government, its general policy may be above all reproach, the sincerity and *bona fides* of the intentions of the editor may not be liable to question, but if any letters or other writings are let in, may be through carelessness, which come within the scope of any of the clauses to section 4, the Government may at once without any trial or even a warning forfeit the security, and in this way ultimately put an end to the newspaper itself. That the influence of a periodical on public life

(1) (1914) I.L.R., 41 Calc., 466.

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of the country is on the whole decidedly beneficial need be no bar to the Government's action. The Local Government, it may be assumed, will not indiscriminately exercise the power which it possesses under this enactment, but the vesting of such unlimited power in the Executive Government is undoubtedly a serious encroachment on the freedom which the press in India enjoyed before the passing of the Act.

The Act as is well known was passed in order to counteract the manifold ingenious devices adopted by the anarchists of Bengal for carrying out their propaganda. How far it has been instrumental in accomplishing that object is not a question with which we are concerned; nor are we concerned with the question whether the legislature was justified in applying such a drastic press law to the whole of India, while the evil sought to be met was mainly connected with the activities of a band of young revolutionaries in one part of the country.

Mrs. Annie Besant has argued having regard to the nature of the enactment that so far at least as it affects European British subjects, section 4 of the Act is *ultra vires* of the powers of the Indian Legislature. The Indian Legislative Council is a subordinate legislature exercising only a delegated authority and section 65 (2) of the Government of India Act lays down that "the Governor-General in Legislative Council has not power to make any law affecting . . . any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom." The contention is this: in the words of Sir WILLIAM BLACKSTONE "allegiance is the tie which binds the subject to the King in return for the protection which the King affords to the subject," and to use the language of BRACTON "the King is under the law, for the law makes the King." What is meant by allegiancé is more fully explained by NORMAN, J., in *In the matter of Ameer Khan*(1): "It is the true and faithful obedience of the subject to the Sovereign. Every one born within the dominions of the King of England, whether in England or in the Colonies or Dependencies, being under the protection, therefore, according to our common law, owes allegiance to the King."

(1) (1870) 6 B.L.R., 392 at p. 451.

By "the unwritten laws" are meant, generally speaking, the laws recognizing the fundamental right of the subject to enjoyment of personal freedom and property of which he could not be deprived except by a sentence of the Court of Law. They were embodied in England in the Great Charter and Petition of Rights which as pointed out by NORMAN, J., "are for the most part declarations of what the existing law was, not enactments of any new law." That learned Judge also observes "the infraction of such laws may be carried to such an extent as to give rise to the right of self-defence on the part of the subject, a right which," says Sir MICHAEL FOSTER, "the law of nature giveth and no law of society hath taken away." Then further on: "It would be strange indeed if a great popular assembly like the Parliament of England had put into the power of a legislature which has not, and in the nature of things could not have, any representative character, the power of abrogating or tampering with such fundamental laws." NORMAN, J., however refused to issue a writ of *Habeas Corpus* to the jailor who had charge of the body of Ameer Khan who had been imprisoned under Regulation III of 1818, holding that its validity had been duly recognized by the legislature and that even if the writ was issued it would be infructuous, as the jailor acting under the warrant of the Governor-General in Council was not bound to obey the writ.

The decision of NORMAN, J., was upheld in appeal by PHEAR and MARKBY, JJ., but the learned Advocate-General has relied upon the judgments in appeal as modifying the propositions cited from NORMAN, J.'s judgment. PHEAR, J., says *In the matter of Ameer Khan*(1) "But I think it right to say that in my judgment the words 'whereon may depend, etc.,' do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribe the nature of the allegiance, viz., of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other; and obviously such laws and principles as these are not touched by the local

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(1) (1870) 6 B.L.R., 392 at p. 477.

law is repugnant to a subject's right to hold and enjoy property unless it is forfeited to the Crown after due trial for any offence or charge proved in due course of law. The Government acting under section 4 need not hear the person whose property it seizes, need not take any evidence nor is it bound to follow any kind of procedure which would ensure that the forfeiture was made after proper deliberation with due regard to the right of the parties concerned and in the true interests of the State. The right of appeal to the High Court under the provisions of sections 17 and 19 does not make any substantial difference as the onus is cast upon the owner of the confiscated property to prove that the order of forfeiture was wrong and that right must, in the circumstances, be treated as more or less illusory.

The contention of the Advocate-General in answer to this reasoning is that there are numerous instances in which personal freedom of the subject is interfered with because of the exigencies of good government. For instance persons suspected of crimes are daily arrested by the Police before they are placed on trial and the laws of every country place restrictions on the user of certain forms of property in the interests of public welfare. This enactment, he says, stands practically on the same footing.

But it is unnecessary to determine any of these questions for the very simple reason that this Court is constituted and this application has been made under the special provisions of the Press Act itself and section 22 of that Act prevents all interference on our part except on one ground mentioned in sections 17 and 19. When this was pointed out to Mrs. Besant, she further contended that section 22 itself was *ultra vires*. Even if that contention were valid whatever other remedy she may have she has none on this application.

Now I shall examine the provisions of section 4 in some detail. It is contended that the phrase "which are likely or may have a tendency directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise" means that if any of the words used may, by any possible construction however ingenious and far-fetched, be supposed to have an objectionable tendency of the nature described therein, that is enough to bring a newspaper within the purview of the section.

This indeed is said to be the interpretation which found favour with Chief Justice JENKINS. He says:

"The provisions of section 4 are very comprehensive, and its language is as wide as human ingenuity could make it. Indeed, it appears to me to embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility on the other.

"It is difficult to see to what lengths the operation of this section might not plausibly be extended by an ingenious mind. They would certainly extend to writings that may even command approval.

"An attack on that degraded section of the public which lives on the misery and shame of others would come within this wide-spread net: the praise of a class might not be free from risk. Much that is regarded as standard-literature might undoubtedly be caught."

Anything which fell from that distinguished Judge has my greatest respect. But though undoubtedly the language of the enactment is, as I have said, extremely, nay dangerously wide, I venture to doubt if the cases which are mentioned above could reasonably be said to come within the scope of the section. In the first place the words "whether by inference, suggestion, allusion, metaphor, implication or otherwise" are merely by way of explanation, and do not in any way enlarge the meaning of the words "which are likely or may have a tendency directly or indirectly". By "tendency," I take it, is meant the *natural* effect of the words used on the readers of the newspaper in question. I do not think that we ought to have any regard in this connection to the effect which they may possibly produce on the minds of abnormally constituted persons or persons whose acquaintance with the language is inadequate or on those who might content themselves with reading certain passages or expresssions apart from the context.

I do not think that our decision upon the tendency of publications in a newspaper should be affected by a consideration of the interpretation which men of ingenious minds may put upon them. All that we are to take into account is the effect which the words are, by their nature, likely to produce on a normal average reader understanding them in their plain natural meaning.

But the onus is laid (see sections 17 and 19) upon the person whose security has been forfeited to prove that the publications

selected by the Government at their own discretion may not have the tendency described in the various clauses. That is not only reversing the ordinary procedure in trials, but the difficulty of proving such a negative as this must in many cases be unsurmountable.

Then apart from Explanation 2, we have not in applying section 4 (1) to consider the intentions of the editor or the writer if it is not shown that the words in their plain ordinary meaning may not tend to produce the objectionable effects mentioned in clauses (*a*) to (*f*).

The extracts under consideration are said to come within clause (*a*), (*c*), (*d*) or (*e*) Briefly speaking, clause (*a*) relates to words having a tendency to incite to acts of violence; clause (*d*) to words tending to put any person to fear and thereby induce him to do an act which he is not legally bound to do or to omit to do any act which he is legally entitled to do and (*e*) relates to words which encourage persons to interfere with the maintenance of law and order.

That portion of clause (*c*) with reference to which the extracts require careful examination is this. "to bring into hatred or contempt His Majesty or the Government established by law in British India . . . or any class or section of His Majesty's subjects in British India or to excite disaffection towards His Majesty or the said Government . . ." It will be seen that this lumps together the offences defined by sections 124-A and 153-A of the Indian Penal Code with this difference that we are not concerned here with any question of intention of the editor or writer of the articles leaving aside for a moment the effect of Explanation 2 which will be considered presently.

The words of section 124-A which has been the subject of interpretation in a number of cases have been substantially reproduced in clause (*c*). "Hatred" and "contempt" which are ordinary English words, I take it, mean something more than mere disapproval or dislike. The word "disaffection" has been explained in the section itself as including disloyalty and all feelings of enmity and I do not think any practical purpose would be served by attempting to suggest any further explanation.

But a question has been raised as to the meaning of the phrase "the Government established by law in British India."

It is contended by the applicant that what is meant by that phrase is the supremacy of the British Crown and the British connection as opposed to independence. This cannot be a definition of "Government" as used in the section; it would only indicate the essential elements in the political relation between India and Great Britain. Government denotes an established authority entitled and able to administer the public affairs of the country. On the other hand Government is not identical with any particular individuals who may be administering the Government. Mr. Justice STRACHEY of the Bombay High Court defined it as "British Rule and its representatives as such—the existing political system as distinguished from any particular set of administrators:" see *Queen Empress* v. *Bal Gangadhar Tilak*(1) Mr. Justice BATTY in *Emperor* v. *Bhaskar*(2) explained the conception of Government in somewhat greater detail:

"What is contemplated under the section is the collective body of men—the Government, defined under the Indian Penal Code. It means the person or persons collectively, in succession, who are authorized to administer the Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals, and not representatives of that abstract conception which is called Government . . . The individual is transitory and may be separately criticised, but that which is essentially and inseparably connected with the idea of Government established by law cannot be attacked without coming within this section"

The same idea underlay Sir COMER PETHERAM's explanation of the phrase in the *Bangobasi case* [*Queen Empress* v. *Jogendra Chunder Bose*(3)], where he says that "British India is part of the British Empire, and is governed like other parts of the Empire by persons to whom the power is delegated for that purpose. There is a great difference between dealing with Government in that sense and dealing with any particular administration" In the above sense "Government" includes not only the Government of India but also the Local Governments.

(1) (1898) I.L.R., 22 Bom., 112 at p. 135.
(2) (1906) 8 Bom. L.R., 421 at p. 438. (3) (1892) I.L.R., 19 Calc., 35.

I think the last passage from Mr. Justice BATTY's judgment cited above requires some explanation. I do not think he meant that the law prohibits criticisms of the Government as constituted in a particular form provided such criticisms do not bring it into hatred or contempt or excite disaffection against it. In fact all criticisms of the measures of a Government must in some degree involve reflections on the Government itself. But section 4 allows less scope to criticisms directed against the Government itself than to criticisms of measures of the Government.

Explanation 2 which is transcribed almost word by word from section 124-A says that "comments expressing disapproval of the measures of the Government with a view to obtain their alteration by lawful means or of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection do not come within the scope of clause (c)." The draftsman who borrowed these words from section 124-A apparently overlooked the fact that the essence of an offence under section 124-A being the guilty intention, Explanation 2 necessarily imported the question of intention while clause (c) to section 4 to which the explanation was attached is not concerned with the intention of the writer of the words charged. However that may be, we must read Explanation 2 as we find it. So reading, it means that comments on the measures and actions of the Government are exempted from the operation of section 4 provided the person making the comment does not excite or attempt to excite thereby hatred or contempt against the Government. But the protection afforded by this explanation is extended only to comments on Government's measures and actions and not to attacks on the Government itself which have to be judged by light of the section 4 alone without reference to the Explanation 2.

It is evident from some of the extracts the subject of the charge, from the statements of the applicant herself and certain copies of *New India* tendered in evidence under section 20 that it is the declared policy of this paper to advocate and agitate for Home Rule in India. The method adopted is to draw attention to those measures and actions of the Government that are in the opinion of the editor injurious to the interest of the people and thereby to enforce the teaching that Home Rule

is the only efficient remedy for most of the political evils in the country. The learned Advocate-General very rightly told us under instructions from the Government that they did not object to advocacy of any Home Rule propaganda: what they objected to was the nature of the matters published in the paper, connected though they might be with a scheme for Home Rule.

And in fact it is difficult to see how any such movement can be regarded as illegal *per se*. It lies entirely with the Sovereign, that is, in the compendious phrase of Dr. DICEY, the King in Parliament, to establish any Government he chooses for India or any other part of the British Empire. There can be nothing wrong therefore in a subject of the Crown urging the desirability of a change in the machinery of Government in India. Changes in the constitution of Governments do take place from time to time with the consent or sanction of the Sovereign and the most recent, in the case of India, were the reforms introduced by Lord Morley. In certain stages of society, reforms in the constitution of the Government are a biological and political necessity. To say that such questions are not open to public discussion, supposing that the law is not violated by the manner and the methods adopted in such discussion, would be opposed to all sound maxims of constitutional law. The principle which bears on the subject has been expressed in the following terms which have met with the approval of some of the most distinguished text-writers:—

"An intention is not seditious if the object is to show that the King has been misled or mistaken in his measures or to point out errors and defects in the Government or constitution with a view to their reformation or to excite the subjects to attempt by lawful means the alteration of any matter in Church or State or to point out with a view to the removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between classes of the subjects"

(See Stephen's Commentaries, volume IV, page 150, 16th edition; Dicey's Law of Constitution, page 240, 8th edition; Halsbury's Laws of England, volume 9, page 460, paragraph 902.)

The applicant has complained to us that the Madras Government never made any pronouncement on the subject of Home Rule and she thought that they objected to the movement

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suggesting thereby that if she had known their real attitude, the tone of some of the articles might have been modified. But then she was not justified in supposing that the Government would act contrary to the law and any such supposition would not be a valid excuse if it led her to publish matters obnoxious to the law.

After the best consideration I have been able to give to these articles, which I shall now proceed to deal with in detail, I fully accept the assurance of the applicant that her newspaper *New India* has been persistently preaching against acts of violence. Nor have I found anything in these articles which can reasonably be taken to suggest that India should sever her connection with the British Crown or the British Empire. In fact it is expressly stated in some of these extracts, for instance Extract No 3, that what *New India* has been struggling for, to use its own language, is "Home Rule" by which is meant Self-Government within and as a part of the British Empire. The applicant indignantly repudiated charges of disloyalty to His Majesty and I find nothing in the language of these articles which would lead me to doubt in any degree the sincerity of her protestation. Nor has the learned Advocate-General suggested otherwise. The real question however is whether the words of any of these extracts are likely to have a tendency to bring into hatred or contempt the Government or to excite disaffection towards the Government or to bring into hatred or contempt any class of His Majesty's subjects in British India, or do they or any of them come within the scope of Explanation 2 to section 4. I will say at once that none of the articles cited in the charge can fairly be said to have any tendency of the description mentioned in (*a*), (*d*) and (*e*).

I will take Serial Nos. 4 *(a)* to 4 *(f)* together. These are letters of correspondents and paragraphs dealing with the practice which obtains on certain railways of reserving compartments for the use of Europeans and Eurasians alone and of excluding from them Indian passengers holding tickets issued to them in due course. They are written on the assumption that the legality of such practice was open to challenge. It is possible that the decision of the Sindh Court referred to was misunderstood but there can be no doubt that the writers *bona fide* believed that it had declared against the validity of the practice. It is stated that it

was a matter of frequent occurrence that, while the compartments reserved for Europeans and Eurasians were empty, Indian passengers were not allowed to use them even though the other compartments were overcrowded and many Indian passengers holding tickets were unable to find seats. The action of the Railway authorities is condemned not only as illegal but objectionable as tending to emphasize racial distinctions. The suggestion is made in several of the extracts that the passengers should test the legality of this practice. It is urged that the editorial note to Serial No. 4 (*d*) "Why did you get out? It is this submission to illegality that causes half the troubles from which Indians suffer" amounts to a suggestion to use violence: but I have no doubt that the note is not reasonably capable of being so understood if read in the light of the letter to which it is attached and in connection with the other writings on the same subject. It has also to be borne in mind that some of those extracts had already appeared in other newspapers.

Extract No. 5 which is headed "the Price of Liberty" is an article quoted from *The Herald* of London. It is an apology put forward by one John Scurr for the action of persons known as conscientious objectors to conscription. It extols the virtues of those who for the sake of the cause which they believe in, cheerfully and boldly suffer all kinds of inflictions. Mrs. Besant has told us that as a matter of fact she has been doing everything possible in her power to support the British cause in this war through the medium of *New India* and that is not denied on the other side. There is no question of conscription in this country and the objection of the Advocate-General to this extract is that it may have a tendency to incite the readers of the *New India* to acts of violence against the Government. But I can find no such suggestion in the extract. Mrs. Besant herself explained to us that the reason why she inserted it in the Home Rule section (that is to say that part of the paper which is especially devoted to the question of Home Rule for India) was simply to supply an object lesson to the people of this country in self-sacrifice. I am unable to say that it suggests in any way that people should take the law into their own hands.

Extract No. 7—"The latest Political Crime in Calcutta and its Moral by Bepin Chandra Pal." This, it is contended, comes under clauses (*a*), (*c*) and (*e*). I have read the article with

considerable care and I cannot find in it any palliation of the anarchical crimes committed by the young anarchists or revolutionaries of Bengal as suggested on behalf of the Crown. What the writer tries to prove is that repression alone is not an adequate remedy for the present situation in that Province. He expresses the opinion that, if the Government would publicly accept Swaraj or Home Rule "as the ideal objective of the immediate historical evolution of the Indians" and "if they would start some of those necessary reforms in the administration which would give a practical assurance to the future national autonomy inside the coming federation of the whole British Empire," the problem might be more easily solved. Mr. Pal asks the Government not to regard these misguided young students as mere ordinary criminals but rather as political offenders. He does not, however, suggest that their offences should not be punished according to law. In one place he says that these men are possessed of a kind of courage which should not be overlooked but in the same sentence he condemns the "suicidal folly and criminal inhumanity of their actions." I do not think that any reader of *New India* who is not predisposed to read in meanings in the article which are not there would carry away the impression that it attempts in any way to excuse the conduct of the political assassins in Bengal. Nor is there a single word in the whole of that article which can be said to have a tendency to bring the Government into hatred or contempt or to excite disaffection against it.

Extract No. 3—"Latest Sin of the Arms Act." It notices a dacoity of a very serious nature which was committed in the house of a rich merchant in a village in this Presidency. Large sums of money and jewels were carried away and the victim, it is said, bitterly complained of the helplessness of the unarmed villagers to offer any resistance to the armed bandits. The moral is pointed that such helplessness is the result of the Arms Act and the writer pleads for its repeal or modification. It is difficult to see how this paragraph can be said to go beyond the limits of fair comment on a measure of the Government which has formed the subject of frequent discussion in newspapers and on public platforms.

Extract No. 1—"Bureaucracy in Excelsis" is a letter written by one Krishnamachariyar denouncing the action of the

Magistrate requiring security from the applicant. It accuses the Madras Government of blind hostility against *New India*, dwells on the "unwisdom of relying too much upon the sympathy of the Bureaucracy towards any of her (i.e., India's) truly higher aspirations" and says "when *New India* mercilessly exposes any and every vagary of the Englishman in this land that it can come across, the Anglo-Indian blood boils with all the uncontrollable rage of the most selfish vested interests." This is undoubtedly a violent piece of writing and goes beyond the limits of fair comment.

Extract No. 2 is also a letter from a correspondent. It not only describes the enforcement of the Press Act against *New India* as "inhuman action and barbarous atrocity," but it leaves the readers under the impression that "the much hated and ever mischievous bureaucracy" is identical with Government. It alleges that the Government have a spite against the Editor of *New India* for "she is the head of an institution which works against the missionaries and the missionaries are the parasites of the Government." It is impossible to say that a publication of this character may not have a tendency to excite hatred against the Government.

Extract No 6 is an editorial article where it is stated—

"Repressive measures such as the Press Act, the Seditious Meetings Act, the Official Secrets Act and the Defence of India Act in the hands of people with vested interests of their own naturally assume a shape and a form all too ghastly for the children of the soil, and day and night exert a baneful influence over them, engendering at once fear and hatred"

Supposing these measures are all of a repressive character and are objectionable, still to describe them in the language quoted is certainly not fair comment, and naturally tends to create a feeling of dislike and hatred against the Government.

Extract No. 8 "Ave Cæsar" is written by Mrs. Besant herself criticizing the order passed by the Government of Bombay under the Defence of India Act prohibiting her from entering that Province. She told us that she wrote in that strain because she was indignant that the Defence of India Act which is directed against the enemies of England and of His Majesty the King Emperor should have been used against her. I am not inclined to attach much importance to this paragraph ; it is an

outburst of an enraged woman who felt that she had been very unjustly dealt with.

In similar strain is Extract No. 9. It contrasts the attitude of Anglo-Indians towards constitutional struggles in India with that of Englishmen in England. In Extract No. 10 there is a suggestion that sometimes action under the Defence of India Act is resorted to by the Government from a feeling of *personal enmity. Extract No. 11 deals with the case of one* Shyam Sunder Chakravarthy, Assistant Editor of the *Bengalee*, who was arrested in Calcutta and in connection with whose arrest the safe of Babu Surendranath Bannerjee, the Editor of that paper, was searched by the police. Without stating whether the arrest was under the ordinary law or under the Defence of India Act or what was the nature of the evidence upon which action was taken by the police, it is asserted "the arrest is legal doubtless but is truly unlawful."

"When injustice is perpetrated, when crimes are committed legally, when innocence is no protection and harmless men are treated as criminals, then we live in a condition of anarchy, no *matter what legal sanction may cover the wrong-doer. Civilization* does not protect us. We should be better off in a state of savagery, for then we should be on our guard, we should carry arms and protect ourselves. We are helpless. We pay taxes to be wronged."

Words *like these exceed the limits of all* fair comment and are likely to excite hatred against the Government.

Extract No. 12 is a plea for Home Rule. It is taken from a contribution in the *Commonweal*. The Advocate-General has especially drawn our attention to the passage where the writer speaks of this age as "an age for heroes who dare to enter the arena of righteous warfare loved by the true Kshatriyas of old, to whom according to the Gita, nothing is more welcome" and to the allusion to Paine, the American writer's saying "that we are living in times that try men's souls." I think the allusion to the true Kshatriyas of old is by way of exhortation, not to wage actual warfare against the Government but to fight the constitutional battle for Home Rule. There are also *allusions* to certain social customs in the East and in the West which are certainly not in good taste and are calculated to arouse class hatred between Englishmen and Indians. There are words which might also be liable to be understood as suggesting that Government

has encouraged dissensions among people of different religions and castes in the country.

Extract No. 13 contains the suggestion that the reason why Bal Gangadhar Tilak of Bombay who had instituted an action in the English Courts against Sir Valentine Chirol was refused a passport by the Bombay Government was that he might not go to England to prosecute his case. I find nothing to warrant such a supposition which, if well founded, would be greatly to the discredit of the Government of Bombay.

The last article, Extract No. 14, contains a statement that—

"The education of Indian Boys is in the grip of foreigners who impose upon them a crushing curriculum, that some of the Professors and Teachers often treat them with the greatest rudeness and address them in the most insulting terms and that they have no regard to their miserable poverty nor try to improve their indecent and insanitary surroundings"

It is written by way of protest against a suggestion that the actions of educational authoritie should not be criticized in the public press. The language used is very strong and it is not right to cast any blame on the English Professors and Teachers for the "indecent and insanitary surroundings of the students." But I do not think that the passage read in the light of the context can be said to have a tendency to bring the Government into hatred or to excite feelings of class hatred, within the meaning of clause (c).

The difficulties of a foreign Government constituted as it is in this country are necessarily very great. It is not to be expected that it should be in complete touch with the genuine sentiments, feelings and aspirations of the people; the information that it can command must at best be secondhand and is often likely to proceed from interested sources. With the best of intentions it is liable to make many mistakes, sometimes serious blunders. These and other inherent difficulties of the Government as at present constituted may or may not justify the demand for Home Rule, and it may be that Self-Government is necessary for the full growth of the people. But the law does not permit a publicist discussing the Government's actions and failures to impute base and dishonourable motives.

Mrs. Annie Besant has assumed full responsibility for everything that appeared in her paper. I am prepared to acquit her

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of any wilful attempt to disseminate disaffection or hatred against the Government of the country or to create feelings of hatred against any class of His Majesty's subjects. But I have been unable to hold that some of the extracts from the publications in the *New India* cited before us may not have such a tendency.

The application must be dismissed.

AYLING, J.

AYLING, J.—This is a petition presented under section 17 of the Press Act (I of 1910) by Mrs. Annie Besant, Editor of the newspaper *New India*, and keeper and printer of the "New India Printing Works." In it, she applies to this Court to set aside an order of forfeiture passed by the Madras Government on 25th August 1916 in respect of a sum of Rs. 2,000 deposited by her as security under section 3 of the Act for the said Press, and of all copies of the *New India* newspaper. It may be mentioned that the forfeiture of the copies of the newspaper appears not to have been enforced by actual seizure: and that the publication of the paper has been continued on deposit of further security under section 5 of the Act.

The order of forfeiture was passed under section 4 of the Act, which empowers the Local Government to take such action when it appears to the Local Government that the Press has been used for printing or publishing any newspaper containing any words . . . "Which are likely or may have a tendency directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise, (*a*) to incite . . . to any act of violence . . . (*c*) to bring into hatred or contempt . . . *the Government established by law in British India* . . . or any class or section of His Majesty's subjects in British India or to excite disaffection . . . towards the said Government . . . " or " (*e*) to encourage or incite any person to interfere with the administration of the law or the maintenance of law or order."

There are two explanations to the section, one of which is of considerable importance and will be dealt with in due course.

Section 17 of the Act allows any person interested in the property thus forfeited to apply to the High Court to set aside such order (of forfeiture) "on the ground that the newspaper . . . in respect of which the order was made did not contain any words . . . of the nature described in section 4 (1)."

Section 18 provides for the constitution of a Special Bench of the High Court composed of three Judges to hear and determine such application.

Section 19 empowers the Special Bench so constituted to set aside the order of forfeiture, if it appears that the words contained in the newspaper in respect of which the order was made were not of the nature described in section 4 (1); and further provides that where there is no majority of the Special Bench which concurs in setting aside the order of forfeiture, the order shall stand.

It will thus be seen that we are a Special Tribunal constituted under a special enactment for a single specific purpose—namely to determine whether certain words contained in the newspaper (and specified in the order of forfeiture) are or are not of the nature described in section 4 (1). This was the conclusion arrived at by a Full Bench of the Calcutta High Court similarly constituted in *In re Mahomed Ali*(1) with which I respectfully agree.

Much of the argument before us has been devoted to the question of whether and to what extent we should concur in the conclusions to which those learned Judges have arrived, or the further question of the proper construction of section 4 (1). The Advocate-General has contended that we should adopt them in their entirety while the petitioner argues that the language of the section defining the nature of the words which would justify forfeiture has been misunderstood and given far too wide an effect.

I do not propose to follow this argument in detail As at present advised, I am by no means satisfied that the interpretation of the learned Judges is not too wide. I can find nothing in the Act which seems to me to throw on the applicant the onus of proving that the words, which are made the ground of forfeiture, do not fall within the scope of the section I certainly do not think this is to be deduced (as has been suggested) from the words of section 19, which empowers the Bench to set aside the forfeiture if it appears that they do not. Whether the words are likely or may have a tendency to produce certain results must be determined primarily by inference from their

(1) (1914) I.L.R., 41 Calc., 466.

own nature. The words themselves form the main evidence in the case: and I do not think the Act throws any onus on either side. I am not satisfied that the words of section 4 ("are likely or may have a tendency") "embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility on the other" or that the wording of the section is so all-embracing that even a person "acting in the highest interests of humanity and civilisation" is confronted with an almost hopeless task in showing that the words he has used do not fall within it. Whether "an attack on that degraded section of the public which lives on the misery and shame of others would come within this widespread net" is a question, the decision of which we may in my opinion well postpone until we are asked to decide it. At present we are only concerned with the question of whether the words of the articles before us do or do not come within the mischief of the section: and if, as I think, they do without placing any startlingly wide construction on the section, it is unnecessary for us in this case to decide to what lengths the section might be ingeniously stretched. That the wording of the section is very wide is, however, undeniable; and in some respects it clearly goes beyond the provisions of the Penal Code. The governing words "are likely or may have a tendency" undoubtedly leave the question of intention quite immaterial: and confine our attention to the natural effect of the words without reference to what the writer meant, or wished to be understood.

To this however, there would seem to be a very important exception in Explanation 2 of the section which runs:—"Comments expressing disapproval of the measures of the Government or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the Administrative or other action of Government or of any such Native Prince or Chief of the Administration of Justice in British India without exciting or attempting to excite hatred, contempt or disaffection do not come within the scope of clause (c).' The learned Advocate-General has argued that even here the element of intention is absent; and that "attempting to incite" is equivalent to "tending to excite." The wording of the explanation which is apparently taken from section 124-A, Indian Penal Code, is not altogether happy. Comments may

excite hatred, etc., but it is difficult to see how comments (*i.e.*, the words used) can *attempt* to excite. The word "attempt' seems to presuppose a sentient being and one animated by a particular intention. I am not disposed to accept the Advocate-General's argument in this respect; and shall consider the extracts placed before us from the point of view that in the case of comments on the measures of Government an intention to excite hatred, contempt or disaffection is necessary to bring them within the scope of clause (c) of section 4 (1) The intention is, of course, deducible from the words of the extracts themselves.

Much argument has also been devoted to the meaning to be attached to the words "Government" or "Government established by law in British India" as used in the Act: and to the words "contempt or hatred." The term "disaffection" is defined in section 4 (1), Explanation 1, which says: "In clause (c) the expression "disaffection" includes disloyalty and all feelings of enmity."

As regards the first point, petitioner asks us to interpret the words "Government established by law in British India" as indicating nothing more than the supremacy of the Crown and the British connection. That is to say, as long as the writer or publisher of an article proclaims his loyalty to the King-Emperor, and his desire that India should still remain a part of the British Empire, he may attack to his heart's content the Government of India or the Government of Madras and hold them up to hatred and contempt, without coming within the scope of the section; and the same interpretation would presumably apply to section 124-A, Indian Penal Code, the wording of which is practically identical. To give effect to such an interpretation would go far to render the task of governing India impossible; and I have no hesitation whatever in deciding that it is not the one intended by the authors of this Act, or one which we should adopt. If anything of the kind were intended, the words used would have been chosen to indicate, not the Government, but the form of Government in so far as it embodies the British connection. We must assume that the term "Government" in Explanation II to sub-section (1) is used in the same sense as in clause (c) of the sub-section and if

petitioner's interpretation is correct to speak of the "measures of the Government" is absolutely meaningless.

The true interpretation is to be found in section 3 of the General Clauses Act (X of 1897) which governs the Press Act as regards definitions of terms. It is sufficient to quote the following sub-sections :—

(21) Government or the Government shall include the Local Government as well as the Government of India.

(22) "Government of India" shall mean the Governor-General in Council or, during the absence of the Governor-General in Council from his Council, the President in Council or the Governor-General alone as regards the powers which may be lawfully exercised by them or him respectively.

(29) "Local Government" shall mean the person authorized by law to administer executive Government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner.

These definitions (which it may be remarked are substantially identical with those given in sections 16 and 17, Indian Penal Code) govern the Press Act "unless there is something repugnant in the subject or context" (*vide* section 3, General Clauses Act). I can find nothing repugnant in the section or Act. The addition of the words "established by law in British India" seem to be intended to emphasize the fact that it is the Government existing at the time that is sought to be protected from attacks of the kind forbidden and to exclude the very plea now raised by petitioner.

As regards the words "hatred" and "contempt" we are asked by petitioner to hold that only such hatred and contempt are contemplated in clause (*c*) as would lead to the commission of the crimes referred to in the other clauses of the sub-section, *e g.*, murder, violence, resistance to the law, intimidation of public servants and others.

I cannot find a shadow of justification for such an argument. Hatred and contempt are perfectly intelligible words: but it is impossible to say what degree of hatred and contempt would be sufficient to lead different people to commit different crimes, and there is no ground for giving them such a limited meaning. No case has been quoted to us in which any Court has applied such a limitation even in construing the old section 124-A, Indian Penal

Code, before the amendment of 1898. The word therein used was "disaffection" and I need only refer to the exhaustive discussion of the matter by STRACHEY, J., in *Queen-Empress* v. *Bal Gangadhar Tilak*(1). "Disaffection" (which word is also found in the section we are construing, in addition to "hatred" and "contempt") was held to mean hatred, enmity, dislike, hostility, contempt and every form of ill-will towards the Government. The amount or intensity of the "disaffection" was held to be absolutely immaterial except as regards the question of punishment. The learned Judge says:

"I am aware that some distinguished persons have held that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion that view is absolutely opposed to the express words of the section itself which as plainly as possible makes the exciting or attempting to excite certain feelings and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance the test of guilt"

The learned Judge's charge to the jury in that case contains an exhaustive discussion of the law of sedition; and I select it for quotation and rely on it with the more confidence because it was substantially approved by their Lordships of the Privy Council in dismissing an appeal specially allowed against the conviction in that case and based very largely on the ground that there had been misdirection on this very point of the meaning of the term "disaffection."

It is not suggested that the subsequent alteration of the law was in the direction of relaxation or less stringency. Section 121-A, Indian Penal Code, was practically recast so as to make it clear that STRACHEY, J.'s interpretation of the law was correct (*vide* Mayne's Criminal Law of India, fourth edition, page 298). Nor is it suggested that a more lenient construction should be put on the section with which we are concerned than would be applied if petitioner were on her trial for a criminal offence.

The learned Judge's remarks are also of the greatest value in dealing with Explanation 2 to section 4 (1). The explanation to the old section 124 A, Indian Penal Code, with which he was dealing was admittedly susceptible of interpretation much more

(1) (1898) I.L.R., 22 Bom., 112.

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favourable to an accused person than the explanations to section 4 (1) of the Press Act, or those to the present section 124-A, Indian Penal Code. STRACHEY, J., however says:

"A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people, then he is guilty under the section, and the explanation will not save him."

The words "dwelling adversely on its foreign origin and character," "imputing to it base motives" or "accusing it of hostility or indifference to the welfare of the people" all have great importance in relation to certain of the articles, which we have to consider. I need hardly say that the first phrase (dwelling adversely on its foreign origin or character) must not be understood in too comprehensive a sense, or divorced from the context.

All unfavourable criticism of a Government's constitution, policy or measures must necessarily tend to arouse dissatisfaction. So far, there is nothing illegitimate. No enactment of the Government of India with which I am acquainted seems to be intended, or reasonably interpreted, could be used to stifle such criticism. But between dissatisfaction on the one hand, and hatred, contempt and disaffection on the other, there is a vast gulf.

It is open to any one to draw attention to the non-Indian elements in the Government of India, and to argue that these impair the efficiency of that Government, and that it would be to the public advantage, if they were replaced by Indian elements. That is legitimate criticism. But it is not legitimate to go

farther and to use the existence of the non-Indian elements of Government as a means of exciting hatred, contempt and disaffection against the Government—as STRACHEY, J., puts it, to hold up the Government to hatred and contempt by dwelling adversely on its foreign character and origin. It all depends on the manner in which and the object with which the circumstance is used in argument.

With these preliminary remarks, I shall now proceed to a consideration of the various aricles in *New India* which have been made the basis of the order of forfeiture. They are in all twenty in number, though seven of them have been grouped together under the heading of Extract No. 4 (*a*—*g*) in the list appended to the order of forfeiture.

In addition to these articles, a number of others culled from various issues of *New India* between 1st August 1914 and the date of the order of security, have been filed, on both sides. They are relied on partly under section 20 of the Press Act as "aid of the proof of the nature or tendency of the articles specified as the basis of forfeiture," and partly as illustrating the policy of the newspaper and in that way, the probable intention of the petitioner where such intention is relevant.

I have considered these articles but find myself unable to derive material assistance from them, one way or the other. In no single case has any attempt been made to show such a connection between one of them and any of the specified articles as would enable a Court to say that a perusal of the one threw appreciable light on the nature and tendency of the other. As regards intention, it seems to me most unsafe to judge of the intention of petitioner in publishing the specified articles, by reference to other articles previously published at long intervals of time, and mostly in other connections The additional articles filed on petitioner's behalf are, as she explains, intended to show that she has upheld the British connection and the authority of the Crown (as distinguished from the Government of India), and that in certain instances she has approved of the action of Government. I have already dealt with the distinction she seeks to draw between the Crown and the Government; and an occasional instance of praise of Government has no bearing on the tendency and extremely little on the intention (where such is relevant) of the specified articles. The articles filed by the

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Advocate-General stand in much the same position. It is sought to prove, by reference to other articles in the paper, that the specified articles were published with the intention of exciting hatred, contempt or disaffection. I prefer to base my conclusions on the actual articles which have to be construed. I do not say these other articles are irrelevant; I have considered them to the best of my ability, but have found them of so little assistance that I do not propose to lengthen my judgment by further reference to them, and shall confine my remarks to the articles specified in the forfeiture order.

Extracts Nos. 1 and 2 have some similarity and may conveniently be dealt with together They purport to be letters from correspondents published on the 7th and 8th June 1916 respectively with reference to the order of the Chief Presidency Magistrate, dated 22nd May, demanding security from petitioner under section 3 (1) of the Press Act. It is not suggested that the fact that they are letters of correspondents makes any difference, and *Apurba Krishna Bose* v. *Emperor*(1) would be clear authority against such a proposition even in a criminal prosecution. But it is contended that they are comments on the measures of Government and fall within Explanation 2. If one were inclined to take a narrow view of the explanation it might be difficult to bring the first extract within it. Extract No. 1 is only a comment on the security order in the sense that it has apparently been evoked by the latter. The nature of the order is not even referred to, except incidentally in a single passage towards the end. I shall however treat both letters as comments on Government measures, and merely consider whether they satisfy the requirement indicated in the words "without exciting or attempting to excite hatred, contempt or disaffection." Extract No. 1 begins by remarking that "out of evil comes good": and after referring to the benefits indirectly arising from the tyranny of the Stuarts, Aurangazebe and Lord Curzon, says that "out of the blind hostility evinced by the Madras Government towards *New India* our ultra-moderate begging politicians are bound to learn the unwisdom of relying too much on the sympathy of the bureaucracy towards any of our truly higher aspirations." The writer then goes off at a

(1) (1908) I.L.R., 35 Calc., 141.

tangent and proceeds to speculate on the motives which have prompted Government's action. He finds no difficulty in discovering them. "We can well guess how the journal (*New India*) has offended the bureaucracy." "The strong plain-speaking of *New India* has grown intolerable for the over-delicate, self-adulent flattery-loving ears of Anglo-India." "When *New India* mercilessly exposes any and every vagary of the Englishman in this land that it can come across, the Anglo-Indian blood boils with all the uncontrollable rage of the most selfish vested interest." This is clearly indicated as the cause for the Government's action. "The real issue may indeed be expressed in one small phrase 'Anglo-India *versus* New India' —or as it is put further on 'the attempt, bound to be futile, is made by Might to overawe and put down Right.'"

The characteristic feature of the article is that it treats the "Bureaucracy," "Anglo-India," and the "Madras Government" as synonymous. Certainly no attempt is made to distinguish Government from the Bureaucracy and Anglo-India, and blind hostility is specifically attributed to the former. The motive suggested as animating all three is of the basest—the protection of selfish vested interests, and the resentment at plain-speaking of flattery-loving ears.

Extract No. 2 follows much the same lines. The first three paragraphs and the first part of the fourth are unobjectionable—at any rate not beyond the limits of fair comment. The writer refers to the fact that *New India* has condemned anarchy, and has not advocated the severance of the British connection and observes that the drastic legislation was very drastically applied, the maximum security being demanded without warning or reasons assigned. The term "inhuman action" is of course very inappropriate to a measure of the kind referred to: but had the writer stopped here, I should certainly hold that the letter did not come within the mischief of the section. The letter, however, proceeds :

"What private cause has made the Government stoop to such a barbarous atrocity we know not. But this we know full well: the much-hated and ever-mischievous bureaucracy discountenances outspoken criticisms and no good Government should be afraid of criticism. We also know that the Government have a spite against the Editor of *New India* for she is the head of an institution which

works against the missionaries and the missionaries are the parasites of the Government."

Further down it proceeds:

"News of Prussian aggression and German atrocity are communicated to India to bewilder the Indian imagination. They are committed, under pressure, during the war, under passion. They are common. But what does this mean? This perpetration of atrocity in civic life, in peaceful times, in a peaceful province? This thunder during this sunny day sets the world a-wondering."

Apart from the grossly exaggerated language applied to the measure, which is the subject of comment, and which it is obviously impossible to justify, what I attach particular importance to is the discussion of motive. "Private cause" is hinted at: and Government is said to have a spite against petitioner for working against the missionary parasites of Government.

No one could write these passages, without the intention of exposing Government to the hatred and contempt of its subjects, and it is not questioned that in all cases the intention of the writer must be ascribed to the publisher.

Neither of these letters can claim the protection of Explanation 2; and each falls to my mind beyond question within the scope of section 4 (1).

I shall next take Extract No. 6—an article entitled "Prussianism in India." The writer begins by referring to the "well-known fact that in India we live hemmed in on all sides by repressive measures. The Press Act, the Seditious Meetings Act, the Official Secrets Act, the Defence of India Act, not to mention several despotic measures of early days—potential of mischief and capable of retarding democratic progress—are all there in the hands of a powerful bureaucracy to be used as it thinks fit." He says they have been used, and tend to terrify people. So far, it may be treated as legitimate though perhaps hardly reasonable comment: but the article then proceeds:

"These iniquitous measures in the hands of people with vested interests of their own, naturally assume a shape and form all too ghastly for the children of the soil, and day and night exert a baneful influence over them engendering at once fear and hatred."

Here we have the same characteristic. Not only are the measures of Government described in language too exaggerated

to be explained merely by an honest desire to criticise: but the motives of Government are impugned and its actions ascribed to a desire to protect "vested interests."

There is a great deal more in the article but while it certainly contains nothing to qualify or soften the passage above quoted, there is nothing to add materially to it and I pass it over.

With this may be taken Extract No. 10 which is short enough to be given *in extenso*:—

"What does internment mean, this power which is in the hands of Governors-in-Council, and is strengthened by the Offence (Defence of India?) Act? It means that by a mere arbitrary exercise of power, any man or woman may be arrested and imprisoned within an area laid down in the *lettre de cachet.* No trial can be claimed: no evidence is published: no reason is given The property of the victim is seized—a punishment reserved by the ordinary law for the highest crimes—he is rendered penniless, no communication may he hold with any friend that does not pass under the eye of an enemy. He is subjected to the grossest personal indignity, and has no redress. And all this degradation is inflicted on him at the arbitrary order of a small group of four men, who may be his personal enemies, who are his enemies in thought and belief. And we run the risk of this treatment if we dare to advocate reforms in the Government of India, which would give to Indians the justice and the liberty which the meanest subject of the Crown enjoys in Great Britain."

The salient feature again is the imputations of motive. The "four men" referred to can only be the Governor of a Presidency and his members in Council, "His Excellency the Governor in Council": and they are described as a group who may be the personal enemies of the individual interned and who are his enemies in thought and belief.

What is this but an attempt to excite hatred against Government?

I pass on to Extract No. 13 This is an article commenting on the action of the Bombay Government in calling on Mr. B. G. Tilak to furnish security for Rs. 40,000 to be of good behaviour under section 108, Criminal Procedure Code. The action was of course taken by a Magistrate: but the article treats it, and, I do not say unreasonably, as taken under the orders of Government. Here again there is no attempt at legitimate comment or criticism: the writer goes at once to the motive, which he ascribes

as dictating the measure. Mr. Tilak is described as "again in the toils of his enemies"—which can only mean Government—and the object of the demand of security is suggested as a desire to save Sir Valentine Chirol (against whom Mr. Tilak had brought a Civil Suit in England) from being brought to account. Petitioner admitted in answer to a question by me in open Court that this was the suggestion and added that it was a warranted inference. This is a specific imputation of the basest motive against the Bombay Government and could only be dictated by a desire to arouse hatred, contempt and disaffection against it.

Extract No. 11 is of a slightly different nature It is called "an outrage in Calcutta" and is a comment on the arrest of the Assistant Editor of the *Bengalee* and the search of the Editor's safe. There is nothing to indicate whether this was under any special enactment or was under the ordinary Criminal Law. Petitioner admitted in Court that it might be under the latter. No special motive is assigned (unlike the cases previously dealt with), but the writer after expatiating on the blameless and respectable life of the Assistant Editor says:

> "The arrest is legal, doubtless, but it is truly unlawful, the breaking of the sacred Law of Justice which holds society together. When injustice is perpetrated, when crimes are committed legally, when innocence is no protection, and harmless men are treated as criminals, then we live in a condition of anarchy, no matter what legal sanction may cover the wrong-doer. 'Civilization' does not protect us; we should be better off in a state of savagery, for then we should be on our guard, we should carry arms, and protect ourselves. We are helpless; we pay taxes to be wronged."

It seems to me impossible for any one to use language such as this without attempting to arouse hatred, contempt or disaffection against the Government. It was used absolutely without excuse, so far as appears. In every country in the world innocent people are liable on occasion to be arrested or to have their safes and houses searched on suspicion. Can any writer not actuated by a desire to arouse hatred and disaffection describe such a state of affairs as anarchy, worse than savagery or say "we pay taxes to be wronged."

Extract No. 9 is an article called "By what it feeds on." It has nothing to do with Government and is not covered by Explanation 2. It was apparently elicited by a suggestion of

an Anglo-Indian paper, that petitioner's publications may not be allowed to use the mails. It is simply an attack on Anglo-Indians as a class. (The term Anglo-Indian is used here and I think in most, if not all, the articles in the old-fashioned sense of an Englishman living in India.) The comparison is between the Englishman and the Anglo-Indian. The writer says:

"The Englishman comes here with all his brave and free instincts growing within him. He is given irresponsible power over other men, he is courted, treated with subservience by his elders and superiors because of that power, and he gradually deteriorates, and becomes the haughty, tyrannical Anglo-Indian. What Englishman could seek to check a constitutional propaganda, to punish outspoken criticism? But an Anglo-Indian, not content with the exercise of the Press Act against Mrs Annie Besant, and the threat of throwing her into gaol and fining her if she dares to *step into* Bombay Presidency, asks that her '*publications*' *may not* be allowed to use the mails. He wishes to revive the days in which his forefathers suffered for freedom of tongue and pen, when their ears were cropped off and they were pilloried for opposing unjust laws and royal tyranny."

I do not regard this article as anything like as bad as those with which I have already dealt; but I think it is likely to bring Anglo-Indians as a class of His Majesty's subjects into hatred and that it must be held to fall within the scope of clause (c) of section 4 (1). It is difficult indeed to justify such a general attack on a class by a single article in a journal however representative of that class.

Extract No. 12 is entitled "Three ways to Home Rule;" *and is taken from the Commonweal. It is a* very long article, and much of it is not open to serious attack. I do not agree with the Advocate-General that reasonably construed as a whole, it is an encouragement or incitement to violence, or falls under either clause (a) or (e). But it seems to me to display again the desire to arouse hatred against both the Government and the Anglo-Indian class. The writer says: "All efforts that Indians make to assert their own rights to gain liberty for the motherland, to win Home Rule for themselves, are resented, and our opponents have recourse to repression and Prussianism."

Anglo-India and the Government are again treated as synonymous. The usual motive is assigned "the vested interests of her (Great Britain's) sons in this land drive out of them their

love of liberty and push them on to mean and undesirable means of action."

Further on the foreign character of the Government is emphasized: "If we are to be tyrannised and lorded over, better that Indians do it—be they Brahmanas or Muslims—than that foreigners do it."

"Indians, remember it: it pays the bureaucrat and the Anglo-Indian, whatever his sub-caste, trader, missionary or administrator, to throw the apple of discord into the midst of a friendly gathering of Hindus and Muslims,—Brahmanas and Non-Brahmanas, Hindus and Indian Christians, Eurasian, and Indian Christians, etc. 'Divide and Rule' has been well observed by the ruling hierarchy in this hapless land, as Captain Gervais Lyons pointed out—(*Afghanistan*, published by Messrs. Higginbothams, Madras, '*with the official* sanction of the Army Council'), and we are traitors to our motherland her peace and prosperity if we allow these aliens' pranks to mar the harmony of our corporate life and labour"

The article is not protected by Explanation 2 and seems to *me to fall under clause (c).*

Extract No. 14 again is a comment, not on any measures of Government, but on a speech of the Honourable Mr. V. S. Srinivasa Sastriyar objecting to the intervention of newspapers in educational disputes. In combating Mr. Srinivasa Sastri's views the following argument is used:—

"Even if the education of Indian boys were in Indian hands, Mr. Sastriyar's position would be impossible; but when we remember that they are in the grip of foreigners, who impose upon them a crushing curriculum in a strange language, who force them to specialize at an age when their natural bent is not discernible, who have no regard to their miserable poverty, nor try to improve their indecent and insanitary surroundings, and who, when professors or teachers, often treat them with the greatest rudeness and address them in the most insulting terms—when this is the present condition of affairs, it is only the feeling that some sympathy is to be found in the press that saves the students from despair."

Petitioner explains that this is simply a criticism of the educational policy of Government. So much might be said of the crushing curriculum and the early specialization. But the reference to the neglect of the miserable poverty of the boys

and their indecent and insanitary surroundings seems to me to go further and to attack Government itself; while the phrase "in the grip of foreigners" is one only calculated to arouse hatred. In this as in the last mentioned articles the foreign character of Government is utilized in what I have tried to distinguish as the illegitimate manner.

Extract No. 7 is of a very different nature to all the rest, and its construction with reference to section 4 appears to me to present peculiar difficulty. It is headed "The Latest Political Crime in Calcutta and its Moral" and is dated 7th July 1916 The crime in question appears to have been the assassination of a Bengali Police officer by anarchists and the writer discusses the character of the assassins, the light in which they are regarded by the public and the best way to deal with them so as to prevent the recurrence of such crimes. The Advocate-General seeks to bring the article under each of clauses (*a*), (*c*) and (*e*). I can find nothing in it coming under clause (c) and clause (*a*) seems to me less applicable than clause (*e*): I shall therefore consider whether the words of the article "are likely or may have a tendency directly or indirectly whether by inference, suggestion, allusion, metaphor, implication, or otherwise, to encourage or incite any person to interfere with the administration of the law or the maintenance of law and order."

In this case, intention is entirely immaterial: we have only to consider the natural tendency of the article as it would present itself to an average reader.

The writer begins by emphasizing the failure which has hitherto attended all attempts to suppress, detect or punish these political assassinations. He pays a well-merited tribute to the courage of Bengali Police officers. He repudiates all sympathy with the crime on the part of himself or other reasonable Indian politicians. He then proceeds to consider the psychology of the criminal and the best means of dealing with him. This is the important part of the article. The writer passes to and fro from censure of the crime to what I think I may not unfairly call admiration of the criminal. He emphasizes the "quiet and even courageous determination of the assassins." He says: "Heroism may, according to some people, be too noble a word to apply to men guilty of such ignoble assassinations; but that there was a kind of courage in any case—an utter disregard of personal

consequences even in these criminals cannot be denied." "Whence comes this determination?" He ascribes it to the fact that they are not ordinary or hardened criminals but idealists of a type. He says that for this reason people pity them "as youthful and misguided enthusiasts" just as they pity a man who kills a faithless wife or a treacherous friend. The ideal they hold is that of seeing their people occupy a legitimate place in modern history and politics. He concludes that punishment and repression are not the right remedy for this evil: but a recognition by Government and the general public of their ideal (above referred to) as containing nothing wrong or criminal. "We shall then be able to convince these young men of the folly and futility of their ways."

Now I am very anxious to do no injustice to the writer but I can only understand his article as amounting to this. The political assassins are courageous young men animated by an ideal with which every Indian must sympathize, and with which no reasonable man of any other race could quarrel. The Government and public should recognize them as such, and in place of punishing them, endeavour to convince them of the "folly and futility" of their ways (i.e., the assassination of their heroic fellow-countrymen in the Criminal Investigation Department). This seems to me most pernicious writing: and writing which must tend to encourage political assassination by removing public detestation of such crimes. *New India* is presumably read by numbers of excitable young men animated (and not unnaturally) by the same ideal which the writer ascribes to the assassins, but which it is impossible for any right-minded person to connect with their crimes. Such young men are practically told that the assassins are pursuing the same ideal as themselves with singular courage and disregard of self: and that such criminals should not be punished but convinced of the folly of their ways. The article presents the assassins to such young men (and to the public generally) in a far more favourable light, than any ordinary person would have viewed them in: and although it may not amount to incitement, it certainly seems to me to give encouragement to the commission of crimes which undoubtedly fall within clause (*e*) of section 4 (1).

As I have already said we have nothing to do with the intentions of the writer. He may be perfectly sincere in

reprobating the crime, while sympathizing (as he undoubtedly does) with the criminal. We have merely to consider the effect of his writings.

I can only conclude that this article falls within clause (e) of section 4 (1).

I have now dealt with 10 of the 14 extracts all of which seem to me to fall in one way or another within the mischief of section 4 (1) of the Act. I propose to briefly dismiss the others. It is not necessary to find that all the articles specified are of the same nature: and the remaining articles are such as, by themselves, to form at best a very doubtful basis for an order of forfeiture.

Extract No. 8 (*Ave Cæsar*) is a protest against the order of Bombay Government excluding petitioner from that Presidency, and I do not feel satisfied that we should be right in inferring a desire to arouse hatred simply from the single use of the term tyranny and the reference to the Royal Arms.

Extract No. 5 is taken from the *Herald*, a London newspaper: and is an impassioned defence of conscientious objectors to military service. I fail to see how it has any tendency of the nature specified in clause (a), (c), or (e) under all of which the learned Advocate-General would bring it.

Extract No. 3 is a comment on a serious dacoity in a village in Bhadrachalam taluk of the Godavari Agency. It is argued that the helplessness of the villagers to protect themselves is due to the operation of the Arms Act. As a matter of fact, it is now admitted that the Arms Act does not apply to the Agency tracts: and so had nothing whatever to do with the case under discussion. Nevertheless, the article is a comment on the operation of an Act and seems to me to fall under Explanation 2. It is a foolish article but I am not prepared to say that it was written with the intention of exciting hatred or disaffection.

Extract No. 4 series consists of seven letters and articles dealing with trouble that has recently arisen in Madras owing to a popular idea that the reservation of railway compartments for Eurasians and Europeans had been declared illegal. There is very little in the series except an editorial note appended to a letter No. 4 (d). The correspondent had stated that he entered a reserved compartment but left it when ordered to do so by the stationmaster and threatened with prosecution. The editor says: "But why did you get out? It is this submission to

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illegality that causes half the troubles from which the Indians suffer."

Now the sole question is what is the natural result and tendency of those words and how are they likely to be understood by the readers of the paper.

Petitioner explains that all she meant was that the correspondent should not have got out until the railway officials had used such show of force, as would justify him in bringing a test case to question the legality of the reservation. If that were the meaning of the words, I do not think they could fairly be brought within any of the clauses of section 4 (1). But is that the sense in which they would be understood by the ordinary reader; I cannot find anything in the series of articles remotely suggesting the testing of the legality of the Railway Company's action in this way. On the contrary the three preceding articles all speak of the illegality of the reservation as if it were beyond question. It is clear from the series that there was a great deal of popular excitement at the time which culminated in a riot [*vide* Extract No. 4 (*a*)]. It seems to me that it was the duty of any newspaper in counselling such modified resistance to the Railway officials as would afford basis for a test case to make its meaning clear. Otherwise there was every danger of the words being construed as advice to resist by all possible means any attempt at eviction and if such were the tendency of the words they would fall within clause (c).

I am inclined to hold that the editorial note to this article Extract No. 4 (*d*), does fall within the scope of section 4 (1): but that the rest of the series do not.

On the findings I have set forth above, I am of opinion that the petition should be dismissed and the order of forfeiture should stand.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The Press from which *New India* is printed has been in existence for over half a century. In it the *Madras Standard* was printed till July 1914. Mrs. Besant purchased the printing press as well as the good-will of the *Madras Standard* on the 14th of that month. From the 1st of August 1914, the name of the paper was changed into *New India*. Mrs. Besant made the usual declaration under section 4 of Act XXV of 1867 on the 2nd of December 1914. It is admitted that no security was demanded from the petitioner at

that time. On the 22nd of May 1916, the Chief Presidency Magistrate, Madras, informed her: "I hereby cancel my order, dated 2nd December 1914, dispensing with security in respect of the 'New India Printing Works' and require, under section 3 (1) of Act I of 1910, to deposit security for Rs. 2,000." It may be taken from this notice that the Chief Presidency Magistrate dispensed with the deposit of security at the time of the declaration and that he recorded his reasons under the proviso to section 3 of the Press Act when doing so. The security was furnished, and the paper continued to be published as before until the 28th of August 1916, when the Local Government acting under section 4, clause (1) of the Press Act, declared that "the security deposited in respect of 'The New India Printing Works, Madras' and all copies of *New India* wherever found to be forfeited to His Majesty."

The present petition was filed under section 17 of the Act to revise the said order. The first point taken by Mrs. Besant was that the order of the 22nd of May demanding security was illegal. Although there is a separate petition complaining against the levy of the security, the question has been raised in this case, presumably on the ground that if the Magistrate was wrong in his demand there was nothing to forfeit and that consequently the order of the Government was void and of no effect. I have discussed the legality of the demand at some length in my judgment in *In re Mrs. Besant*(1); I adopt the conclusion therein come to. The further point is, that even if the demand of security was illegal, whether that question is open in an application presented under section 22 of the Press Act. The answer to this question depends upon the construction to be placed on the section. That section lays down in general terms that a declaration shall be conclusive evidence as against all persons that the forfeiture has been incurred. I cannot accept the learned Advocate-General's suggestion that this clause must be read as declaring that the forfeiture has been legally made. It only enacts that the declaration is notice to all persons that the Government have declared the forfeiture. But the matter does not end here. The

(1) (1916) I.L.R., 39 Mad., 1164 at pp. 1185 to 1193 *infra*.

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I am inclined to hold that the editorial note to this article Extract No. 4 (*d*), does fall within the scope of section 4 (1): but that the rest of the series do not.

On the findings I have set forth above, I am of opinion that the petition should be dismissed and the order of forfeiture should stand.

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worded phrases have to be subjected to some pruning and adjustment. Bearing these propositions in mind, I am of opinion that proceedings under section 3 are not subject to our revisional jurisdiction under sections 17 and 22 of the Press Act.

The next point relates to the construction of section 4. Before dealing with the arguments on behalf of the Crown, I shall consider a preliminary objection raised by the petitioner. It was broadly contended at the outset that the whole Press Act was *ultra vires* of the Indian Legislature. But when it was pointed out that the petitioner herself invoked our interference under section 17 of that Act, she contended that section 4 of the Act at least was *ultra vires*. It was not Mrs. Besant's case that the Press Act offends any Act of Parliament. Her point was that the provisions of section 4 affected "the unwritten laws and constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." She argued that to declare property to be forfeited without first obtaining the decision of the Civil Courts in that behalf was an act of confiscation which interfered with the allegiance of the subject to the Crown. Mr. Justice NORMAN's observations in the *Wahabi Case* [*In the matter of Ameer Khan*(1)] were relied on. The learned Judge, after referring to the Great Charter and the Bill of Rights, said:

"Now if it be true, as laid down in *Calvin's Case*(2), that *protectio trahit subjectionem et subjectio protectionem*, that allegiance and protection are reciprocally due from the subject and the sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects . . . No man can study the history of England, or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II, without seeing that on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend in no small degree the allegiance of the subjects. It would be a startling thing to find that rights of so sacred a character could be taken away by an Act of the subordinate legislature. It would be strange indeed if a great

(1) (1870) 6 B.L.R., 392. (2) 7 Rep., 1.

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popular assembly like the Parliament of England had put into the power of a legislature which has not, and in the nature of things could not have, any representative character, the power of abrogating or tampering with such fundamental laws."

The question in that case related to the right of the High Court to issue a writ of *Habeas Corpus* to produce a person detained in custody. It was held that this right of the subject to move the High Court was not taken away by any Act of the Indian Legislature. I do not think the observations above quoted can affect the present case. As Lord Justice BUCKLEY pointed out in *West* v. *Gwynne*(1) there is no presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, according to the learned Lord Justice, interfere with existing rights. An Act of the Legislature in this behalf cannot be regarded as interfering with the allegiance of the subject. MARKBY, J., said in the appeal from the decision of Mr. Justice NORMAN in the same case *In the matter of Ameer Khan*(2), that an Act of the Legislature does not affect the prerogative of the Crown and conversely the allegiance of the subject merely because it affects the liberty of the subject. The foundation of all criminal laws in India would be shaken to its root, if it is held that the legislature has no power to enact laws depriving the subject of his liberty. So also with reference to property. It is possible to argue—I do not wish to commit myself definitely to an opinion on this matter—that any Act of the legislature which permanently deprives the subject of his property without vesting in a judicial tribunal the power to pronounce on the legality or justice of the step taken may be said to strike at the root of the allegiance due from the subject. This question requires a great deal more argument than has been addressed to us; but under the Press Act, section 4, the subject is not deprived of the right of showing that the forfeiture has not been incurred. Instead of taking the decision of the Court first and then declaring the forfeiture, the process has been reversed; such a procedure cannot be said to affect the allegiance of the subject. The Indian Legislature has enacted other provisions of a similar nature, *e.g.*, sections 88 and 89 of the Code of Criminal Procedure. I am of opinion that section 4 is not

(1) (1911) 2 Ch., 1 at p. 12. (2) (1870) 6 B.L.R., 392 at p. 459.

ultra vires of the powers of the Imperial Legislature. Mrs. Besant seemed to suggest that she carried with her to India her inherent rights under the Bill of Rights and the Great Charter; but she did not press the point.

I now turn to the construction which the learned Advocate-General sought to put on the various sub-clauses of section 4 (1). I thought, at first, that he was asking us to put a very illiberal construction upon them; because, if accepted, it would make the publication of any respectable newspaper impossible; but no thinking over the matter, I am not sure that I have been fair to the learned Advocate-General. I do not think that the seriousness of the consequences is the right test. We have to administer the law as we find it. In my opinion, there is great force in the arguments for the Crown, although I do not accept them in their entirety. The language of the section is this: "containing any words, signs or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise." The word *likely* refers to the probable inference that may be drawn; when that word is followed by the words "*may have a tendency*," the contention that the barest possibility of the words, etc., conveying a particular impression was contemplated seems not unreasonable. I asked, in the course of the argument, whether the probability or possibility should not be reasonable. The learned Advocate-General replied that a possibility is not generally reasonable I do not think the word *reasonable* would be misapplied even to a possibility. I am not prepared to hold that what the legislature had in mind was an unthinking, perverse and blind possibility and not a consequence, however far-fetched and remote it might be, which can be deduced by a reasonable human being. The process by which the inference is to be drawn is very tightly worded. When the probability or possibility is to be reached "directly or indirectly, whether by inference, suggestion, allusion, metaphor or implication or otherwise," it looks as if all egress is barred. The word *otherwise* is the finishing stroke. It is no wonder that the learned Chief Justice of the Calcutta High Court pronounced the right vested in the High Court as illusory.

If the language had stopped here, I would have considered it a waste of time to examine the articles complained of, because by

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no stretch of ingenuity can they be said not to contravene one or the other sub-sections of section 4 (1). But there is Explanation 2, and it is mainly with reference to its language that the keeper of the press can expect to get some redress. The learned Advocate-General drew our attention to the difference in language between the explanations to sections 124-A and 153-A of the Indian Penal Code and the explanation to section 4 of the Press Act. The latter is impersonal, whereas the former apparently refers to the motives and intentions of the offender. There is much force in this observation. At the same time, I am not prepared to hold that the intention of the writer is of no consequence in applying the provisions of the Press Act. I adhere to the opinion which I expressed during the course of the argument that while the operative portion deals purely with the language employed, divorced from considerations of motive or intention, Explanation 2 furnishes a ground of exemption, if it can be shown that there was no intention to excite or to attempt to excite hatred, contempt or disaffection. It is true that in the vast majority of cases the intention must be gathered from the language employed, but it is possible to show that what *prima facie* appears objectionable should not be given the meaning attributable to the words employed The difference is very thin, no doubt; but I think that the legislature was contemplating in Explanation 2, the possibility of proof by the person proceeded against that the intention to create disaffection was not in the mind of the writer The other alternative would compel us to hold that whatever the motive, if the words employed have the remotest tendency to make a single unreasoning individual disaffected, the press should be forfeited. In other words, it is the forbearance of the Crown from taking steps under the Act that gives life to a respectable newspaper and not any protection which has been introduced into the Act by the explanation. I am unwilling to proceed on this basis.

The meaning to be attributed to the words " without exciting or attempting to excite hatred, contempt or disaffection " is not free from difficulty. The learned Advocate-General relied upon the summing up of STRACHEY, J., in *Queen-Empress* v. *Bal Gangadhar Tilak*(1) in explanation of the various terms. I may say

(1) (1898) I.L.R., 22 Bom., 112.

at once that I agree with the conclusion that the word *disaffection* is used in the sense of *disloyalty*. That was how Sir COMER PETHERAM understood it in *Queen-Empress* v. *Jogendra Chunder Bose*(1) and that was also the view taken by Mr. Justice STRACHEY. Thel learned Judge's interpretation of the words "hatred and contempt" requires more examination. This is what he says:

"But if he goes beyond that, and whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him."

With a good portion of the sentiments expressed in this sentence, I agree. Some qualifications are however necessary. The times have changed a great deal since the learned Judge delivered his charge. If I may use a very hackneyed expression, the angle of vision has changed largely. In a solemn document issued under the signature of a Viceroy, the legitimacy of the claim to have political autonomy in India under certain conditions was discussed. This implies that the time may come when Indians can be trusted to largely administer the affairs of their own country. The process may have to be gradual. But when the possibility is recognized one cannot get away from the fact that it is the administration of non-Indians that would be replaced in the endeavour to reach autonomy. Consequently, when the learned Judge says "dwelling adversely on its foreign origin and character" would make a man guilty of exciting hatred and contempt, I am not prepared to accept it, without qualification. In my opinion, suggestions to the effect that an indigenous agency would be more suitable in certain departments of the administration and should be more largely employed in others, should not be regarded as exciting hatred or disaffection. Of course, language may be employed which may render this advocacy dangerous. But *prima facie* I would be unable to discern in criticisms of this kind an intention to excite hatred or contempt. I would also qualify the phrase which says that attributing indifference to the welfare of the people would amount to

(1) (1892) I.L.R., 19 Calc., 35.

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sedition. In *Reg.* v. *Alexander Martin Sullivan*(1) FITZGERALD, J., told the jury "that a journalist may canvass and censure the acts of Government and their polity." *(Piggott's Case.)* The learned Judge also said :

> "A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity and not imputing corrupt or malicious motives. . The law does not seek to put any narrow construction on the expressions used and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion."

In *Sullivan's Case* [*Reg.* v. *Alexander Martin Sullivan*(1)], the same learned Judge cautioned the jury thus : "It is not mere strong language, such as 'desecrated Court of Justice,' or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal spirit. You should recollect that to public political articles great latitude is given. Dealing as they do with the public affairs of the day, such articles if written in a fair spirit, and *bona fide*, often result in the production of public good. Therefore I advise and recommend you to deal with these publications in a spirit of freedom, and not to view them with an eye of narrow criticism." I do not see why these salutary tests should not be applied in considering whether the articles in question are protected by the explanation. If criticism attributing indifference to the welfare of the people is couched in language which imports corrupt or malicious motives, the writers cannot escape. But if it aims only to draw attention to a weak point in the administration in the hope that the criticism may lead to the redress of grievances or the removal of a disability, I do not think the writing can be condemned. Subject to these reservations, I accept the summing up of Mr. Justice STRACHEY as fairly accurately explaining the words I have referred to.

The next argument dealt with the meaning to be attached to the various clauses of sub-section (1) of section 4. Before Mrs. Besant addressed the Court, in answer to a suggestion from the learned OFFICIATING CHIEF JUSTICE, the Advocate-General pointed out under what clauses the offending articles included in the declaration of forfeiture fell. I shall discuss the articles

(1) (1868) 11 Cox's Cr. C., 51.

separately later on. At present, it is enough to say that almost all the articles were regarded as coming under section 4 (1) (c), while (a) and (e) were added to a few. The important question which might have necessitated a great deal of discussion was fairly solved by the admission of the learned Advocate-General that he had instructions to say that the discussion as to "Home Rule" was not *per se* objectionable. A reservation was made that the discussion might amount to bringing into hatred or contempt the Government established by law in British India, if the methods advocated to gain "Home Rule" and the language employed in pushing it forward were calculated to disseminate hatred or contempt. There can be no doubt that two essentials should be kept in mind in asking for changes in the machinery of Government. The allegiance to the throne and person of the sovereign should be held as inviolate; and there should be no suggestion that the connection which makes India an integral part of the British Empire should be severed Within these limits, it is permissible to ask that the details of the administrative machinery should be readjusted to meet the exigencies of the times. A demand for change there will be in the most perfect form of popular Governments. That demand *ex-necessitate* would show that the existing machinery is out of gear in some particular or other. In one sense such a criticism may excite disaffection towards the Government established by law. It is conceivable that there may be even dislike; but if the object is to rearrange the *personnel* and even in a measure substitute new classes of men in the places occupied by the old, provided the advocacy is attributable to a genuine desire to strengthen the feeling of loyalty and the link that binds the Empire, there can be no room for saying that hatred, contempt or disaffection was preached. Mr. Justice BATTY has given clear expression to this idea in *Emperor* v. *Bhaskar*(1). This is what he says:

"One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government, because they are only individuals, and are not representatives of that abstract conception which is called Government. Individuals come and go, but the Government is supposed to remain."

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(1) (1906) 8 Bom. L.R., 421 at p. 433.

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And again at page 441 the learned Judge says:

"Changes in policy and changes in measures are *liable to criticism*, and to criticise and urge objections to them is a special right *of a free Press in a free country*. The British nation *has* always specially boasted that it had a free Press but the freedom of that Press is conditional upon one thing; every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State. It is only on that condition that it is possible to have a free Press."

I entirely agree. Stephen in his Digest of the Criminal Law says:

"*An intention to show that Her Majesty has been misled or* mistaken in her measures, or to point out errors or defects in the Government or constitution as by law established, with a view *to* their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention."

The demand that there should be *alterations in the State* is one of those claims which every law-abiding subject interested in the well-being of the Government might legitimately advance. I am not to be understood as suggesting that the expression "*Government established by law in British India*" *applies only* to British sovereignty and the British connection. I adopt Mr. Justice STRACHEY's definition of these words. He says: "It means, in my opinion, British rule and its representatives as such, the existing political system as distinguished from any particular set of administrators." It is the system of Government that section 4 (1) (c) contemplates, and not the persons who for the time being carry on the details of the administration. Clause (a) does not require much comment. A great deal will depend upon the language used. Clause (e) is not easy to define. The objects aimed at must be those which would render friendly co-operation between the different races living in India impossible. The language must be such as to lead to the breaking of the peace. Otherwise, any argument tending to suggest that particular persons are not carrying on the machinery of Government efficiently may be said to incite the

people to interfere with the maintenance of law and order. Dissatisfaction with men and measures is believed in many quarters as a healthy sign of progress. It is not necessarily incompatible with a desire not to interfere with the administration of the law or with the maintenance of law and order. I propose to keep before me these principles in judging of the character of the articles complained of.

On one other section of the Act, I shall say a word, before discussing the articles. When Mrs. Besant wanted to put in copies of other articles which appeared in the *New India* newspaper, the learned Advocate-General contended that it is only the Crown that is entitled to this right under section 20 and not the petitioner. I do not think such a contention can be upheld. The more serious question under the section is whether articles evidencing the general policy of the paper can be received in evidence. In my opinion, there must be some connection between the subject-matter of the articles tendered and of the articles which are objected to. The articles are to be received "in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper." Speaking for myself, I would have rejected some of the articles tendered on either side as being unconnected with the views taken exception to. But, however, we have let in only such of them as either bear on the general policy of the paper or are connected with the subject-matter of the impeached articles. I am content to accept the decision come to by the learned CHIEF JUSTICE on this question.

Now, I proceed to deal with the articles.

Extract No. 1.—I gave expression, during the course of the argument, to my ideas regarding the inappropriateness of the language employed in this letter. It is ill-balanced and foolish. I am not, at the same time, able to attach to the language the sense which the learned Advocate-General imputed to it. To one reference in this letter, he attributed a meaning which I cannot but regard as far-fetched. This reference is to the "grim contest between Hiranya and Prahlada." I am afraid I must adopt the rôle of the Puranic story-teller for the nonce. The story is very familiar to the readers to whom, in the main, the paper is addressed. Hiranya was not a bad king. At least, I am not aware, that it is with reference to his misrule, the story

has been told. Hiranya, in the Purana, symbolizes the egotistic self. He is his own God. He says to himself and to others that there is none greater than himself. There is no God to whom Hiranya is accountable. His son personifies the abnegation of self—the subjection of the man to the dictates of the Supreme. From his cradle he lisps the name of God. In school, he invokes God's name. He infuses this spirit into his fellow-students. The teacher is much upset and complains to Hiranya. At first, the father is contemptuously tolerant, then he coaxes his son into accepting his dogmas; then there is threat; violence afterwards, followed by every attempt to be rid of the stripling who defies all his cherished ideals. Even here, the father, by instinct of nature, resists the temptation to kill the boy himself. He employs other agencies. Even the fond mother is pressed into service; but all the machinations prove of no avail. The patient trust in God and the uncomplaining tenacity of purpose so exasperate Hiranya that he resolves to lay his own hand on his son. Before he takes the fatal step, he asks his son to point to the place where the God he worships can be found. The boy boldly replies "He is everywhere." The irate father asks "Is He in this pillar?" "Yes, He is everywhere" is the quiet answer. Then the father kicks the pillar violently saying "let Him come out, if He is there." God does come out of the stone pillar and destroys Hiranya. This is the story recounted everywhere to prove the omnipresence of God and the immanence of righteousness and virtue. In the Hindu theology, Prahlada is the foremost of religious devotees.

Now in this story, Prahlada does not wage war against Hiranya. He does not kill his father. Prahlada is in the letter intended to represent the Indian, and Hiranya, the Anglo-Indian. It is clear, therefore, that the people are not incited to violence against the Anglo-Indians. If they behave like Prahlada, they must lead uncomplaining lives, leaving the justice of their cause to be vindicated in the fulness of time. I do not say that a certain amount of dislike will not be engendered by the comparison; but I do not think that hatred or contempt will be inculcated by the reference, if that story is understood rightly. Nor do I think that the Anglo-Indian will be incited to hate the people by his being depicted as Hiranya. The cultured few who represent that class are not likely to be led into a feeling of

hatred or contempt by hysterical writing of this kind. At the same time, I cannot but condemn, in strong terms, the latitude which the writer has allowed himself in describing men and measures. Mrs. Besant, like most others, might exclaim: "Save me from my friends." She has rightly taken the responsibility for this effusion on herself, and while I am unable to see that the article is covered by any of the clauses of section 4 (1), I cannot help saying that it is a mischievous and an ill-balanced production.

Extract No. 2.—This letter lacks the adjectival exuberances which characterized the previous one; but portions of it are more culpable than the former. The paragraph in page 15 beginning with line 29 and ending with line 35 is unjustifiable. I think it is calculated "to bring into hatred or contempt" the Government of Madras. "Prussian aggression" and "atrocity in civic life in peaceful times" are expressions which cannot be condoned. Further, the sentence "that the missionaries are the parasites of the Government" is unwarranted. I hold that portions of this letter come under section 4 (1) (c). I do not think sub-clause (e) applies.*

Extract No. 3.—I can see nothing wrong in this article. It is true, as pointed out by the learned Advocate-General, the article ignores the fact that the Arms Act does not apply to the Agency tracts. But the subject matter of the grievance is not what affects these tracts. The general sentiment is in no way incompatible with perfect submission to everything that the most fastidious can insist upon as being due from the subject to the Government.

Extract No. 4.—Here again, there has been a misunderstanding of the law as declared by the Punjab Chief Court. It is extraordinary that an overruled judgment should have been allowed to be the basis of comment so long. The learned Advocate-General has informed us that the decision in *Mathradas* v. *Secretary of State*(1) on which these articles were based was reversed on appeal in April 1913—*Mathradas* v. *Secretary of State*(2). The articles were all written since the date of the appeal decision. There is no doubt that there has been a great want of judgment in the writer not having taken care to ascertain whether *Mathradas* v. *Secretary of State*(1) was

* See page 1092 *supra*.

(1) (1911) 13 I.C., 237. (2) (1913) 21 I.C., 409.

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modified or set aside. I say nothing about the correctness of the law as expounded on appeal; but granting that the critic ought to have exercised more care and caution, I fail to see how hatred, contempt or encouragement to interfere with the administration of the law can fairly be attributed to these articles. I think they are covered by the explanation. The editorial note finding fault with the persons who walked out is only an exhortation to submit themselves to some personal inconvenience in order that the legality of the procedure adopted by railway companies may be tested in a Court of Law. I hold that these articles do not offend any of the provisions of section 4 (1).

Extract No. 5.—This is a quotation from the *Herald*, London. At first, I was inclined to think that its place under the "Home Rule Section" was objectionable; but on carefully reading it through, I find that nobody is held up to hatred or contempt and none is encouraged to break the law. The burden of the article is "the price of liberty is death." It is a call to make heavy sacrifices; not an exhortation to use violence, but a call to stand at the post of duty even to the point of death, if the person is in earnest in securing rights. The theme is in the main religious. The martyrdom of Catholics, Protestants and Atheists is extolled. They suffered death to testify to the strength of their conviction. It is this spirit of self-sacrifice that the *Herald* preached to the Pacifist who refused to join the Army Corps. In inserting the article under the heading "Home Rule," the person responsible for the selection wanted those that advocated "Home Rule" to act in this spirit. I am unable to see in this article anything which brings it within the mischief of section 4 (1).

Extract No. 6.—This is strong writing. But I am unable to detect anything in it which is calculated to bring the Government into hatred or contempt. The word "Prussianism" has been objected to. In this article, it is applied to a particular journal and not to any class. I hold this article is not obnoxious to section 4 (1).

Extract No. 7.—As was suggested by the learned OFFICIATING CHIEF JUSTICE during the course of the argument, I read this article once again, forgetting, for the time being, that it was written by Bepin Chandra Pal. I am not able to detect its

sinister import. If one reads a great deal between the lines and then begins to argue that the article is dangerous, he must be prepared for the answer, "You are not condemning my words, but words which you are interpolating." On the face of it, the writer points out how the political anarchists have not been brought under the grip of law, notwithstanding the severe measures taken to put them down. He suggests a mode of dealing with their crimes. I am not able to spell out of this article an intention to extol anarchism and to invite unwary youths to commit acts of violence with impunity. I do not think that sub-clauses (*a*), (*c*) and (*e*) of section 4 (1) apply to this contribution.

Extract No. 8.—I hold this article comes under section 4 (1)(*c*). Mrs. Besant said that *she wrote it under great provocation.* That is apparent. To say that the "escutcheon" of the Bombay Government should have the words "Justice gagged, sable and gules, and the legend: My strong arm and your Wrong," is calculated to bring that Government into hatred and contempt.

Extract No. 9.—This article extols the Englishmen at home at the expense of those that have come out to India. I do not think this article contravenes section 4 (1) (*c*).

Extract No. 10.—This refers to the probable result of an internment order. The reference to four men "who are his personal enemies and who are his enemies in thought and belief" is undoubtedly misconceived. I am not prepared to say that the characterisation of the *personnel* of the Government as the personal enemies of the writer is calculated to excite contempt or hatred. I do not consider this article comes under section 4 (1) (*c*).

Extract No. 11.—I am satisfied that this article comes within the purview of section 4 (1). The statement that the arrest which was conceded to be legal is "truly unlawful" and breaks "the sacred Law of Justice which holds society together," is meaningless. But the sting of the article is in its tail. "*Civilisation does not protect us; we should be better off in a state of savagery, for then we should be on our guard, we should carry arms, and protect ourselves. We are helpless; we pay taxes to be wronged.*" The appeal to barbarism may incite violence, and the sentence "that we pay taxes to be wronged" is calculated to bring the Government into contempt, by suggesting that the

taxes are utilized for oppression. I think this article is within section 4 (1) (c) and (e).

Extract No. 12.—This long extract from the *Commonweal* is not really objectionable. The reference to Gita and the appeal to evince the true Kshatriya spirit are not intended to create disaffection. It is intended to whip up laggards. The gates of heaven, in this case, being the gate to "Home Rule" the exhortation is to the people to come forward at once, and not to lose the opportunity of gaining their rights. The suggestion is not to fight, but to take time by the forelock. The word "Prussianism" seems to have a fascination to writers of this school, but I am inclined to think that these men do not use the word with a knowledge of what it imports. Such catch-words are the stock-in-trade of writers aspiring to write to news-papers and other periodicals. The statement that "political petitioning and prayer should be abandoned" is not an appeal to give up constitutional methods, but an advice to proclaim rights without following it up by deputations for their enforce-ment. I do not think this article is impeachable under section 4 (1) (c) or (e). I certainly see nothing in it to bring it under section 4 (1) (a).

Extract No. 13.—Portions of this article are clearly objection-able. The suggestion that the Bombay Government is in league with Sir Valentine Chirol is certainly calculated to bring that Government into contempt. I hold this is covered by section 4 (1) (e).

Extract No. 14.—This article was written after the Extra-ordinary meeting of the Senate of the Madras University. I am not able to see in it anything which brings it within section 4 (1) (c). The statement about insanitary surroundings refers to the agitation to provide hostels.

Apart from the legal tests, it is not easy to lay down any absolute rule by which the culpability or otherwise of these articles can be judged. Personal inclinations would necessarily play a great part in passing judgment upon a question of this description. Experience of life, and a knowledge of the modes of thought and of the activities which actuate men who though engaged in politics are honestly devoted to their sovereign and are unquestionably endeavouring to promote good-will and a

closer understanding between the rulers and the ruled may also serve as guides. Even here temperament would play no mean part. Considerations like those I have mentioned have weighed with me in the main.

To summarize my conclusions, I hold that Extracts Nos. 2, 8, 11 and 13 contain statements and sentiments which are calculated to bring the Government established by law into hatred or contempt and to interfere with the maintenance of law and order. It is not for me to say whether the punishment inflicted is necessary to expiate the offence. We have no right to apportion the quantum of punishment. I, therefore, hold that Mrs. Besant has not shown that the extracts I have mentioned "did not contain any words, signs or visible representation" of the nature described in section 4, sub-section (1). At the same time, I am clear that none of the articles to which our attention has been drawn has been written in a spirit of disloyalty to the sovereign. If I may say so, they all aim at making India better understood and better appreciated. They undoubtedly very freely express disapprobation with the existing machinery of the Government. These comments, according to Mrs. Besant, were intended to make British rule in India more firmly established and to remove causes of discontent which may have a tendency to undermine the British connection. I have little doubt that this has been the policy of the paper; but what we have to see is not whether the intentions of the editor are praiseworthy and the articles themselves may ultimately help good government and law and order, but whether the articles taken exception to are not obnoxious to section 4 of the Press Act. Viewing the four articles I have referred to from this point of view, I am of opinion that they do offend the Press Act. The petition must, therefore, be dismissed.

N.R.

APPELLATE CRIMINAL.

Before Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916.
October 6, 7 and 18.

In re MRS. ANNIE BESANT (RESPONDENT), PETITIONER.*

Certiorari *Indian Press Act (I of 1910), sec. 3 (1), proviso, construction of—Original order of Magistrate dispensing with security—Demand of security by Magistrate, thereafter, legality of—Government of India Act (5 & 6 Geo. V), cap. 61, ss. 106 and 107—Criminal Procedure Code (Act V of 1898), sec. 435—High Court, power of, to issue writ of* certiorari, *under, to cancel Magistrate's order—Magistrate demanding security, not a "Court" but executive officer—Writ of* certiorari, *when, can be issued—"Judicial act," what is—Indian Press Act (I of 1910), sec. 22, whether a bar to issue of writ of* certiorari*—"Proviso," object of—Keeping a press whether a "licensed calling" or common law right.*

Per ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., not dissenting)—The Chief Presidency Magistrate acting under section 3 (1) of the Indian Press Act is not a "Court" but is only an executive officer entrusted with the performance of certain administrative duties, whose details are left entirely to his discretion; hence an order by him requiring security from the keeper of a press, even if in excess of his powers, is not capable of being revised by the High Court, either by means of a writ of *certiorari* issued under sections 106 and 107 of the Government of India Act (5 & 6 Geo. V, cap. 61) or by the exercise of revisional powers as provided by section 435, Criminal Procedure Code (Act V of 1898).

Sivagami Achi v. *Subrahmania Ayyar* (1904) I.L.R., 27 Mad., 259, *Shankar Sarup* v. *Mejo Mal* (1901) I.L.R., 23 All., 313 (P.C.) *Minakshi* v. *Subramanya* (1888) I.L.R., 11 Mad., 26 (P.C.) and *Vijiaraghavalu Pillai* v. *Theagaroya Chetti* (1915) I.L.R., 38 Mad., 581, applied.

Per ABDUR RAHIM, OFFG. C.J. and SESHAGIRI AYYAR, J.—Whether an act is judicial or not depends on the nature of the powers conferred by the legislature, the character of the act sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations.

Per curiam.—Every keeper of a printing press who makes a declaration under section 4 of the Press and Registration of Books Act (XXV of 1867) after the commencement of the Indian Press Act (I of 1910), is simultaneously liable to deposit such security as the Magistrate demands under section 3 (1) of the Indian Press Act, even though the press and the newspaper published therein were in existence before the passing of the Press Act. But the Magistrate may, under the proviso to section 3 (1), make an order dispensing with a security.

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* Criminal Revision Case No. 661 of 1916.

Per ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., *contra*).—If once a Magistrate dispenses with security, he cannot thereafter cancel such order and demand security.

The words "or may from time to time cancel or may make any order under this sub-section," which are to be found in the same proviso as that which enables a Magistrate to make an order dispensing with security cannot be construed to include an order dispensing with security.

A proviso appended to a section is either an explanation or a qualification of the section. It does not add to or enlarge the scope of the section

West Derby Union v. *Metropolitan Life Assurance Society* (1897) A.C., 647, referred to.

Per AYLING, J.—The substance, and not the form, must be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before, and this proviso is really such a one

Per ABDUR RAHIM, OFFG. C.J. and SESHAGIRI AYYAR, J.—The Supreme Court of Madras had the right to issue writs of *certiorari* as the King's Bench in England, and that right has been preserved to the High Court by the Charters of 1861 and 1865, the Letters Patent of 1865 and the Government of India Act of 1915 and no Act of any legislature has taken away this right.

Nundo Lal Bose v. *The Corporation for the Town of Calcutta* (1885) I.L.R., 11 Calc., 275, referred to.

Per ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J. (AYLING, J., *contra*).—*Obiter.* Supposing the orders of the Magistrate under section 3, to be judicial, section 22 of the Indian Press Act has not taken away this right, in cases where the orders are *ultra vires.*

Ex parte Bradlaugh (1878) L.R., 3 Q.B.D., 509 and *The Colonial Bank of Australasia* v. *Willan* (1874) L.R., 5 P.C., 417 at p. 422, referred to

Per AYLING, J.—Section 22 precludes revision of an order demanding security whether it was with or without jurisdiction. The Press Act is a self-contained and complete Act.

Quære—Whether the order of the Magistrate demanding security is not judicial?

Power of issuing writ of *certiorari* being only discretionary, it cannot be issued where there is delay in applying for it

Per ABDUR RAHIM, OFFG. C.J.—While the powers of revision of the High Court are exercisable only in respect of proceedings of ordinary Courts, writs of *certiorari* are available to quash proceedings not only of Courts but also of tribunals specially constituted and entrusted with duties of a judicial character.

Per ABDUR RAHIM, OFFG. C.J. (SESHAGIRI AYYAR, J., *contra*).—Proceedings will not be removed to the superior Court by a writ of *certiorari* unless that Court can deal with them fully and satisfactorily.

Per SESHAGIRI AYYAR, J.—Even after the Indian Press Act, the right to keep a press and to use it is a common law right and it cannot be likened to a "licensed trade or calling."

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Even if a statute expressly takes away the power to issue writs of *certiorari*, it must be deemed that it is taken away only in respect of acts not *ultra vires*.

PETITION under sections 106 and 107 of the Government of India Act (5 & 6 Geo. V, cap. 61) and section 435 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of C. B. N. PELLY, the Chief Presidency Magistrate, Egmore, Madras, dated the 22nd May 1916, calling on the petitioner to deposit security for Rs. 2,000 under section 3 (1) of Act I of 1910

This is a petition presented to the High Court by Mrs. Besant under sections 106 and 107 of the Government of India Act (5 & 6 Geo V, cap. 61) and under section 435 of the Criminal Procedure Code (Act V of 1898) for cancellation of an order, dated 22nd May 1916, of the Chief Presidency Magistrate of Madras, requiring her to deposit a security of Rs. 2,000 which superseded a previous order of the same Magistrate, dated 2nd December 1914, dispensing with security, in respect of a press called the "New India Printing Works" owned by the petitioner. The order of 22nd May 1916 was made without any notice to the petitioner. This petition was presented during the pendency of another petition, viz., Original Petition No. 122 of 1916, with which this is connected (reported in page 1065 *ante*).

The security demanded by the Magistrate was deposited on 5th June 1916, but the Government ordered the security to be forfeited to His Majesty by an order, dated 25th August 1916, made under section 4 (1) of the Indian Press Act (*vide* page 1089 *ante* for the orders of the Magistrate and the Government). This petition was presented after the order of forfeiture and more than three months after the order of the Magistrate demanding security.

C. P. Ramaswami Ayyar for the applicant.

Hon. Mr. *S. Srinivasa Ayyangar*, the *Acting Advocate-General*, *E. R. Osborne*, the *Acting Public Prosecutor*, and *J. C. Adam*, the *Crown Prosecutor*, for the Crown.

C. P. Ramaswami Ayyar.—I may be permitted to move this petition under section 106 also of the Government of India Act. [The Court granted the permission.] The High Court has power to revise proceedings of inferior Courts by issuing writs of *certiorari*. This power, which is exercised by the Court of

King's Bench was given to the Supreme Court of Madras by the charter creating it; and the later Acts and Letters Patents of 1862 and 1865 relating to the creation of the High Court of Madras and the Government of India Act of 1915 have preserved the same for the High Court. This power can be exercised by this Court in this case for these reasons: (1) the Magistrate in demanding security after once dispensing with it acted in excess of the jurisdiction given to him by the statute. (2) If the Magistrate acted in this matter in any capacity at all, he acted as a Court. (3) If he is not a Court, at least the proceedings before him were *judicial* proceedings. Though the Magistrate purports to act under the Press Act, he does not act under it. He is a Court—*vide* section 2 (*d*) of the Press Act and section 6 of the Criminal Procedure Code.

[*The Advocate-General* —I contend that the order in question is an executive order of the Magistrate and as such not revisable by this Court.]

[ABDUR RAHIM, OFFG. C.J.—You do not contend he is not a Court.—Answer: He may be a Court, but this order of his, is not revisable.]

Then he is a Court and any act done by a Court or by a public body under powers conferred by a statute is a judicial act and not an executive one.

[ABDUR RAHIM, OFFG. C J.—Have you got any case where Government has passed judicial orders revisable by Courts.]

Yes: see *Maharaja of Jeypore* v. *Gunupuram Deenabandhu Patnaick*(1). Compare the power under section 36 of the Legal Practitioners Act which has been held to be a judicial one, for which see *In re Siddeshwar Boral*(2) If new powers are given to an existing Court, it gets those powers only in its capacity as a Court; see *National Telephone Company, Limited* v. *Postmaster-General*(3). Even when a statute expressly prohibits a revision by the High Court, it has been held that there is a right of revision in respect of orders passed without jurisdiction. see *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh*(4), *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal*(5), *Ex parte Bradlaugh*(6) and *Gulli Sahu* v. *Emperor*(7). So, even if we

(1) (1905) I L.R., 28 Mad., 42 (2) (1899) 4 C W N., 30.
(3) (1913) A.C., 546 (4) (1899) I L.R., 26 Calc., 188.
(5) (1913) I L.R., 36 Mad., 275 (6) (1878) L.R., 3 Q.B.D., 509.
(7) (1915) I.L.R., 42 Calc., 793 at p. 796.

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suppose that section 22 of the Press Act takes away the right, it does not matter if the order is without jurisdiction—see *Gulli Sahu* v. *Emperor*(1). As to what are "judicial acts:" see Halsbury's Laws of England, volume 10, page 161, where all the cases are collected. The Presidency Magistrate was a Court in this respect and he erred in making the order demanding security without hearing me. There is a right of audience before every Court and the usual incidents of litigation, such as right of appeal, exist in respect of its pronouncements, see *Boulter* v. *Kent Justices*(2), where a licensing Magistrate was held a "Court." The fixing by the Magistrate of the amount of security between Rs. 500 and Rs. 2,000 is an act of judicial discretion The action of a statutory body such as a Medical Council has been held to be judicial: see *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom*(3).

[ABDUR RAHIM, OFFG. C.J.—The Magistrate is not, in fixing the amount, bound to take evidence.]

That does not deprive his act of the character of being judicial, as he has to act on some material and not arbitrarily. If the Magistrate wishes to dispense with security he has to state his reasons. Then certainly he is acting as a Court. If he is a Court in making that order, then the cancellation or review of that order is also a judicial order. All orders under section 3 (1) are judicial.

[ABDUR RAHIM, OFFG. C.J.—No reasons were given by the Magistrate for dispensing with security.]

That is immaterial. The words "if he thinks fit" in section 3(1) go with all the three classes of cases mentioned therein. In *Sharp* v. *Wakefield*(4), it has been held that in granting a license to a liquor-seller a Magistrate acts judicially and that "discretion" means judicially exercised discretion: see also *Hodson* v. *Pare*(5), *Rex* v. *Woodhouse*(6) and *Vasudeva Aiyar* v. *The Negapatam Devasthanam Committee*(7). Apart from his acting judicially or apart from his being a Court, if his action is contrary to the statute under which he is acting, his action is liable to be revised by the High Court under powers of *certiorari*—*Ex parte*

(1) (1914) I.L.R., 41 Calc., 400
(2) (1897) A.C., 556 at pp. 561 and 567.
(3) (1890) 25 Q.B.D., 90 at p. 92
(4) (1891) A.C., 173 at p. 179.
(5) (1899) 1 Q.B., 455 at p. 457.
(6) (1906) 2 K.B., 501 at pp. 512 and 513 (C.A.).
(7) (1915) I.L.R., 38 Mad., 594

Bradlaugh(1), *The King* v. *Justices of Somersetshire*(2), *The Queen* v. *Mary Wood*(3), *The Queen* v. *The South Wales Railway Co.*(4) and *In re Nataraja Iyer*(5)—which collects all the Indian cases. In *Reg.* v. *Ramdas Samaldas*(6), it was held that the High Court could issue writs of *certiorari* even after the passing of the Criminal Procedure Code: see also *The Colonial Bank of Australasia* v. *Willan*(7) which holds that want of jurisdiction or fraud in obtaining an order can be questioned by writs of *certiorari*: see also *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta*(8). In the present case there was a want of jurisdiction to cancel the security. The proviso to section 3 only enables the Magistrate to cancel in a case where some security was originally demanded. It does not apply to a case where the original order dispensed with any security. There are two parts in the proviso to section 3: the purpose of a proviso to a section is to except what is stated therein from the operative part of the section. The second part has no relation to the first. A proviso is not a part of the section: see *Duncan* v. *Dixon*(9).

[ABDUR RAHIM, OFFG. C.J.—A power to dispense with security cannot be within a power to demand it, the second part cannot relate to the first.]

A proviso may be a condition or commentary on the previous portion of the section. The use of the word "or" gives effect to my interpretation. That meaning is to be adopted which will make the whole section sensible. The language of a section ought not to be strained especially against the subject in the case of a penal Act such as the Press Act. Where there are several provisos to a section, each is a proviso to the main section and not that the second is a proviso to the first—see *Stourbridge Navigation Co.* v. *Earl of Dudley*(10), see also *Guardians of West Derby Union* v. *Metropolitan Life Assurance Society*(11), same case on appeal *West Derby Union* v. *Metropolitan Life Assurance Society* (12). Section 22 is no bar to this application, for it refers only to

(1) (1878) L.R., 3 Q.B.D., 509.
(2) (1820) 5 B. & C., 816; s.c., 106 E.R., 503. (3) (1848) 119 E.R., 400 at p. 401.
(4) (1849) 13 Q.B.C., 988 at p. 993, s.c., 116 E.R., 1540 at p. 1542.
(5) (1918) I.L.R., 36 Mad., 72 at pp. 92, 94 and 95.
(6) (1875) 12 Bom. H.C.R., 221.
(7) (1874) L.R., 5 P.C., 417 at pp. 442 and 443.
(8) (1885) I.L.R., 11 Calc., 275. (9) (1890) 44 Ch., 211.
(10) (1859) E. & E., 409 at p. 427; s.c., 121 E.R., 495 at p. 503.
(11) (1897) 1 Ch., 335 at pp. 343, 345, 347 and 354.
(12) (1897) A.C., 647 at pp. 649 and 651.

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proceedings relating to forfeiture and not to orders demanding security. The words "such application" in that section support my interpretation of this section.

The Advocate-General for the Crown.—I submit that the order of the Magistrate was only administrative and not judicial and as a writ of *certiorari* can be issued only in respect of judicial acts, this petition is incompetent; Halsbury's Laws of England, volume 10, page 171 and *Rex* v. *Woodhouse*(1). Moreover a writ of *certiorari* lies only in respect of proceedings pending before an inferior Court, *i.e.*, to remove them to the High Court; here the proceeding is completed as soon as the deposit was made. Writ of *certiorari* can be issued only if the High Court is competent to deal with matter as fully and satisfactorily as the inferior Court Here by the statute all the details as to the demand of the security are left entirely to the discretion of the Magistrate; which must be and can be exercised only by him on various considerations, such as preservation of peace, extent of circulation of a newspaper, etc. Moreover the remedy by way of *certiorari* which is a common law remedy can be had only in respect of rights and liabilities known to common law: and as the liability to deposit is not a common law liability but is a new one created by the Press Act no writ can be issued. There has been no instance of this Court having issued such a writ. In India this common law right of *certiorari* has been embodied in several statutes: see section 115, Civil Procedure Code, section 435, Criminal Procedure Code, section 25, Provincial Small Cause Courts Act and section 15 of the Charter Act and it is no longer a common law right here. This right does not exist *afortiori*, in the case of the Press Act, which, in respect of procedure, etc., is self-contained and complete and does not provide for revision

[ABDUR RAHIM, OFFG. C.J.—Unless the High Court's power to revise this matter is taken away expressly, how do you say it is taken away?]

I contend that section 22 has expressly taken away this right; I also contend that this right must be deemed to have been impliedly taken away as the jurisdiction of the Magistrate is newly created for the first time constituting him a special tribunal and out of the course of common law. No revision lies in such a case—see *Hartely* v. *Hooker*(2). See Halsbury's Laws of

(1) (1906) 2 K.B., 501 (C.A.). (2) (1777) 2 Cow., 523; s.c., 98 E.R., 1221.

England, volume 10, pages 161 and 168, as to when *certiorari* lies; American Encyclopædia, volume 6, pages 737 to 754.

[SESHAGIRI AYYAR, J.—Does not section 22 affect the liberty of the subject in a way?]

No. It is not a penal provision; for no one is bound to have a press; a condition precedent to keeping a press, such as giving security, is not a penal provision. Keeping a press is a licensed trade; compare the Press Laws of Ireland when the Coercion Acts were in force. The Press Act is just like a taxing enactment. Cases of assessment stand on a different footing; for assessment tribunals are Courts.

[ABDUR RAHIM, OFFG. C.J.—If your argument is correct as to the law of England, then the Indian High Court has greater power under section 15 of the Charter Act, or section 107 of the Government of India Act; for the words are very general, *i.e.*, the High Court has general power of superintendence over all inferior Courts.]

No. Only over such Courts as are subject to its appellate jurisdiction, and the Magistrate in this matter is not subject to the appellate jurisdiction of the High Court. The act of the Magistrate is not a judicial act. He is designated only as an official. No revision lies in such cases—see *Rudolf Stallmann* v. *Emperor*(1), *In re Mohunt Deva Dass*(2), *Gulli Sahu* v. *Emperor*(3), *In re Damma*(4) and *In re Dalsukhram Hurgorindas*(5).

[SESHAGIRI AYYAR, J.—Refer to *Vijiaraghavalu Pillai* v. *Theagaroya Chetti*(6).]

Yes; see also *In re Chinnasamy Aiyar*(7). Demanding security is not charging a man with any offence. A grant of a license by a special company was held not a judicial act—see *R.* v. *Watermens Company*(8). No *certiorari* lies in respect of an appointment by justices to an office or in respect of the issue of a license as such acts are ministerial: see *Reg.* v. *The Overseers of Salford*(9).

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(1) (1911) I.L.R., 38 Calc., 547.
(2) (1838) I.L.R., 38 Calc., 550.
(3) (1915) I.L.R., 42 Calc., 793.
(4) (1907) I.L.R., 29 All., 563.
(5) (1907) 9 Bom., L.R., 1347.
(6) (1915) I.L.R., 39 Mad., 581.
(7) (1909) 19 M.L.J., 565.
(8) (1897) I Q.B., 659.
(9) (1852) 118 E.R., 259.

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[SESHAGIRI AYYAR, J.—The Privy Council case of *Minakshi* v. *Subramanya*(1) on the point of appointment is sufficient.]

See also *The Queen* v. *Justices of Manchester*(2), *Rex* v. *Woodhouse*(3) and *Boulter* v. *Kent Justices*(4). The applicant before the Magistrate has no *right* to be exempted from security on any ground. The reasons are required to be stated for the information of the Local Government.

[ABDUR RAHIM, OFFG. C.J.—Why of Government alone? It is a statutory duty. *Prima facie* the performance of every statutory duty is judicial. Supposing no reasons are given, is there any remedy to compel the Magistrate to give reasons?]

No remedy lies.

[ABDUR RAHIM, OFFG. C.J.—Is the Magistrate precluded from taking evidence?]

I submit so, for the Press Act does not provide for it; and the Magistrate cannot compel the applicant or any one else to give evidence on the question. The fact that only certain portions of the Criminal Procedure Code are made applicable shows that this act is only ministerial and not judicial. Moreover, if he is to be considered a Judge, then the special provision under section 22 to protect him from actions is unnecessary in view of the existence of the Judicial Officers Protection Act XVIII of 1850. It has been held that a Civil Court in settling a proclamation of sale does not act "judicially": see *Sivagami Achi* v. *Subrahmania Ayyar*(5); see also *Shankar Sarup* v. *Mejo Mal*(6) on a Court's powers under section 295, Civil Procedure Code of 1882, being said to be administrative; see also *Royal Aquarium Society, Limited* v. *Parkinson*(7). These cases show that simply because a discretion is vested in a tribunal the act is not to be considered a judicial one: *cf.* *Vasudeva Aiyar* v. *The Negapatam Devasthanam Committee*(8) and *Subbier* v. *Abboy Naidu*(9). Moreover in this case the security was deposited without any protest; thereafter the legality of the demand of security cannot be questioned. Deposit of security even on protest is

(1) (1888) I.L.R., 11 Mad., 26 (P.C.) (2) (1899) 1 Q.B., 571
(3) (1906) 2 K.B., 501 at pp. 512, 520 and 535.
(4) (1897) A.C., 556 at p. 561. (5) (1904) I.L.R., 27 Mad., 259.
(6) (1901) I.L.R., 23 All., 313 at p. 322 (P.C.).
(7) (1892) 1 Q.B., 431 at pp. 442 and 448.
(8) (1915) I.L.R., 38 Mad., 504. (9) (1915) 29 M.L.J., 671.

an acquiescence to the jurisdiction—see American Cyclopædia, volume 6, page 769. Trying to revise the order demanding security on the ground of want of jurisdiction *after the security is forfeited* is not open to the applicant.

[ABDUR RAHIM, OFFG. C.J.—You did not raise this point *in limine*. Moreover there is no limitation for a revision petition.]

I contend the Magistrate had jurisdiction to demand a security under the proviso to section 3 even after once dispensing with it. The second portion of the proviso gives a power in addition to others previously mentioned. Provisos are of various kinds. Some are qualifications. Some are exceptions, some are by way of abundant caution. See definition of "sub-section" in the General Clauses Act. Proviso is a part of the section itself. In section 3 the record of reasons is only in cases of dispensing with security. The use of the word "or" does not show that it is only an alternative power at one and the same time. The use of the word "may" also in the second portion of the proviso shows the cumulative power. The two parts of the proviso refer to two different times.

[ABDUR RAHIM, OFFG. C.J.—Why no reasons are to be given when the Magistrate cancels a previous order demanding security?]

"Any order under this sub-section" includes all kinds of orders that are contemplated by this sub-section, including an order of an exemption under the proviso. The words are not "any *other* order." The word "or" means, "and" in the context—see *Walker* v. *York Corporation*(1) and *Ditcher* v. *Denison*(2). The purpose of a proviso is given in *West Derby Union* v. *Metropolitan Life Assurance Society*(3), *Rhondda Urban Council* v. *Taff Vale Railway*(4), *Zamindar of Chellapalli* v *Rajalapati Somayya* (5), *Natesa Chetty* v. *Vengu Nachiar*(6) and Halsbury's Laws of England, volume 27, page 137. Assuming all this is wrong, section 22 is a complete answer to this application. Section 22 deals with all proceedings taken under the Press Act including not only proceedings for forfeiture but also order for security.

(1) (1906) 1 K B., 724
(2) (1857) 14 E.R., 718, s.c., 11 Moo. P C C., 324 at p. 338.
(3) (1897) A.C., 647.
(4) (1909) A C., 253 at p. 258.
(5) (1914) 27 M.L.J., 718 at pp. 720 and 727
(6) (1910) I.L.R., 33 Mad., 102 at p. 104.

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Section 22 has expressly taken away powers of revision in any manner. Section 22 has to be read with sections 17, 18 and 19. The only application that is open to the applicant in respect of acts done or purporting to be done under the Act is the one mentioned in section 17 of the Act and not under any other Act. *Maxwell*, at page *218*, says that "a jurisdiction can be taken away even by implication." *Empress* v. *Burah*(1) decides that the Imperial Legislative Council has full power to legislate on matters like this in any way it likes.

C. P. Ramaswami Ayyar for the applicant replied.

ABDUR RAHIM, *OFFG. C.J.*

ABDUR RAHIM, OFFG. C.J.—This petition is under sections 106 and 107 of the Government of India Act (5 & 6 Geo. V, cap. 61) and section 435 of the Code of Criminal Procedure asking us to revise the order of the Chief Presidency Magistrate requiring deposit of security from the petitioner. I have already dealt with the contention of Mrs. Annie Besant in the petition under section 17 of the Press Act and held that the order was made in excess of the power conferred on the Magistrate but that there was no provision in the Press Act itself which would enable us to revise the order. (See pages 1108 to 1110 *ante*.)

Under section 106 of the Government of India Act which continues in this High Court all the powers and authority already vested in it we are asked to quash the proceedings of the Magistrate by means of a writ of *certiorari*. The old Supreme Court of Madras which is now absorbed in the High Court had all the jurisdiction and authority of the Court of King's Bench in England which included the power to issue writs of *certiorari*. (See 39 & 40 Geo. III, cap. 79, and the Letters Patent of 1800.) That power has been preserved to the Madras High Court by High Courts (Charter) Act, 1861, the Charter Act of 1865, Letters Patent, Madras, 1865, and lastly the Government of India Act, 1915. It is not shown that this jurisdiction has been taken away by any act of the legislature which could only be done by express words or by necessary implication.

I find nothing in section 22 of the Press Act which can be said to have deprived the High Court of this power. Section 22 says "every declaration of forfeiture purporting to be made under this Act shall as against all persons be conclusive evidence

(1) (1878) I.L.R., 4 Calc., 172 (P.C.).

that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court except the High Court on such application as aforesaid . . . ." The first part, I have no doubt, does not refer to the validity of an order of forfeiture but to the fact that it has been made. And I do not see how it is possible to read the words "and no proceeding purporting to be taken under this Act" as including any order of the Magistrate under section 3 (1), otherwise the passage would run thus "and no proceeding purporting to be taken under this Act including an order of the Magistrate under section 3 (1) shall be called in question by any Court except the High Court on such application as aforesaid." This would make no meaning. The application referred to there is an application under section 17, that is to set aside an order of forfeiture and that clearly shows that the proceeding in contemplation of the legislature is a proceeding under section 4 and under similar sections of the Act and not a proceeding under section 3 which has nothing to do with forfeitures at all. This may be an omission on the part of the legislature, but we have to give effect to the Act as we find it.

There can be no doubt whatever that this High Court has jurisdiction to issue writs of *certiorari* in order to remove the proceedings of Courts or of persons entrusted with judicial functions out of ordinary course of legal procedure for the purpose of quashing them. It was stated at the bar that no instance of the issue of such writs by this Court is to be found on record. But that would not extinguish the jurisdiction. It is true, as pointed out by the Advocate-General, that many of the powers which the King's Bench exercises in England by means of writ of *certiorari* have been expressly conferred upon the High Courts in India by different legislative enactments such as section 15 of the Charter Act, section 115 of the Civil Procedure Code, section 25 of the Provincial Small Cause Courts Act and section 435 of the Criminal Procedure Code, etc.

But these powers of revision and control are available only over the proceedings of ordinary Courts; while a writ of *certiorari* is issued not only to Courts but to tribunals specially constituted and entrusted with duties of a judicial character. For instance in England the proceedings of Censors of the Royal College of Physicians, of the Commissioners of Sewers, of Canal

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Commissioners, of Sheriffs and of Licensing Justices have been held to be subject to the writ. Writs of *certiorari* have also been issued by the Calcutta and Bombay High Courts. In *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta*(1) an assessment made by the Commissioners of the town of Calcutta was removed to the High Court by a writ of *certiorari* and quashed by Chief Justice GARTH and Justice WILSON. The learned Judges in that case do not appear to have entertained any doubt whatever that they had jurisdiction to issue the writ The first and essential question on this application is whether the taking of security by the Magistrate under section 3 (1) of the Press Act was a ministerial or judicial act. If the former, it is conceded that we cannot interfere even by a writ of *certiorari* much less under section 435, Criminal Procedure Code, or under the power of superintendence which we possess over the inferior Courts under section 107 of the Government of India Act.

That the writ lies only with respect to judicial acts is well established (see *Halsbury's Laws of England, volume 10*, paragraph 338). Whether an act is judicial or not depends on the nature of the powers conferred by the legislature, the character of the act sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations. Our attention has been drawn to many English cases in which writs of *certiorari* have been issued by the King's Bench in England In some of them it looks as if the line of differentiation between a judicial and administrative act was very faint. But whether any particular function was of a judicial character or not in those cases depended on the provisions of the particular statutes concerned and no good purpose would be served by reviewing them.

Now what are the functions of the Magistrate under section 3 (1) of the Press Act? Every keeper of a printing press is required to deposit security and all that the Magistrate has to do is to say what should be the amount of security provided it is not less than Rs. 500 or more than Rs. 2,000. The matter is left entirely to his discretion and so is the question whether he should or should not cancel or vary any order that he may make in this connection. He is not required to hear the

(1) (1885) I.L.R., 11 Calc., 275

owner of the printing press or to take any evidence. He is not to conform to any conditions or formality before passing any such order. In fact it cannot be said that there is any "case" or "cause" before him which he has to adjudicate upon. The discretion which is vested in him, such as it is, is absolute; it has all the attributes of an executive and not a judicial discretion. I do not see how it would be possible for any one asked to revise such an order as the Magistrate is empowered to pass, to say whether it is proper or not. No doubt when a Magistrate dispenses with the deposit of security, he can do so only for special reasons to be recorded by him Having regard however to the whole scheme of the Act, I do not think that those reasons are required in order to enable the High Court to make any pronouncement upon them. They are apparently required for the information of Government. What is also of importance in judging of the intentions of the legislature as to whether the proceedings of the Magistrate under section 3 (1) are to be regarded as judicial in character or not is the provision of section 22 by which Magistrates purporting to act under the Act are especially exempted from all civil or criminal liability. That would not have been necessary if the Magistrate in exercising his powers under section 3 (1) were acting as a judicial tribunal.

The Indian decisions which approach at all near this case are *Sivagami Achi* v. *Subrahmania Ayyar*(1) where it was held by a Full Bench of this Court that the proceeding of a Court under section 287 of the Code of Civil Procedure settling a proclamation of a sale of property in execution is of an administrative and not of a judicial character , *Shankar Sarup* v. *Mejo Mal*(2) where an order of distribution under section 295 of the Code of Civil Procedure was held by the Privy Council to be in the nature of an administrative act; *Minakshi* v. *Subramanya*(3) which decides that no appeal lies from an order of a District Judge appointing a member of a Committee of a temple, and *Vijiaraghavalu Pillai* v. *Theagaroya Chetti*(4) in which it was held that the High Court has no jurisdiction to revise an order passed by a Presidency Magistrate in an enquiry held by virtue of the rules framed by Government under the Madras City Municipal Act,

(1) (1904) I.L.R., 27 Mad., 259 (2) (1901) I.L.R., 23 All., 313 (P.C.).
(3) (1888) I.L.R., 11 Mad., 26 (P.C.). (4) (1915) I.L.R., 38 Mad., 351.

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III of 1904, as to the competency or otherwise of a candidate for a municipal election.

Mr. C. P. Ramaswami Ayyar who argued the case of the petitioner with great ability referred us to a number of decisions of the Calcutta High Court in which they set aside orders of District Judges declaring certain persons to be touts within the meaning of the Legal Practitioners Act. It is perfectly clear from section 36 of that Act that the function to be exercised by the Courts mentioned therein is judicial in nature. They have to hear the persons sought to be proceeded against and to take evidence and their order must conform to certain conditions.

The other contention of the Advocate-General that proceedings will not be removed into the superior Court by a writ unless they are capable of being determined there is also well established (see Halsbury's Laws of England, volume 10, paragraph 335, page 170, and the cases cited there). None of the matters which are left to the determination of the Chief Presidency Magistrate by section 3 (1) of the Press Act are such that this Court would be in a position to deal with at all satisfactorily. A writ is granted only in respect of matters which but for some especial legislation creating especial tribunals would have been within the ordinary jurisdiction of the superior Court. The Press Act has conferred upon the Presidency Magistrate novel powers which were never known to be exercised by this Court or by any subordinate Court in the land. He is to take security from every person keeping a printing press and it is left entirely to his discretion whether to dispense with the security or not. There need be no question of the likelihood of the owner of the press committing any offence or doing any acts to the injury of the public or of any individual, as in the two cases covered by chapter 8 of the Criminal Procedure Code.

I may also notice here the contention of the Advocate-General that the Indian Press Act of 1910 is a self-contained enactment. He points out that it provides for its own rules of procedure and evidence (see sections 21, 25 and section 20), creates a special Court of Appeal for revising certain orders passed under the Act (section 18) and expressly limits jurisdiction of the ordinary Courts in respect of the principal matters dealt with by the Act (section 22). None of these provisions however singly or collectively have necessarily the effect of taking away our revisional jurisdiction over the proceedings of the Magistrate if he was acting judicially.

The legislature, however, in delegating to the Magistrate the functions under section 3 (1), does not regard him as a Court but as an Executive officer entrusted with the performance of certain administrative duties. If an Executive or an Administrative officer acts in excess of his powers, such acts are not liable to be reviewed by the High Court whether by means of a writ of *certiorari* or under its ordinary revisional powers. The only remedy open to an aggrieved person in such cases would be by an action.

The petition is dismissed.

AYLING, J.—This is a petition presented on behalf of Mrs. Annie Besant, editor of *New India* and keeper of the "New India Printing Works." It is connected with Original Petition No. 122 of 1916. In that petition presented under section 17 of the Press Act (I of 1910) we were asked to set aside the order of forfeiture of security passed by the Madras Government on 25th August 1916 under section 4 of the same. The present petition which was presented during the hearing of the other asks for the cancellation of an earlier order of the Chief Presidency Magistrate, dated 22nd May 1916, in which he required petitioner to deposit security to the amount of Rs 2,000 under section 3 (1) of the Act. This security was duly deposited: and is the security which was declared forfeited by the order of Government, dated 25th August 1916.

The main ground alleged in the present petition for setting aside the Chief Presidency Magistrate's order is that it was passed without jurisdiction, but section 7 of the petition runs—

> "7. That the order of the Magistrate is further invalid because the Press Act or in any event section 4 thereof is *ultra vires* of the powers of the Governor-General in Legislative Council."

This was not seriously pressed. We have nothing to do here with section 4. If, as is suggested, the whole Press Act is *ultra vires* and of no effect, it is open to petitioner to seek her remedy in the ordinary Courts. It is no possible ground for the exercise of our revisional jurisdiction.

The contentions of Mr. C. P. Ramaswami Ayyar, who argued the case very ably and fully for the petitioner, may be summarized as follows.

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(a) That the order of the Chief Presidency Magistrate, dated 22nd May 1916, was *ultra vires*, because by a previous order, dated 2nd December 1914, he had passed an order dispensing with security in respect of this Press, and had thereby exhausted his powers under section 3. He could not afterwards "cancel or vary" it.

(b) That it is open to us to set aside the said order, dated 22nd May 1916, in exercise of our powers under sections 106 and 107 of the Government of India Act of 1915.

(Section 435 of the Criminal Procedure Code was also referred to in the petition: but was not relied on in argument as adding anything to the above.)

(c) That we should exercise our power and set the order aside.

It is not suggested that we can order return of the security, but that our order will set petitioner free to pursue her remedy further at common law.

Each of these positions requires careful examination.

The first (a) depends on the proper construction of section 3 (1) of the Press Act, which runs as follows:—

"Every person keeping a printing press who is required to make a declaration under section 4 of the Press and Registration of Books Act, 1867, shall, at the time of making the same, deposit with the Magistrate before whom the declaration is made security to such an amount, not being less than 500 or more than 2,000 rupees, as the Magistrate may in each case think fit to require, in money or the equivalent thereof in securities of the Government of India.

"Provided that the Magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section."

It is beyond dispute that on 2nd December 1914, the Chief Presidency Magistrate passed an order under the first part of the proviso dispensing with the deposit of any security for the petitioner's press. The contention is that this order is irrevocable; and that, once it is passed, the press is exempt from all possible liability for security under the Act as long as it remains in the same hands.

It is argued (1) that the words "any order under this section" do not cover an order dispensing with security and (2) that the proviso merely gives the Magistrate an option of two alternatives, (*a*) to dispense, (*b*) to cancel or vary, of both of which he cannot avail himself.

Some argument was also devoted to the question of whether the clause requiring the record of special reasons applied to an order cancelling or varying. I feel no doubt whatever that they do not. Their position, enclosed between the words "may" and "dispense," to my mind clearly indicates that their operation is limited to an order dispensing with security. If the first "may" followed instead of preceded the words "if he thinks fit, for special reasons to be recorded by him," it would be different.

Now returning to the first argument above recited, it is, I think, clear that the term "proviso" as applied to the second paragraph of sub-section 3 (1) *is a misnomer. As pointed out* by the learned Officiating CHIEF JUSTICE in the course of argument, the effect of the paragraph is simply to give the Magistrate additional powers over and above those conferred by the first paragraph. To quote from Lord HALSBURY. "The substance, and not the form, must, however, be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before." Halsbury's Laws of England, volume 27, page 137.

This being so, the sub-section must be treated as a whole; and there is no reason why the words "any order" should not cover an order dispensing with security. As the Advocate-General very pertinently argued, had the intention of the framers of the Act been that ascribed to them by Mr Ramaswami Ayyar, in place of "any order under this sub-section," we should have "any *other* order under this sub-section." There is no reason why we should read into the "proviso" the word "other" as petitioner's case requires us to.

Just as the first argument requires the insertion of the word "other," so, it seems to me, the second argument requires the insertion of the word "either" after the first "may." It is hardly necessary to say that where a person is by statute empowered to take a course (*a*) or take a course (*b*), the one is not necessarily exclusive of the other and, in fact, will not be, unless

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there is something to suggest a choice between two alternatives. There is nothing of the kind here, and the words "from time to time" are strongly against such an interpretation

The sub-section may not be a triumph of draftsmanship, but its meaning seems to me to be reasonably clear. It is designed to give the Magistrate the fullest discretion both as regards requiring security and determining the amount; and this discretion is to be exercised not once for all, but may be revised from time to time.

If this be, as I think, the true construction, then the order of the Chief Presidency Magistrate passed on 22nd May 1916 was perfectly legal

Passing then to the second point (*b*), supposing that the order of the Chief Presidency Magistrate of 22nd May 1916 was bad for want of jurisdiction by reason of his previous order, dated 2nd December 1914, what powers of interference do we possess?

The petition as originally presented referred us to section 107, Government of India Act, 1915, which is substantially identical with section 15 of the Charter Act, but at the outset of the hearing petitioner was allowed leave to add section 106 of the same. The object was to include the power of interference by way of *certiorari* which was said to be covered by the latter section. Neither side were able to refer us to a single instance in which this power has been exercised by this Court, and whether section 106 really adds anything to the powers of superintendence under section 107 was the subject of much argument; as also whether this was a case of the class to which writs of *certiorari* apply. The main difficulty in petitioner's way is, however, section 22 of the Press Act. This runs as follows:—

"Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and *no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid*, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

The second clause which I have italicised is the important one, and everything turns on the effect to be given to it. It seems to me to be absolutely comprehensive. To quote the language of JENKINS, C J., in connection with another section of the Act: "Its language is as wide as human ingenuity could make it."

I cannot for a moment entertain the suggestion that it only applies to proceedings by way of forfeiture There is nothing to support such a reading. The language is clear—"no proceeding purporting to be taken under this Act": and it must be held to include the proceedings of a Magistrate under section 3 (1).

I must also reject without hesitation the argument that the Chief Presidency Magistrate's order, dated 22nd May 1916, did not purport to be one under section 3 (1). A perusal of this order itself is sufficient.

Mr. Ramaswami Ayyar has, however, argued that in spite of this section, the power of the Court to interfere by way of *certiorari* is left unaffected, provided the proceedings were taken without jurisdiction. The case mainly relied on by him is that of *Ex parte Bradlaugh*(1) in which the learned Judges held that a section in an Act of Parliament taking away *certiorari* did not apply where there was an absence of jurisdiction, or, as COCKBURN, C.J., put it, "where the application for the *certiorari* is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction."

I have very carefully considered this decision, but it seems to me that the principle therein enunciated is not applicable to the present case. Whether the power of interference by *certiorari* is taken away absolutely or only in respect of proceedings with jurisdiction must depend in each case on the wording of the statute which takes the power away. No one contends that it is not within the competence of the legislature to take it away altogether; and in cases of a newly constituted offence or liability, it might, without any undue jealousy of the power of the Court, elect to do so It is in this connection that the greatest importance attaches to the words in section 22 "proceeding purporting to be taken under this Act." There is

(1) (1878) L. R., 3 Q.B.D., 509.

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nothing corresponding to this in 2 & 3 Vict., cap. 71, the Act which was relied on as taking away the *certiorari* in *Ex parte Bradlaugh*(1). This, as it seems to me, makes all the difference. The reason underlying the decision above quoted and others to the same effect is thus concisely stated by Lord HALSBURY: "Although *certiorari* is taken away, it may be granted even on the application of the defendant, where the inferior Court has acted without or in excess of jurisdiction *for in such a case the Court has not brought itself within the terms of the statute taking away* certiorari."

Here the jurisdiction of this Court is equally barred in respect of proceedings *purporting* to be taken under the Press Act, as in respect of proceedings taken under the said Act with jurisdiction.

There is really nothing very startling in this view of the matter. The Press Act is an entirely new enactment brought into force in the interests of public tranquillity and imposing novel liabilities on the keepers of presses and publishers of newspapers chiefly in the matter of security. As far as can be seen it is self-contained and complete; and reference to the Courts of Law is only left open by section 23 (which relates to prosecution before a Magistrate for failure to deposit security), and applications to this Court under section 17. As regards the latter, sections 17—21 limit most carefully the scope of the enquiry, and the nature of the order to be passed; they also provide for the constitution of a special tribunal, and for the enactment of special rules for its procedure together with a special provision as regards evidence (section 20) Apart from this, section 22 bars the jurisdiction of all Courts as regards proceedings purporting to be taken under the Act. *It is open to any one to* argue that the enactment is unnecessary or impolitic; but there is nothing which would justify us in refusing to give effect to what seems to be its plain meaning. I am of opinion that by reason of section 22 it is not open to us to set aside the Chief Presidency Magistrate's orders.

Either of the above points is sufficient to dispose of the petition; and I only add a few words because they are both points on which I have the misfortune to differ from the learned

(1) (1878) L.R., 3 Q.B.D., 509.

Officiating CHIEF JUSTICE and from my learned brother, SESHAGIRI AYYAR, J. There remains the question of whether the order of the Chief Presidency Magistrate is of such a nature that we could interfere with it under section 106 or 107 of the Government of India Act even if we were not prevented by section 22 of the Press Act. This is a matter in which I feel considerable doubt due chiefly to the very wide interpretation given by the English Courts in numerous cases to the expression "Judicial Act." I recognize however the force of the arguments on the other side; and will merely say that if it were in my view necessary to determine this question I should not be prepared to dissent from the conclusion arrived at by the learned Officiating CHIEF JUSTICE and SESHAGIRI AYYAR, J. I would however prefer to base my decision on the grounds set forth above

I may add that, even assuming that we possess the power of interference under either section, it would still be, to me, a matter of grave consideration, whether that power should be exorcised in this case; (Point C). I am not prepared to accept the Advocate-General's contention that by depositing the security as required by the order, petitioner waived her right to subsequently question its validity. But if the order was illegal, it was open to her to petition this Court the very next day to exercise its powers under sections 106 and 107. Instead of this she took no action whatever till more than three months later when the Government, proceeding on the assumption that the initial order of the Magistrate was valid, took further steps under section 4 and forfeited the security. In other words, she waited until the matter had reached another stage altogether before questioning the legality of the order.

Our exercise of those extraordinary powers is always discretionary; and I doubt whether in such circumstances we should feel called upon to exercise our power.

I would dismiss the petition.

SESHAGIRI AYYAR, J. SESHAGIRI AYYAR, J.—This is an application to revise the order of the Chief Presidency Magistrate calling upon the petitioner to deposit security. Mr. C. P. Ramaswami Ayyar asked the permission of the Court, at the outset, to include section 106 of the Government of India Act of 1915 among the provisions of law he relied on. The point argued related to the powers of the High Court to call up and revise the proceedings

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of the learned Chief Presidency Magistrate. Before dealing with the specific questions discussed, a short resume of the history of the jurisdiction of the High Court over such matters may be given.

In the Letters Patent establishing the Supreme Court of Judicature at Madras, dated 26th December 1800 (39 & 40 Geo. III, cap. 79), it was stated that the Court "shall have such jurisdiction and authority as our justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain, called England, as far as circumstances will admit." By 24 & 25 Vict., cap. 104, the High Court was constituted. Under section 9 of the Act it was provided that "the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts." By section 8, the Supreme and the Sudder Courts were abolished, and the records of those Courts became "records and documents of the High Court established in the Presidency." It is thus clear that the High Court inherited all the powers which the old Supreme Court had. Section 10 which deals with the powers exercised over persons living beyond the local limits of the original jurisdiction need not be considered in this connection. The Letters Patent accompanying the Charter distinctly enacts by section 16 that "the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court of Madras." Then came 28 Vict., cap. 15. The Letters Patent issued with reference to this statute re-enacted by section 17 the powers given already, and stated that the powers hitherto "exercised before the publication of these presents" shall vest in the High Court. The Consolidating Act of 1915 confirms the said powers by enacting that the High Court shall have such jurisdiction "as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act." It is apparent

from these recitals that the High Court has the same powers over persons resident within the local limits of its ordinary original jurisdiction as are exercised by the Court of the King's Bench in England

Mr. Ramaswami Ayyar's contention was that as the Chief Presidency Magistrate is subject to the appellate jurisdiction of the High Court, his order demanding security should be revised by us. He asked us to issue a writ of *certiorari* against the Magistrate's proceedings. The solution of this question involves the determination of the following among other points :—

(*a*) Is the writ in form and substance available to the petitioner?

(*b*) Is our jurisdiction taken away by virtue of the provisions of section 22 of the Press Act?

(*c*) Is the Chief Presidency Magistrate, in performing his duties under the Press Act, amenable to our jurisdiction?

(*d*) Is the action of that functionary illegal or irregular?

As regards the first of these questions, the learned Advocate-General argued that as the Press Act created a new kind of liability which cannot be said to correlate to any of the common law rights possessed by the subject, this Court inheriting the rights of the Court of the King's Bench, had no right to interfere. One broad proposition was advanced that the right to keep a press was not an inherent right of every subject. The learned Advocate for the Crown suggested that the right to have a press is analogous to the right to carry on any trade or profession and consequently, a license should be obtained in that behalf. This argument is so opposed to all ideas of free press and of free speech that we asked for some authority for this proposition. The learned Advocate-General referred us to what obtained during the Third Republic in France and to the Press Laws passed in Ireland when the Coercion Acts were in force. The preamble to the Press Act does not say that this is an emergency measure passed to steer the country during times of apprehended danger. The Act is apparently a permanent addition to the statute book, intended to regulate the conduct of the press during peaceful and normal times. I do not think that the exceptional circumstances which made the authorities in France and Ireland record the use of free speech and free

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writing as exercisable only on licenses obtained thereto have any analogy. In England, the law is clear that the right of free writing is a common law right. The early law on the subject is fully stated by Professor Blake Odgers in his article on the Liberty of the Press contributed to Encyclopædia of the Laws of England, volume 8, page 155. At its inception, kings, peers and priests unaccustomed to the sarcasms printed against them resolved that printing presses should be under the King's supervision. Then a company of certain merchants was given the privilege of keeping a press. Afterwards the universities were each allowed to have one. In the days of Queen Elizabeth, the publications issuing from the press had to be read over by the bishops and the privy councillors. In 1637, the Star Chamber decreed that all printed matter should be submitted to licensers. After the abolition of the Star Chamber, the Long Parliament passed similar decrees. Against this Milton protested, in his famous work "A speech for the Liberty of Unlicensed Printing." In 1695, when the revision of statutes came up before the House of Commons, the law of the Long Parliament was omitted from the statute book after a conflict with the House of Lords. From that year onwards, the liberty of the press has not been interfered with. This short statement about the legal history of the English Press shows conclusively that the freedom of the press is not a "licensed calling"; but a common law right inherent in every subject, subject to certain limitations. Lord MANSFIELD in *Rex* v. *Dean of St. Asaph*(1) said, that "the liberty of the press consists in printing without any previous license, subject to the consequence of law." The principle recognized in England is that so long as free writing does not offend the law of libel, the press is unfettered. Lord ELLENBOROUGH in *Rex* v. *Cobett*(2) stated: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary license necessary. But if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." "The power of free discussion," said Lord KENYON, C.J., in *Rex* v. *Reeves*(3), "is the right of every subject of this country." The latest pronouncement on the subject is that of

(1) (1789) 3 T.R., 428 at p. 431. (2) (1804) 29 St. T., 41 at p. 49.
(3) (1796) Peake; Add. C., 86.

Lord RUSSEL OF KILLOWEN, C.J., in *Reg.* v *Gray*(1). He said "The liberty of the press is no greater and no less than the liberty of every subject of the Queen." Professor Dicey in commenting upon some of these cases says. "This principle is radically inconsistent with any scheme of license or censorship by which a man is hindered from writing or printing anything which he thinks fit, and is hard to reconcile even with the right on the part of the Courts to restrain the circulation of a libel, until at any rate, the publisher has been convicted of publishing it." Of course exceptional circumstances connected with the safety of the Empire may demand a departure from these principles, *e.g.*, the appointment of a censor, etc. But I am unable to hold that the law as to freedom of writing in India is not offshoot of the principles that obtain in England, but has been borrowed from the Emergency laws of the Third Republic. I am prepared to hold that even after the Press Act, the right to keep a press and to use it is a common law right and has not the slightest resemblance to the exercise of a trade or calling for which a license should be taken out.

Another argument for the Crown was that a writ of *certiorari* contemplates that the High Court is capable of substituting its own judgment for that of the tribunal whose proceeding is revised, and that as we cannot say what the exact amount of the security should be and whether it should be demanded or not, we have no power to revise the order. I do not think that it is a condition precedent to the issue of the writ that we should be able to place ourselves, in the position of the Court whose order is complained against. The writ may assume various forms. It may be an order to transfer proceedings (see sections 526 and 528 of the Code of Criminal Procedure and sections 22 and 25 of the Code of Civil Procedure). It may relate to the stay of proceedings (the Code of Civil Procedure provides for this). It may seek to set aside orders or judgment (section 115 of the Code of Civil Procedure, section 435 of the Code of Criminal Procedure and section 25 of the Provincial Small Cause Courts Act). In short, it is enough that in the exercise of our jurisdiction, we direct the lower Court to reconsider its order or judgment. I am, therefore, of opinion that the fact that we cannot place ourselves in the position of the Chief Presidency Magistrate is not a bar to our entertaining the application.

(1) (1900) 2 Q.B., 36 at p. 40.

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The learned Advocate-General also seemed to suggest that as the right to issue the writ has now been engrafted into legislative provisions, the old prerogative need no longer be invoked. The fact that our powers are recognized in legislative provisions is not an argument for holding that that power does not exist *aliunde*.

The next branch of the argument was that by section 22 of the Press Act, the right, if any, possessed by us has been taken away. As I read the section, I am unable to understand it as expressly or even by implication taking away the power of the High Court. All that can be said is that the Act does not provide for the order under section 3 being revised. It is now well settled that unless the power to issue a writ of *certiorari* is expressly taken away, it inheres in the Court. It was held in *R.* v. *Reeve*(1) that the writ being one for the benefit of the subject, cannot be taken away *without express negative words*: see also *R.* v. *Jukes*(2) and *R.* v. *Plowright*(3). The English Judges have been so jealous in preserving this right, that they have held that even when the legislature provided that certain matters shall be finally determined by an inferior Court, the Court of King's Bench was not powerless—*R.* v. *Reeve*(1) I am therefore clear that section 22 has not taken away the right.

Moreover, even if the right is taken away, the High Court can interfere, if there has been a want of jurisdiction in the inferior Court. The reason of the rule is that the power *prima facie* exists in the High Court in all matters which are not within the cognizance of the inferior Court; and when this latter Court acts beyond its powers, it usurps jurisdiction which the High Court can control. The leading authority on the subject is *Ex parte Bradlaugh*(4); MELLOR, J., stated in that case that "it is well established that the provision taking away the *certiorari* does not apply when there was an absence of jurisdiction." *The King* v. *Justices of Somersetshire*(5), *The Queen* v. *Wood*(6) are to the same effect. In *The Queen* v. *The South Wales Railway Co.* (7), COLERIDGE, J., stated "where that (want of jurisdiction in the inferior Court) is made out, the

(1) 2 Barr., 1040.
(2) (1800) 8 T R., 542.
(3) 3 Mod. Rep., 94.
(4) (1878) L.R., 3 Q B D., 509.
(5) (1826) 5 B. & C., 816; s.c., 108 E R., 303.
(6) (1855) 5 E. & B., 49.
(7) (1849) 13 Q.B C., 988; s.c., 116 E.R., 1540.

statutory prohibition does not apply and the inherent jurisdiction of this Court is unrestrained."

It is on this principle that the High Court in this country have acted in interfering with orders passed by Magistrates under section 145 of the Code of Criminal Procedure. Section 435, clause (3), would seem to suggest that the High Courts should not revise orders passed under Chapter XII and section 176. But there are no positive words affecting the jurisdiction of the High Court. Consequently, there has been a long course of decisions holding that the prohibition did not affect our powers of interference when want of jurisdiction was made out. This absence of jurisdiction "may be founded upon certain proceedings which have been made essential preliminaries to the enquiry or upon facts or fact to be adjudicated upon in the course of the enquiry:" see *Colonial Bank of Australasia* v. *Willan*(1) and *Rex* v. *Woodhouse*(2). A further qualification has been introduced in favour of the interference of the Court of the King's Bench. Even when jurisdiction to issue the writ was expressly taken away, if fraud has been practised in the procuring of the judgment the writ can issue—*R.* v. *Gillyard*(3).

I shall now consider the third question. I had considerable doubts during the course of the argument upon this subject. Mr. Ramaswami Ayyar and the learned Advocate-General placed before us a bewildering array of authorities. The question whether a particular act done by an avowedly judicial tribunal is performed by that tribunal ministerially or judicially is not easy to determine. I concede that *prima facie* an order passed by an officer who acts ordinarily judicially may be presumed to have been passed by him in that capacity. I shall also grant that the officer need not be sitting as a Court to attract to himself judicial functions. The fact that he may have to take evidence is not a conclusive test of acting judicially. In *Rex* v. *Woodhouse*(2) VAUGHAN WILLIAMS, Lord Justice, doubted "whether the fact that there was no jurisdiction to make an administrative as distinguished from a judicial order would enable the Court to issue a *certiorari*." Lord Justice FLETCHER MOULTON, after an elaborate discussion on the meaning of the terms "judicial acts" and "administrative acts" says "The true view of the limitation would seem to be that the term 'judicial act' is used in

(1) (1874) L.R., 5 P.C. 417 at p. 442. (2) (1905) 2 K.B., 501 at p. 515.
(3) (1848) 12 Q.B., 527.

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contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for the writ of *certiorari* at common law." The position is thus succinctly expressed in 6 American Cyclopædia, 753: "It necessarily follows that the writ will not lie to review acts which were *not done in the* exercise of judicial power or *authority*, but were merely ministerial, executive, or legislative in their character." I do not propose to examine the English authorities any further. I am bound, however, to consider a few Indian decisions. The most important of them is that of the Judicial Committee in *Shankar Sarup* v. *Mejo Mal*(1). The question related to the construction of section 295 of the old Code of Civil Procedure. Lord ROBERTSON in delivering the judgment of the Board said: "The scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present." In making the distribution, the Court had to hear the parties and to decide upon the merits Mainly relying upon this decision, a Full Bench of our High Court held in *Sivagami Achi* v. *Subrahmania Ayyar*(2) that a District Munsif acting under section 287 of the Code of 1882 was only performing a ministerial duty and that his proceedings were not subject to revision by the High Court. The District Munsif in settling the proclamation under that section was entitled to take evidence and to come to a conclusion on the question. The learned Judges were much influenced by the circumstance that by section 288, the officer was given the same protection from being proceeded against for damages as Act XVIII of 1850 gave to *ordinary* Judicial officers. The inference they drew was that in settling the proclamation, he was not acting judicially. This proposition applies with equal force to the present case. Then there is the decision in *Vijiaraghavalu Pillai* v. *Theagaroya Chetti*(3) to which I was a party with my learned brother Mr. Justice AYLING. I do not think the present case is stronger than that.

(1) (1901) I.L.R., 23 All., 313 (P.C.). (2) (1904) I.L.R., 27 Mad., 259.
(3) (1915) I.L.R., 38 Mad., 581.

In Calcutta, we have *Rudolf Stallmann v. Emperor*(1) and *[illegible] Sahu v. Emperor*(2) which support the view taken in the Madras case. Reference should also be made to *Minakshi v. Subramanya*(3) in which the Judicial Committee held that a District Judge in appointing a committee member under section 10 of Act XX of 1863 was performing a ministerial duty. As against these decisions may be put the decision in *Nundo Lal Bose v. The Corporation for the Town of Calcutta*(4). In that case, however, some judicial authority was given to the tribunal. On the whole, I am inclined to the view that the Chief Presidency Magistrate was not acting judicially when he called upon the petitioner to deposit security. An examination of the provisions of the Press Act leads to the same conclusions. (*a*) There is nothing in the Act which compels the Magistrate to hold any enquiry, although I do not say that he is debarred from doing so, (*b*) the nature of the information to be laid before him is not specified—Mr. Ramaswami Ayyar has drawn our attention to the fact that an application was made, as a matter of fact, by Mr. Brightwell, (*c*) the Magistrate is not bound to state any reasons, (*d*) he has an unfettered discretion in fixing the amount, (*e*) a special provision is made in section 22 of the Act granting protection for proceedings passed in good faith as are secured to Judicial Officers by Act XVIII of 1850. These considerations have influenced me in holding that the action of the Chief Presidency Magistrate was not judicial but only ministerial.

The last point for consideration is whether in the exercise of the power given to him by the Act, the Chief Presidency Magistrate acted illegally. Sub-section (1) of section 3 before it reaches the proviso has two substantive provisions: (1) The keeper of the press shall make a deposit at the time of the declaration, and (2) that the amount of the deposit shall be fixed by the Magistrate between Rs. 500 and Rs 2,000. The first requirement is imperative. The second gives a discretion to the Magistrate. The proviso also consists of two parts: (1) The Magistrate may for special reasons to be recorded by him dispense with any security, and (2) he may from time to time cancel or vary any order under the sub-section. From this [illegible] text it is clear that the power to dispense with the [illegible]

(1) (1911) I.L.R., 38 Calc., 547. (2) (1915) I.L.R., 42 Calc., [illegible]
(3) (1888) I.L.R., 11 Mad., 26 (P.C.) (4) (1885) I.L.R., 11 Calc., [illegible]

In re MRS. BESANT.

SESHAGIRI AYYAR, J.

qualifies the rule which imposes the security. The first part of the proviso, to my mind, is a conditional avoidance of the antecedent clause to demand the security. It should be regarded as a defeasance clause to the first part of the section. The second proviso naturally would govern the power to vary given in the second portion of the section. When the legislature gave a discretion to the Magistrate to fix the amount, it also gave him power to vary the amount from time to time. It would, therefore, seem that the second part of the proviso should be read as qualifying the clause which gives discretion to demand a varying security The learned Advocate-General naturally laid stress upon the use of the words "*vary any order*" under this sub-section Those words are capable of including orders passed under the proviso; but it has to be noticed that the clause calling upon the Magistrate to record special reasons cannot grammatically be read with the clause beginning with "or may from time to time vary, etc." Is it reasonable to hold that an order which necessitated the record of reasons at its inception was intended to be capriciously set at nought the next moment? That would be imputing incongruity to the legislature. Further the use of the disjunctive participle *or* seems to suggest that the order contemplated by the second clause of the proviso is different in nature from that which the first part enables the Magistrate to make.

I have thus far submitted the section itself to a close analysis. Very able arguments were addressed to us on both sides upon the meaning and office of a proviso. A great deal would depend upon the draftsmen. A proviso may at times serve to introduce an exception. It is often in the nature of a condition precedent to the enforcement of the operative clause. It is doubtful whether it can ever add to the clause itself. The learned Advocate-General referred us to *Rhondda Urban Council* v. *Taff Vale Railway*(1). In that case, the so-called proviso was in a separate section. It was held that this new section created a new liability. I do not think this case helps us much. Nor does *Mohummud Buhadoor Khan* v. *The Collector of Bareilly*(2) decide that a proviso can add to the section. On the other hand, Lord CHANCELLOR, Lord WATSON and Lord HERSCHELL held in *West Derby*

(1) (1909) A.C., 253. (2) (1874) 1 I.A., 167.

Cripps v. Metropolitan Life Assurance Society(1) that a proviso cannot enlarge the scope of the section. In a later case, Lord Justice FLETCHER MOULTON says " The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington*(2), *In re Brocklebank*(3), and *Hill v. East and West India Dock Co.*(4), have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso." See *Rex v. Dibdin*(5) The preponderance of authority is in favour of the view that, a proviso annexed to a section should not be read as enlarging the scope of that section.

In the present instance we have first a clause making the deposit absolute, then a proviso which enables it to be dispensed with after recording reasons; and we are asked to add a new power which would allow the Magistrate to cancel the last order without assigning any reasons. I am free to confess that the language of the section is by no means clear. Nor are the authorities as to the construction of a proviso uniform. But I am not prepared to impute to the legislature the want of logic and reasonableness which the construction contended for by the Crown entails I am therefore of opinion that the Chief Presidency Magistrate had no power to demand security after having dispensed with it at the time of the declaration.

But as I have held that the order was passed by the Magistrate in his executive capacity, I am of opinion we have no power to interfere in revision under the Government of India Act. It is hardly necessary to say that the petition has been argued with great ability on both sides.

N.R.

(1) (1897) A.C., 647
(2) (1844) 6 Q B, 649
(3) (1889) 23 Q.B.D., 461.
(4) (1884) 9 A.C, 448
(5) (1910) Pr, 57 at p. 125.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1916. January 16 and February 2.

C. V. VENUGOPAL MUDALI (SECOND DEFENDANT), APPELLANT,

v.

C. VENKATASUBBIAH CHETTY AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 13 AND 14), RESPONDENTS.*

(Indian) Limitation Act (IX of 1908), arts 11 and 13—Civil Procedure Code (Act V of 1908), O XXI, r 63—Claim petition filed on the original side of the High Court—Claim allowed—Appeal under the Letters Patent, if competent—Order confirming original order—Suit under Order XXI, rule 63, after one year from date of original order, but within one year from order on appeal—Starting point of limitation

A claim petition was filed by the second defendant objecting to the attachment of certain properties as belonging to the first defendant in execution of a decree passed by the High Court on its original side. The petition was allowed in favour of the claimant by an order passed by a single Judge of the High Court on its original side. The plaintiff, who was the decree-holder, filed an appeal against the order to the High Court under the Letters Patent, and the original order was confirmed on appeal. The plaintiff brought a suit under Order XXI, rule 63 of the Code of Civil Procedure (Act V of 1908), to establish his right to attach the property, more than one year from the date of the original order but within one year from the date of the order passed on appeal.

Held, that article 11 and not article 13 of the Limitation Act (IX of 1908) applied to the case but that the suit was not barred, as the starting point of limitation under article 11 was the date of the order passed on appeal.

The word "order" in article 11 of the Limitation Act should be construed as meaning the only subsisting order in the case, which is the appellate order (when there has been an appeal), in accordance with the recognized principles of jurisprudence.

An appeal lies under the Letters Patent against an order of a single Judge of the High Court on its original side, passed on a claim petition filed therein.

APPEAL against the judgment and order of BAKEWELL, J., in the ordinary original civil jurisdiction in Civil Suit No. 14 of 1912.

The material facts appear from the judgment.

V. V. Srinivasa Ayyangar for the appellant.

C. Venkatasubbaramayya for the respondent.

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* Original Side Appeal No 102 of 1913.

VENUGOPAL MUDALI *v.* VENKATA-SUBBIAH CHETTY.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The second defendant is the appellant. The suit was brought on the original side of the High Court for the establishment of the plaintiff's right to attach the plaint properties in execution of the decree which the plaintiff had obtained against the first defendant in Original Suit No. 13 of 1905. The second defendant put in a claim petition when the properties were attached by the plaintiff in execution of that decree on the allegation that the properties did not belong to the first defendant (the judgment-debtor) but to his wife (the third defendant) and that the second defendant had a mortgage right over the properties, the mortgage having been created by the third defendant in favour of the second defendant's transferor. His (second defendant's) claim petition was allowed in August 1909 by a single Judge of this Court sitting on the original side. The plaintiff (the decree-holder) appealed against that order and that order was confirmed by a Division Bench of this Court on the 21st December 1910. Thereupon the plaintiff brought this suit on the 16th December 1911 just within one year of the order of the Appellate Court but more than one year after the date of the order passed by the single Judge.

The second defendant raised a preliminary contention that the suit was barred by limitation under article 11 of the second schedule of the Limitation Act. His contentions were—

(*a*) The order of the Division Bench dated December 1910 dismissing the appeal from the order dated August 1909 passed on the claim petition was passed without jurisdiction as no appeal lay against the latter order

(*b*) Even if such an appeal lay the one year's period mentioned in the third column of the article 11 of second schedule of the Limitation Act commenced in August 1909 (the date of the original order allowing the claim petition) and not from the date of the appellate order (December 1910).

(*b*-1) As the appellate order did not interfere with the original order it could not be held to have superseded the original order.

(*b*-2) As even if it superseded the original order the order mentioned in the third column of article 11 means the original order the legislature not having in article 11 used the words " final decision on order " (as the legislature did in article 13) and not having expressly postponed the commencement of the limitation

VENUGOPAL MUDALI v. VENKATASUBBIAH CHETTY

SADASIVA AYYAR, J.

period to the date of the final order [as it did in clause (2) of article 182].

On this preliminary question of limitation Mr. Justice BAKEWELL decided against the second defendant for the following reasons:—(1) that the Division Bench who decided the appeal in the claim petition case had jurisdiction to entertain and decide the appeal on the authority of *Sabhapathi Chetti v. Narayanasami Chetti*(1), (2) that article 11 of the Limitation Act does not apply to the suit as it was not a suit to establish any right denied to the plaintiff by the original order on the claim petition but it was a suit to set aside the appellate order passed in the Letters Patent Appeal and hence the article 13 of the Limitation Act was the article applicable.

I might at once say that with very great deference I am unable to agree with the opinion of the learned Judge that the proper article applicable is not article 11 of the Limitation Act but article 13. The proceedings in an appeal against an order passed in a petition case are a continuation of the proceedings commenced by the petition and hence the appellate order is also an order on the same claim petition and as article 11, clause (1), specifically deals with a suit which is allowed to be brought by the legislature to contest the order on a claim, article 13 cannot be applied. Their Lordships of the Privy Council have held that the suit itself so brought is in the nature of a review of the order passed in the claim petition and that it is a mistake to treat the action brought under section 283, Civil Procedure Code, as an original action (see *Phulkumari v. Ghanshyam Misra*(2) and *Krishnappa Chetty v. Abdul Khader Saheb*(3).

There remain then for consideration the other contentions which I have referred to as (*a*) and (*b*).

As regards contention (*a*) there can be no doubt that in *Sabhapathi Chetti v. Narayanasami Chetti*(1) it was held by Sir ARNOLD WHITE, C.J., and Mr. Justice BHASHYAM AYYANGAR that an appeal under the Letters Patent lay from the orders of a single Judge of this Court passed on the original side in a claim petition. It is however urged that though there was a preliminary objection raised by the respondent in that case that no appeal lay and that

(1) I.L.R., 25 Mad., 555. (2) (1904) I.L.R., 35 Calc., 202 (P.C.).
(3) (1914) 26 M.L.J., 440 at p. 450.

VENUGOPAL MUDALI v. VENKATA-SUBBIAH CHETTY.

SADASIVA AYYAR, J.

contention was overruled that contention was supported only by the argument that section 590 of the old Civil Procedure Code prohibited an appeal and that the respondent's vakil did not put forward the argument in that case that by section 283 of the Civil Procedure Code, the order passed on the claim petition by the single Judge was "conclusive." Having regard to the eminence of the learned vakils who appeared for the respondent in that case and to the eminence of the Judges who decided that case, I feel diffident to hold that if the objection based on section 283 (present Order XXI, rule 63) was a stronger objection than the objection put forward under section 591, the stronger objection would not have been separately put forward, noticed and dealt with. I take it that as the word "conclusive" cannot possibly mean more than "shall not be set aside by way of an appeal review or revision," the prohibition under section 283 cannot where an objection is taken to the competency of an appeal be stronger than the objection taken under section 591. [As regards the maintainability of a review of such an order, see *Cochrane* v. *Heera Lal Seal*(1) and *Bhyrub Chender Surmah Chowdhry* v. *Madhub Ram Surmah*(2). As regards revision,—see *Ittiachan* v. *Velappan*(3)] The reasoning by which it was held in *Sabhapathi Chetti* v. *Narayanasami Chetti*(4), that the appeal granted by section 15 of the Letters Patent was not intended to be taken away by section 591 of the Civil Procedure Code applies also to the contention that by section 283 the said right of appeal is taken away. That reasoning is that "when the legislature has already given its attention to a particular subject and provided for it, it is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language" and also that the provisions of the Civil Procedure Code referring to appeals are intended to apply to appeals from one Court to a higher Court and not from one Judge of the same Court to other Judges of that Court. The longstanding practice also has been to allow such appeals under the Letters Patent. I do not think that it is advisable to reopen the question or to scrutinize minutely whether the reasons alleged in the older decisions supported by such longstanding practice can be entirely

(1) (1867) 7 W R., 79
(2) (1873) 20 W.R., 84.
(3) (1885) I.L.R., 8 Mad., 484 (F.B.).
(4) (1902) I L.R., 25 Mad., 555.

VENUGOPAL MUDALI v. VENKATASUBBIAH CHETTY. —— SADASIVA AYYAR, J.

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There remain then for consideration the other contentions which I have referred to as (*a*) and (*b*).

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(1) (1902) I.L.R., 25 Mad., 555. (2) (1908) I.L.R., 35 Calc. ...
(3) (1914) 28 M.L.J., 449 at p. 453

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(3) (1885) I.L.R., 8 Mad., 484 (F.B.). (4) (1902) I.L.R., 25 Mad., 555.

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I need not say that where the order on a review petition as distinguished from an appeal petition merely refuses to interfere with the judgment or order sought to be reviewed or where an appeal is not entertained at all though filed, the original decree or order is and continues to be the subsisting and final decree or order. In this respect an order rejecting a review petition stands on a different footing from a decision passed on appeal confirming the lower Court's judgment and dismissing the appeal. If the decision on review or revision does interfere with the original decision, the former decision becomes the only subsisting order and stands on the same footing as the decision passed in a competent appeal. It will in that case become the starting point for limitation

In the result, I would dismiss this appeal with costs.

NAPIER, J.

NAPIER, J.—I concur.

K.B

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

MUTHAMMAL (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF TINNEVELLY (DEFENDANT), RESPONDENT.*

1914, September 22 and October 2 and 9.

Civil Procedure Code (Act V of 1908), sec 11—Res judicata—Decision of a Boundary Settlement Officer—Grounds of decision, if res judicata—Boundaries Act (XXVIII of 1860), ss 24 and 25—Estoppel.

Where a Boundary Settlement Officer decided under the Boundaries Act (XXVIII of 1860) that certain lands did not belong to a *mittadar* but to the Government on the ground that they never had formed part of the area of the *mitta*, and no suit was brought by the *mittadar* to contest the decision under section 25 of the Act,

Held, that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the *mittadar* to recover the lands as having formed part of the *mitta* or in the alternative for a reduction of the *peshkash* of the *mitta*.

Kamaraju v. The Secretary of State for India (1888) I.L.R., 11 Mad., 309 (F.B.), followed.

Per SESHAGIRI AYYAR, J.—The decision of the Survey Officer is binding upon the parties whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not.

* Letters Patent Appeal No. 41 of 1913.

Krishna Behari Roy v. *Brojeswari Chowdranee* (1875) 2 I.A., 283 at p. 286, and *In re Bank of Hindustan, China and Japan (Alison's Case)* (1873) L.R., 9 Ch. App., 1, referred to.

MUTHAMMAL v. THE SECRETARY OF STATE FOR INDIA.

APPEAL under section 15 of the Letters Patent against the judgment of WHITE, C.J. (TYABJI, J., dissenting) in *Muthammal* v. *The Secretary of State for India*(1) preferred against the decree of K. RAMANADA AYYAR, the Subordinate Judge of Tinnevelly, in Original Suit No. 57 of 1908.

The plaintiff brought a suit in 1908 to recover certain lands from the Secretary of State for India in Council on the ground that they formed part of an estate called the Vallam *mitta* which was sold in Court auction and purchased by the predecessor in title of the plaintiff in 1868. The plaintiff alleged that the lands were part of the *mitta* of which she was the present proprietor, but that the Forest Department of the Government wrongfully took them up in 1880 and included them in the reserved forest and that in spite of repeated demands by the successive owners of the *mitta* the Government had not restored them to the *mittadar*.

The plaintiffs also prayed in the alternative, in the event of her not being entitled to recover possession of the lands, for a declaration of her liability to pay as *peshkash* no more than Rs. 535–7–6 per annum for the lands of the *mitta* in her possession at present after excluding the lands taken over by Government as aforesaid, the total *peshkash* of the entire *mitta* having been fixed at Rs. 825. In 1880 the then owner of the *mitta* filed a petition before the Boundary Commissioner under the Boundaries Marks Act (XXVIII of 1860), claiming the suit lands as lands forming part of the Vallam *mitta* and that they were improperly taken over by the Forest Department as aforesaid. The Boundaries' Commissioner held an inquiry and, after taking the evidence adduced by the petitioner and examining the Government records, decided against the claim of the petitioner holding that the lands never formed part of the *mitta* but were the property of the Government, he passed an order on the 9th July 1880 under section 24 of the Boundaries Marks Act, and no suit was filed by the petitioner to contest this order under section 25 of the Act. The defendant contended in the suit that the lands did not appertain to the *mitta*, that the claim for possession was barred by limitation, that the suit was barred

(1) Appeal No. 199 of 1910.

MUTHAMMAL v. THE SECRETARY OF STATE FOR INDIA.

SESHAGIRI AIYAR, J.

the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of *The Duchess of Kingston*." In *Narayanan Chetty* v. *Kannammai Achi*(1) the learned Judges say that an appellate judgment operates by way of estoppel as regards all findings which are necessary to make the decree effective. *Gokul* v. *Shrimal*(2) lays down the same proposition. Apart from the plea of *res judicata* as a question of estoppel the same considerations must apply. In Bigelow on Estoppel, sixth edition, page 181, after a full examination of all the English and American authorities, it is stated: "A former judgment or verdict, on the other hand, is conclusive between the parties to contested causes (as has already been intimated) of all necessary inferences arising from it as well as of the matters actually in issue." See also pages 97 and 157. Sir GEORGE MELLISH expresses the proposition thus in *Alison's Case, In re Bank of Hindustan, China and Japan*(3): "It is clear, I apprehend, that a judgment of the Court of Common Law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered." It seems clear from these authorities that the plea of *res judicata* or estoppel is available not only as regards the final conclusion of the Court or officer, but also regarding all findings necessary for arriving at that conclusion whether they are given on formal issues raised in the case or are referable to points which must have been the basis of the final determination. In the present case, the principal subject of controversy was whether the court-sale of the *mitta* included the lands which the Government claimed to exclude. It was on the ground that it did not form a portion of the *mitta* that the Survey Officer decided that the property did not belong to the claimant, but to the Government. That pronouncement estops the appellant from claiming that the lands in dispute passed to him by the auction sale. As the *peshkash* was imposed only after the sale to him, it follows that the assessment on these lands was not taken into account in fixing the amount payable by the appellant

K.R.

(1) (1905) I.L.R., 28 Mad., 339.
(2) (1904) 6 Bom. L.R., 283.
(3) (1874) L.R., 9 Ch. App., 1 at p. 2

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South-Indian Images of Gods and Goddesses. [illegible] b H. Kris Sastri, B.A. An Illustrated Guide to t[illegible] ust publis y the Government Press, Madras [illegible] as.).

Telugu Shorthand Manual. By M.R Ry. M. Srinivasa Rao (recommen or the use of candidates taking vernacular shorthand as an optional subject). P Rs. 3-8-0 a copy. Copies can be had from the Superintendent, Government Pr Mount Road Branch.

NOTICE.

The Bengal and Madras Service Family Pension Fund which provisionally managed and assisted by Government has for its obj the provision of monthly pensions for the maintenance of the widow and children of subscribers and is open, with certain exceptions, to active and pensioned members of the Uncovenanted Service of Gover ment (except those serving under the Government of Bombay) and local fund servants earning pensions from Government. Some of t special features of the fund are (1) that widowed daughters incapab of remarriage or children labouring under such mental or bodi infirmities as incapacitate them from earning their livelihood preclude the possibility of marriage (in case of a daughter) are admitt to its benefits; and (2) that subscribers to the widows' and daughte branches are entitled to a refund of 30 per cent of the premia pai should the nominees predecease them after five years of admissio The fund is now of ten years' standing and has a balance of over thr and a half lakhs with Government on 4 per cent interest. For forr